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Making Faretta v. California Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries

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MAKING *FARETTA V. CALIFORNIA* WORK PROPERLY: OBSERVATIONS AND PROPOSALS FOR THE ADMINISTRATION OF WAIVER OF COUNSEL INQUIRIES

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INTRODUCTION

In 2001, Benjamin Egwaoje walked into several Chicago-area banks and attempted to withdraw cash using several credit cards he received by less-than-lawful means.[2] He was arrested several weeks later when a bank teller recognized him and noticed that he was using different cards with different names than on his prior visit.[3] Before his trial in April 2002, Egwaoje went through a number of attorneys and continuously requested to have an unusually speedy trial, which did not give his attorneys enough time to prepare his defense.[4] On the morning of his trial, he fired

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[2] *See* United States v. Egwaoje, 335 F.3d 579, 581 (7th Cir. 2003) (stating Egwaoje netted $39,000 in that scheme); *see also* Adina Matusow, *Court Considers Risk of Self-Representation: Case Led by Kenneth Starr Asks Justices to Give Trial Courts the Chance to Appoint Defense Counsel When Appropriate*, LEGAL TIMES, Mar. 15, 2004, at 8 (detailing circumstances surrounding Egwaoje's arrest).

[3] *See Egwaoje*, 335 F.3d at 581 (stating bank teller stalled Egwaoje at bank until police arrived).

[4] *Id.* at 581–82. Several of Egwaoje's attorneys withdrew from the case because of irreparable conflicts between them and Egwaoje. *Id.* Egwaoje, knowing that his attorneys could not have enough time to prepare for the trial, kept demanding that he receive a speedy trial. *Id.* The court on multiple occasions reminded him that his attorneys needed to prepare for trial, and set numerous court dates. *Id.* Upon Egwaoje's request to have his second attorney replaced, Judge Zagel warned Egwaoje that he would not necessarily give him an attorney that would agree with him, and that he was not sure whether Egwaoje even had a viable defense. *See* Brief for Respondent at 4, Egwaoje v. United States, 541 U.S. 958 (2004) (No. 03-691).

his final attorney and informed the court that he wanted to represent himself.[5] The court warned him of the dangers and disadvantages of self-representation and permitted him to present his defense.[6] At his trial, he called no witnesses, presented no evidence in his defense, and was later convicted.[7]

The Seventh Circuit affirmed Egwaoje's conviction after he appealed and claimed that he was improperly denied the right to counsel.[8] The Court of Appeals here found that he had made a knowing and intelligent waiver of his right to counsel.[9] The court came to the conclusion that, although there was no formal inquiry into Egwaoje's ability to waive his right to counsel, it was more important to show that Egwaoje understood the situation he was getting himself into. The court found that such a showing was made because the trial judge ensured that Egwaoje knew the dangers and disadvantages of self-representation.[10] Using a

[5] *See Egwaoje*, 335 F.3d at 583. On the morning of the trial, Egwaoje requested a sixty-day continuance to prepare for trial. The judge denied this request. Upon hearing this, Egwaoje stated that he wished to proceed *pro se*. *Id.* Judge Zagel stated to Egwaoje, "I have set the schedule. I have seen in you a course of conduct that has been nothing but an attempt to frustrate the government's effort to bring you to trial, to play games, to demand a speedy trial, and then demand a continuance." Respondents' Brief at 4, *Egwaoje* (No. 03-691).

[6] *Egwaoje*, 335 F.3d at 583–84. The court stated that Egwaoje was being foolish by representing himself. *Id.* at 584. In fact, the judge stated that he was required to "admonish" Egwaoje. *See* Respondents' Brief at 4, *Egwaoje* (No. 03-691). Halpern, Egwaoje's attorney at the time, agreed to stay as standby counsel. *Egwaoje*, 335 F.3d at 584.

[7] *See* United States v. Egwaoje, 335 F.3d 579, 584 (7th Cir. 2003) (discussing procedure of proceeding). *See generally* Torres v. United States, 140 F.3d 392, 395 (2d Cir. 1998) (convicting defendant even though she refused "the appointment of counsel, demanded to represent herself and then informed the district court that she would neither present a defense nor participate in the proceedings"); People v. Clark, 789 P.2d 127, 150 (Cal. 1990) (holding "the defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty").

[8] *See Egwaoje*, 335 F.3d at 589 (affirming both defendant's conviction and sentence); Patricia Manson, *Court: Man Had 'Fool' for a Lawyer – Self*, CHI. DAILY L. BULL., July 10, 2003, at 1 (reporting "[t]he 7th U.S. Circuit Court of Appeals rejected arguments Wednesday that Benjamin Egwaoje was denied his constitutional right to an attorney when he was allowed to defend himself at trial"). *See generally* Godinez v. Moran, 509 U.S. 389, 399 (1993) (finding "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself").

[9] *See Egwaoje*, 335 F.3d at 585 (concluding Egwaoje's waiver was made "knowingly and intelligently" due to totality of circumstances surrounding it); Manson, *supra* note 8, at 1 (noting that Egwaoje understood predicament which he was entering); *see also* Faretta v. California, 422 U.S. 806, 836 (1975) (finding technical legal knowledge not to be relevant to assessment of defendant's "knowing exercise" of right to defend himself).

[10] *See Egwaoje*, 335 F.3d at 586 (noting that defendant's criminal history "bears upon the defendant's understanding of the risks involved and the nature of the charges brought against him").

totality of circumstances approach, the court held that Egwaoje made such a knowing and intelligent waiver, thus effectively waiving his right to counsel.[11] Upon this finding, the court affirmed his conviction.[12] The Supreme Court denied Egwaoje's petition for certiorari on the issue of whether courts may force a defendant to accept counsel (thereby not re-examining the Court's decision in *Faretta v. California*, discussed herein).[13]

Because the Supreme Court denied certiorari, the persistent question of how a trial judge is to conduct a waiver of counsel inquiry was left unanswered.[14] It is well settled that a criminal defendant has the right to waive counsel, so long as that waiver is knowing and intelligent.[15] The controversies currently in dispute, however, are whether a trial judge needs to provide a defendant with a warning of the dangers and disadvantages of self-representation, whether the court's decision as to the validity of a defendant's waiver should take place in a formal setting, and what role standby counsel has with regard to this question.[16]

[11] *See Egwaoje*, 335 F.3d at 586 (holding that Egwaoje's behavior shows that he made knowing and intelligent waiver).

[12] *See Egwaoje*, 335 F.3d at 581 (affirming conviction).

[13] *See* United States v. Egwaoje, 335 F.3d 579 (7th Cir. 2003), *cert denied,* 124 S. Ct. 1712 (2004).

[14] *See* Adina Matusow, *Court May Re-Examine Defendant's' Right to Self-Representation*, N.J. L.J., Mar. 15, 2004 (noting that circuits are split on whether trial court, while deciding on defendant's waiver request, should conduct formal inquiry). *See generally* Jeffrey M. Rosenfeld & Sheri Klintworth, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: III. Trial: Right to Counsel*, 89 GEO. L.J. 1485, 1493–94 (2001) (discussing holding in *Faretta* that "the judge's failure to hold a waiver hearing, however, may not be sufficient error to warrant reversal, particularly if the trial record otherwise demonstrates a knowing and intelligent waiver"); Frederic Paul Gallun, Note, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under* Faretta, 23 N.E. J. ON CRIM. & CIV. CON. 559, 601 n.63 (1997) (noting "seven circuits follow the 'record as a whole approach,' and five circuits follow the 'formal inquiry approach'").

[15] *See* Iowa v. Tovar, 541 U.S. 77 (2004) (stating that "waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances'") (quoting Brady v. United States, 397 U.S. 742, 748 (1970)); Faretta v. California, 422 U.S. 806, 835 (1975) (stating accused must "knowingly and intelligently" forego benefits associated with right to counsel) (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)); Gallun, *supra* note 14, at 564 (stating *Faretta* test is "to ensure that the defendant is literate, competent, understanding, that he or she knowingly and voluntarily intends to waive his or her Sixth Amendment right to counsel, and that the defendant is aware of the dangers and disadvantages of self-representation").

[16] *See* Matusow, *supra* note 14 (recognizing 'that courts have been trying to come up with different ways to apply *Faretta*'s standards in response to Brief by Solicitor General Theodore Olson); *see also* Rosenfeld & Klintworth, *supra* note 14, at 1497 (clarifying that *pro se* defendant has "no absolute right to standby counsel, to hybrid representation, or to access to a law library"). *See generally* Brian H. Wright, Comment, *The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro se with a Defendant's Right to*

This Note will first lay out in Part I the general history behind the right to waive counsel at a criminal trial and discuss the Supreme Court's decision in *Faretta v. California*. Part II will examine the standard of inquiry used in waiver hearings. In Part III, this Note will discuss the problem of warning a defendant of the dangers and disadvantages of self-representation and will provide a recommendation as to what extent a judge can give a warning. Part IV will inspect the methods of deciding whether a defendant can waive her right to counsel and discuss the dangers and disadvantages in conjunction with those methods. Finally, Part V will discuss the role of standby counsel in a waiver decision.

I. SELF-REPRESENTATION IN GENERAL

A. Evolution of the Right to Self-Representation

The right of self-representation has its beginnings in the right to counsel guaranteed by the Sixth Amendment.[17] In *Powell v. Alabama*,[18] the Supreme Court held that the right to counsel, at least in a state death penalty case, is also subject to the

Assistance of Counsel, 76 MARQ. L. REV. 785, 786 (1993) (advancing "[t]here has been a split in authority among the appellate courts since *Faretta* on the question of how to recognize a defendant's constitutional right to proceed *pro se* without violating his constitutional right to counsel").

[17] U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence.*

Id. (emphasis added). The Sixth Amendment grants defendants in criminal proceedings the right to counsel. *See id.* It has also been construed to require counsel unless such right has been completely and intelligently waived. *See* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963). The Supreme Court has read the right to self-representation into the Sixth Amendment based on the structure of amendment and the "common historical practice of self representation." John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 495 (1996).

[18] 287 U.S. 45, 49–50 (1932) (explaining how three black men were charged with and convicted of rape in a single day, with sentence of death, which was upheld in face of claims that defendants were not afforded right to counsel). *See* Jeffrey Levinson, Note, *Don't let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 152 (2001) (commenting that although defendants in *Powell* had counsel, one was appointed on morning of trial, and other was not a member of the Alabama bar).

guarantees made by the Fourteenth Amendment.[19] In *Powell*, the judge appointed members of the bar to represent the defendant at his arraignment and assumed they would stay on for trial, which they did not.[20] The Supreme Court decided that the defendant, under these circumstances, must be afforded the proper time to retain his own counsel.[21] Ultimately, the Court, in reviewing that decision, held that the trial judge did nothing more than provide an "expansive gesture" of representation without actually providing for counsel.[22]

Later in *Johnson v. Zerbst*,[23] the Court expanded on a defendant's Sixth Amendment right to counsel, finding that the Amendment provides for a waiver of the right to counsel in federal criminal cases.[24] When a defendant requests waiving her

[19] *See* Powell v. Alabama, 287 U.S. 45, 68 (1932) (holding that right to counsel is fundamental in character for state capital cases); *see also* Martinez v. Court of Appeal of California, 528 U.S. 152, 154 (2000) (stating 6th and 14th amendments guarantee counsel in all criminal cases). *See generally Gideon*, 372 U.S. at 342 (expanding principle in *Powell* in asserting assistance of counsel is fundamental right incorporated to States through due process clause of 14th amendment).

[20] *See Powell*, 287 U.S. at 49 (noting record from lower courts reflects that defendants were represented by counsel at arraignment, although no attorney was hired for them); *see also* Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 437 (2003–04) (explaining although trial court appointed "all of the members of the bar" to represent defendants at trial, it only appointed one attorney on morning of trial without opportunity to prepare).

[21] *See Powell*, 287 U.S. at 53 (stating defendant in capital case should be offered "fair opportunity to secure counsel of his own choice"); F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 215 (2002) (noting *Powell* established appointed counsel should have time necessary to effectively prepare for trial); Levinson, *supra* note 18, at 151 (arguing that right to have lawyer of one's choosing, who can have enough time to communicate with defendant is essential segment of effective counsel right that emerged from Powell).

[22] *See Powell*, 287 U.S. at 56–57 (determining trial judge's decision did not create obligation for any local attorney). *See generally* Bell v. Cone, 535 U.S. 685, 695–96 (2002) (noting denial of counsel at "critical stage of the litigation creates a presumption of complete denial of counsel"); Jenny Roberts, *A Conference on New York City's Criminal Courts: Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L. J. 1097, 1106 (2004) (arguing that in order to have effective representation under 6th amendment, defense counsel must have duty to investigate defenses and prosecution's potential case).

[23] 304 U.S. 458 (1938). The Petitioners in *Zerbst* were United States Marines convicted of passing and possessing counterfeit twenty-dollar bills. *Id.* at 460. They were indicted, arraigned, tried, convicted, and sentenced in the same day. *Id.* They were never given an opportunity to hire an attorney and were not allowed to present an effective case. *Id.* at 460–61.

[24] *See id.* at 465 (reasoning that because Sixth Amendment exists to protect defendants from their own ignorance of law, it would be ironic for Court to hold that defendant who is ignorant of his own rights should be denied protection of Constitution); *see also* Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 370–71 (2003) (arguing that although Court extended guarantee of counsel to all indigent criminal

right to counsel, the judge must make the "weighty" decision of determining whether the accused has waived the right intelligently and competently.[25] In addition, if the defendant has not intelligently and competently waived her right to counsel, and is not represented by counsel, then any conviction the defendant has received in that proceeding is implicitly barred by the Sixth Amendment.[26] The right to make an intelligent waiver was later recognized in *Adams v. United States ex rel McCann,*[27] where the court held that since a defendant can waive her right to a jury trial, there is no reason why she should not be able to waive the right to counsel.[28]

The right to waive counsel in a criminal trial was not ratified as a constitutional right under the Sixth Amendment until thirty-three years later when the Supreme Court decided *Faretta*

defendants, it subsequently limited this extension to federal courts). *But see* Betts v. Brady, 316 U.S. 455, 472–73 (1942) (concluding that Sixth Amendment does not apply to States because such application would be overly broad and would prevent States from reflecting "judgment of the people"), *overruled by* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

25 *See* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (stating trial judge must determine whether there has been valid waiver by examining "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused"); *see also* People v. Lego, 660 N.E.2d 971, 973 (Ill. 1995) (stating requirement "calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"); Jennifer W. Corinis, Note, *A Reasoned Standard for Competency to Waive Counsel after* Godinez v. Moran, 80 B.U. L. REV. 265, 268 (2000) (arguing that defendant who makes this waiver is subject to requirement of higher mental capacity than would be required if proceeding was with assistance of lawyer).

26 *See Zerbst*, 304 U.S. at 468 (holding that waiver under these circumstances would violate right of defendant to have assistance of counsel at trial). *See generally* Alabama v. Shelton, 535 U.S. 654, 662 (2002) (characterizing principle that no person may be imprisoned for any offense without representation at trial as "controlling rule"); Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) (explaining that without counsel provided for indigent defendant, there will be no fair trial, especially considering the "vast sums of money" expended by State to try defendant).

27 317 U.S. 269 (1942). Here, the court noted that these waivers are subject to safeguards, such as that the presiding court must be uncoerced with "no interest other than the pursuit of justice" and the defendant must be afforded time to "meet" the charges of the State. *Id.* at 275.

28 *See id.* at 271–72 (explaining that waiver was valid because defendant signed waivers to effect that he would represent himself and to consent to trial without jury and, resultantly, convinced trial judge that he was competent); *see also* James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 577–78 (1998) (noting deciding how to plead and whether to waive right against self-incrimination is up to defendant in criminal proceedings); Brian H. Wright, Comment, *The Formal Inquiry Approach: Balancing A Defendant's Right to Proceed Pro se with A Defendant's Right to Assistance of Counsel*, 76 MARQ. L. REV. 785, 788 (1993) (noting that original issue of appeal is centered around defendants' ability to waive jury trial in criminal proceeding).

v. California.[29] Describing the right to waive counsel as a right "correlative" to the rights found in the Sixth Amendment, the Court determined that a defendant may waive his or her right to counsel, with the caveats that the choice be knowing and intelligent and that the choice be approved by the court.[30] The right to self-representation has since been extended to other parts of the criminal adversarial process.[31]

B. The Faretta Decision

In *Faretta v. California*, Anthony Faretta was charged with grand theft.[32] At his trial, Faretta requested that he dispense with his assigned public defender and represent himself.[33] Faretta reasoned that the public defender's office had a heavy caseload and would not give much attention into his case.[34] The hesitant judge granted Faretta's request.[35] However, later in the trial, the judge raised the issue *sua sponte*.[36] After asking Faretta multiple questions of state law, the judge decided that Faretta had not made a knowing and intelligent decision to

[29] 422 U.S. 806 (1975) (holding right of self representation as implied in 6th amendment and is incorporated to States through Due Process Clause of 14th Amendment).

[30] *See id.* at 814 (stating 6th Amendment entails "correlative right to dispense with a lawyer's help") (quoting Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942)). *But see* Godinez v. Moran, 509 U.S. 389, 399 (explaining that competency required to waive right to counsel in criminal proceedings is not based on capability of defendant to represent himself, but on his ability to knowingly make waiver); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 202 (2001) (noting that criminal defendant who does proceed *pro se* can freely violate rules of professional conduct for lawyers).

[31] *See e.g.*, Iowa v. Tovar, 541 U.S. 77, 88–89 (2004) (stating that defendant in criminal proceeding can proceed *pro se* when entering guilty plea, but court does not have obligation to warn defendant of dangers of self representation); Alabama v. Shelton, 535 U.S. 654, 672 (2002) (holding if defendant is deprived of assistance of counsel during trial, no sentence can be given); Patterson v. Illinois, 487 U.S. 285, 296 (1988) (holding that defendant's awareness of her *Miranda* rights is sufficient for waiver of counsel in post-indictment questioning).

[32] Faretta v. California, 422 U.S. 806, 807 (1975) (noting that defendant was charged with grand theft in Superior Court of county of Los Angeles).

[33] *Id.* (explaining defendant had previously represented himself in another criminal proceeding, and wanted to represent himself because of heavy caseload of public defender).

[34] *Id.* at 807 (stating that Faretta thought defender's office was "loaded down"); *see also* Teresa A. Scott, Recent Development, *The Role of Standby Counsel: The Road from* Faretta *to* Wiggins, 27 HOW. L.J. 1799, 1801 (1984) (explaining Faretta's opinion as to why public defender would be ineffective).

[35] *Faretta*, 422 U.S at 808 (granting Faretta's request).

[36] Farreta v. California, 422 U.S. 806, 808 (1975) (noting that hearing was held two weeks later).

waive counsel and, additionally ruled that there was no constitutional right to self-representation.[37] Faretta was later tried with a public defender as counsel and was subsequently convicted.[38] The California Court of Appeals affirmed the conviction.[39]

The Supreme Court granted certiorari to hear the case.[40] In his majority opinion, Justice Stewart mainly relied upon historical grounds to find a basis for a constitutional right to self-representation.[41] Before the United States was founded, the general practice of the colonies was to allow defendants to represent themselves.[42] After the American Revolution, the new states added the right to self-representation to their constitutions in "wholesale fashion."[43] The Judiciary Act of 1789 provided that defendants be able to conduct their own defense or use an attorney.[44] Only one day after the Act of 1789 was passed, the

37 *Farreta*, 422 U.S. at 808–11 & n.3 (depicting circumstances surrounding reversal of judge's prior ruling that Faretta could represent himself).

38 *Farreta*, 422 U.S. at 811. Justice Stewart indicated that even after counsel was appointed in this case, Faretta still requested to be his own co-counsel, *id.* at 810.

39 *Farreta*, 422 U.S. at 811–12 (affirming conviction based on similarly decided case).

40 *Farreta*, 422 U.S. at 812 (stating same).

41 *See* Farreta v. California, 422 U.S. 806, 822–32 (1975) (relating history of assistance of counsel from early English jurisprudence to writing of Sixth Amendment after ratification of Constitution); *see also* Scott, *supra* note 34, at 1801 (noting that Court relied on historical foundation of 6th Amendment); Meghan H. Morgan, Article, *Standby Me: Self-Representation and Standby Counsel in a Capital Case*, 16 CAP. DEF. J. 367, 369–70 (2004) (recognizing that Court based its decision on long history of British and colonial jurisprudence from which 6th Amendment emerged).

42 *See Faretta*, 422 U.S. at 828 (stating, "Indeed, even where counsel was permitted, the general practice continued to be self-representation."); *see also* Mindy D. Block, Comment, *The Criminal Defendant's Sixth Amendment Right to Lay Representation*, 52 U. CHI. L. REV. 460, 471 (1985) (noting that American historical practice was to allow defendant to represent himself); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV 130, 137 (1985) (stating that colonies allowed defendant to choose whether to retain counsel or to represent himself).

43 *See* Faretta v. California, 422 U.S. 806, 830 (1975) (stating along with right of self representation came "other rights basic to the making of a defense"); *see also* Block, *supra* note 42, at 468 (stating that many early state charters secured right to self-representation); Rieder, *supra* note 42, at 138 (recognizing that many newly drafted state constitutions protected both defendant's right to retain counsel and to represent himself).

44 *See* 28 U.S.C.S. § 1654 (2005) (requiring that "[i]n all courts of the United States 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."); *see also Faretta*, 422 U.S. at 831 (discussing language of Judiciary Act); Rieder, *supra* note 42, at 138 (citing 28 U.S.C. § 1654 as support that freedom to choose between representation by counsel and self-representation was basic right of free people).

Sixth Amendment was proposed, evidencing that lawmakers still had the Act and the right of self-representation on their minds.[45]

The Court went further in stating the distinction between the right to obtaining counsel voluntarily and having counsel forced upon a defendant.[46] The Court noted, "where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly."[47] After holding that there is a right to self-representation in the Sixth Amendment, Justice Stewart continued, in dicta, to state that the defendant must make the decision to disregard counsel "knowingly and intelligently" and that the defendant, during an inquiry, "*should* be made aware of the dangers and disadvantages of self-representation."[48]

The dissent, authored by Chief Justice Burger, mostly focused on how the right might be a disadvantage to the defendant. Burger concluded that the defendant would lose whatever defense she had if she decided to represent herself.[49] The purpose of a criminal trial, according to Chief Justice Burger, is to achieve justice — a purpose that would not be well-served if the defendant was allowed to represent herself.[50] In fact, "the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense . . . ."[51] Finally, Chief Justice Burger suggests that the Judicial Act of 1789 was passed with the right to self-representation because the

45 *See Faretta*, 422 U.S. at 831 (noting time in which 6th amendment was proposed); Morgan, *supra* note 41, at 368–69 (proposing because Judiciary Act of 1789 was enacted one day before Sixth Amendment was proposed, it follows the right to represent oneself has been protected since nation's inception); Jeffrey P. Willhite, Note, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro se in Iowa*, 28 IOWA L. REV. 205, 209 (1992) (noting that Judiciary Act of 1789 was passed one day before proposal of Sixth Amendment).

46 *See Faretta*, 422 U.S. at 833 (recognizing difference between right to counsel and compelling acceptance of counsel); Morgan, *supra* note 41, at 369 (discussing court's recognition of difference);
Marie Higgins Williams, Comment, *The Pro se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 799 (2000) (quoting Court's recognition of difference).

47 *Faretta*, 422 U.S. at 834.

48 Faretta v. California, 422 U.S. 806, 835 (1975) (emphasis added).

49 *Id.* at 838 (Burger, C.J., dissenting) (discussing harm of accused conducting trial for himself).

50 *Id.* at 839 (arguing prosecutor and judge have duty to ensure justice is achieved and by allowing self representation, that goal is "ill-served").

51 *Id.* at 840 (noting that only trial judge is in position to evaluate whether defendant is capable of representing himself).

Sixth Amendment was not intended to contain it.[52] Thus, it was intentional that the right was left out of the Sixth Amendment.[53]

C. Circuit Court Interpretations After the Faretta Decision

Since the *Faretta* decision, the various circuits have taken divergent views on what constitutes a valid waiver of counsel.[54] Possibly the most restrictive of these circuits is the Sixth Circuit. In *United States v. McBride*,[55] the court stated that before a defendant is allowed to waive counsel, the trial judge must ask the defendant thirteen questions drawn from the BENCH BOOK FOR UNITED STATES DISTRICT JUDGES.[56] A "strongly worded admonishment" against self-representation is also included in this procedure.[57] Literal compliance with the standard is not required, as the Sixth Circuit held that asking twelve out of the thirteen questions is sufficient.[58] In addition, the Ninth Circuit

[52] *See id.* at 844 (emphasizing distinction between Sixth Amendment and Judiciary Act in that Sixth Amendment includes right of counsel and Judiciary Act provides right of self-representation).

[53] *See* Faretta v. California, 422 U.S. 806, 844 (1975) (concluding that this distinction was intentional).

[54] *See generally* United States v. Erskine, 355 F.3d 1161 (9th Cir. 2004); United States v. McBride, 362 F.3d 360 (6th Cir. 2004); Dallio v. Spitzer, 343 F.3d 553 (2d Cir. 2003); United States v. Joseph, 333 F.3d 587 (5th Cir. 2003); United States v. Cassidy, 48 Fed. Appx. 428 (4th Cir. 2002); United States v. Kimball, 291 F.3d 726 (11th Cir. 2002); United States v. Oreye, 263 F.3d 669 (7th Cir. 2001); Braun v. Ward, 190 F.3d 1181 (10th Cir. 1999); United States v. Salemo, 61 F.3d 214 (3d Cir. 1995); Berry v. Lockhart, 873 F.2d 1168 (8th Cir. 1989); United States v. Bailey, 675 F.2d 1292 (D.C. Cir. 1982); Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976).

[55] 362 F.3d 360 (6th Cir. 2004).

[56] *See* United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004) (mandating district courts to ask questions set forth in BENCH BOOK FOR UNITED STATES DISTRICT JUDGES); 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, 449–50 (1987) (explaining how Sixth Circuit uses BENCH BOOK FOR UNITED STATES DISTRICT JUDGES before procuring valid waivers of counsel); *see also* Todd A. Pickles, Note, People v. Welch: *A Missed Opportunity to Establish a Rational Rule of Competency to Waive the Assistance of Counsel*, 34 U.S.F. L. REV. 603, 607–08 (2000) (discussing different circuits' approaches to level of competency needed for self-representation).

[57] *See McBride*, 362 F.3d at 366 (holding district court judges responsible for verbalizing even one strongly word admonishment); *see also* United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) (discussing dialogue and inquiry that must take place between judge and accused before he or she chooses self-representation); Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55, 66–67 (2003) (concluding that courts must ensure that defendants are knowingly, intelligently and voluntarily waiving their right to counsel).

[58] *See McBride*, 362 F.3d at 366 (finding twelve out of thirteen questions asked substantially complied with required inquiry); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) (ruling that Bench Book would be useful as a guideline in situations where defendant's seek to waive representation); *see also* McGovern, *supra* note 56, at 450

has held that in order to properly determine the validity of a waiver, the trial judge *must* "insure that [the defendant] understands 1) the nature of the charges against him; 2) the possible penalties; and 3) the dangers and disadvantages of self-representation,"[59] rather than simply suggest that the judge *should* do these things.[60]

While the Ninth Circuit does not require as rigid a formula as the Sixth Circuit, the Eighth Circuit holds similarly, stating that it is essential that the defendant be made aware of the dangers and disadvantages of self-representation.[61] However, the Eight Circuit asserts, based on a totality of circumstances test,[62] that if the defendant has this knowledge from elsewhere, the judge is not required to give a detailed warning.[63]

Advocating a low standard for waiver validity is the Seventh Circuit, which holds in *United States v. Oreye*[64] that it is the judge's responsibility to ensure that the defendant knows his rights and does not make any "hasty decisions."[65] Judge Posner

(explaining inquiry used by Sixth Circuit when utilizing Bench Rules and determining defendant's self-representation).

59 United States v. Erskine, 355 F.3d 1161, 1167 (9th Cir. 2004) (quoting United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987)).

60 *See* Faretta v. California, 422 U.S. 806, 835 (1975) (recommending that judges should ensure self-represented defendant has knowledge and makes informed decision); *see also* Colquitt, *supra* note 57, at 66–67 (noting minimal routine inquiry that judge should perform before making informed decision regarding defendant's self-representation); Pickles, *supra* note 56, at 629 (explaining Ninth Circuit's requirements of psychiatrist evaluation, judge's personal interview with defendant, judge's warning of disadvantages of defending *pro se*, and judge's determination of defendant's reasonable choice before compelling defendant's self-representation).

61 *See* Berry v. Lockhart, 873 F.2d 1168, 1170 (8th Cir. 1989) (ruling that accused must be made aware of all disadvantages of self-representation); Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir. 1988) (offering judges' option to warn of dangers and disadvantages of self-representation); *see also* Pickles, *supra* note 56, at 607 (citing Eighth Circuit's standard for waiver of counsel).

62 *See Berry*, 873 F.2d at 1170 (holding record as whole must be reviewed for circumstances proving knowledge and intelligent waiver of counsel); *Meyer,* 854 F.2d at 1114 (establishing that courts must take into consideration defendant's circumstances when making assessment of his or her competence to waive counsel); Decker, *supra* note 17, at 514 (discussing judicial inquiry of totality of circumstances, including defendant's background, experience and conduct).

63 *See Meyer*, 854 F.2d at 1114 (explaining that warning is not always required or absolute); *see also* Wright, *supra* note 16, at 794 (discussing Eighth Circuit's view along with six other circuits which hold that waiver can be discerned from defendant's knowledge of circumstances). *But see* Colquitt, *supra* note 57, at 65 (highlighting that defendants are statistically better off with counsel and emphasizing importance of ensuring proper waiver).

64 263 F.3d 669 (7th Cir. 2001).

65 *See* United States v. Oreye, 263 F.3d 669, 672 (7th Cir. 2001). Here, the trial judge gave Oreye the choice of remaining with his current counsel, finding new counsel who would be ready to go to trial immediately, or representing himself and keeping his current

states that, though the court must make sure of this, the judge cannot mandate any kind of warning.[66] The danger of this, as stated in *United States v. Hill*,[67] is that, if a specific warning were given, the judge would "depict self-representation in such unremittingly scary terms that any reasonable person would refuse."[68]

The Fourth Circuit states that the trial court must determine from the record as a whole whether a defendant's waiver was "knowing and intelligent."[69] However, it notes that failure to grant a waiver where the defendant deserves one is reversible error.[70] Likewise, the First Circuit espouses the view that a waiver decision should be made on the case's facts[71] and states that there are no required questions or warnings to determine whether a waiver is valid.[72]

Finally, several Circuits walk the fine line between these two views. The Fifth Circuit, in *United States v. Joseph*,[73] states that the defendant should be aware of the dangers and disadvantages

counsel as standby counsel. *Id.* at 670. The court determined that Oreye did not need to specifically state that he wanted to represent himself, but such a desire can be inferred from the defendant's other statements and actions. *Id.*

66 *See Oreye*, 263 F.3d at 672 (ruling that judges cannot mandate warning against right to self-representation because it is defendant's constitutional right).

67 252 F.3d 919 (7th Cir. 2001).

68 United States v. Hill, 252 F.3d 919, 928–29 (7th Cir. 2001).

69 United States v. Cassidy, 48 Fed. Appx. 428, 438 (4th Cir. 2002) (concluding waiver was valid because it was knowing and voluntary).

70 *See Cassidy*, 48 Fed. Appx. at 438. The court also states that a judge cannot deny a defendant's waiver request if she believes that the defendant would benefit from the assistance of counsel. In *Cassidy*, defendant was given time to hire his own counsel and failed to do so. *Id.* at 437. Thus, his waiver was properly denied even though the court did not give him any time to prepare a *pro se* defense. *Id.* Notably, other courts have failed to find reversible error because the defendant's waiver was valid. *See* United States v. Melvin, 48 Fed. Appx. 63 (4th Cir. 2002). In fact, a court's refusal to accept a valid waiver of counsel has been considered reversible error. *See generally Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989: III. Trial (Part 1 of 2)* 78 GEO. L.J. 1077, 1085–86 (1990).

71 *See* United States v. Campbell, 874 F.2d 838, 845 (1st Cir. 1989) (stating that when determining whether waiver of counsel is valid, court should look to totality of "particular facts and circumstances surrounding the case"); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (emphasizing importance of all facts and circumstances of case); *see also* Carter v. Illinois, 329 U.S. 173, 183 (1946) (Murphy, J., dissenting) (demanding that facts in record "should not be ignored if justice demands their use").

72 *See* United States v. Manjarrez, 306 F.3d 1175, 1179 (1st Cir. 2002) (acknowledging First Circuit's more contextual approach to evaluating waiver of counsel); *Campbell*, 874 F.2d at 845 (stating that First Circuit has not construed earlier cases to require particular technical inquiry); *Meachum*, 545 F.2d at 279 (adopting less technical approach).

73 333 F.3d 587 (5th Cir. 2003).

of self-representation,[74] but that the trial judge's decision may come from a consideration of the defendant's age, experience, education and background.[75] In *United States v. Kimball*,[76] the Eleventh Circuit lists many of the *Faretta* requirements for a waiver, but prefaces them all with a "should" rather than a "must."[77] For example, the court states that the judge *should* make the defendant aware of the dangers and disadvantages of self-representation[78] and that there *should* be a pretrial inquiry into the matter.[79] Finally, the District of Columbia Circuit has added to the Eleventh Circuit's determination, stating that the trial judge's decision must be made clear on the record.[80]

D. Competency Issues

Though competence is a major issue in the waiver debate,[81] *Faretta* uses the word "competent" only once in the decision, within its discussion of the competence of a defendant who is waiving the right to counsel.[82] In fact, the term's use comes not

74 *See* United States v Joseph, 333 F.3d 587, 590 (5th Cir. 2003) (suggesting that defendant should make decision with his or her "eyes open"); United States v. Davis, 269 F.3d 514, 518 (5th Cir. 2001) (stressing that court should ensure defendant is fully aware of decision); United States v. Martin, 790 F.2d 1215, 1218 (5th Cir. 1986) (holding that defendant must make decision "knowingly and intelligibly" and must be unequivocal).

75 *See Joseph*, 333 F.3d at 590 (listing various factors court may consider); *Davis*, 269 F.3d at 518 (mentioning factors included in court's analysis of whether defendant can appreciate his or her decision); *Martin*, 790 F.2d at 1218 (stating that court must consider age and education in addition to other background information).

76 291 F.3d 726 (11th Cir. 2002).

77 *See id.* at 730 (noting court's discretion).

78 *See* United States v. Kimball, 291 F.3d 726, 730 (11th Cir. 2002) (recognizing that defendants have right to represent themselves).

79 *See Kimball*, 291 F.3d at 730 (noting that pretrial inquiries are "ideal method[s]").

80 *See* United States v. Bailey, 675 F.2d 1292, 1300 (D.C. Cir. 1982) (holding that "dangers and disadvantages of self-representation" must be made clear on record); Hsu v. United States, 392 A.2d 972, 983 (D.C. Cir. 1977) (requiring clarity on record regarding waiver of counsel); *see also* Brooksany Barrowes, Comment, *The Permissibility of Shackling or Gagging Pro se Criminal Defendants*, 1998 U. CHI. LEGAL F. 349, 354 n.40 (1998) (noting D.C. Circuit's requirement for trial judge to ensure on record that defendant's waiver is voluntary).

81 *See* United States v. Morgan, 346 U.S. 502 (1953) (stating that conviction cannot stand unless defendant was competent in waiving counsel); Brooks v. McCaughtry, 380 F.3d 1009, 1011 (7th Cir. 2004) (relating competency to stand trial with competency to waive counsel). *See generally* Godinez v. Moran, 509 U.S. 389 (1993) (describing issues of competency with respect to waiver of counsel).

82 *See* United States v. Faretta, 422 U.S. 806, 835 (1975). The Court stated that the record indicated that Faretta himself appeared competent. *Id.* In the dissent, Chief Justice Burger states that the courts are plagued by a deficient amount of competent attorneys. *Id.* at 845, and that the addition of a competent attorney is all that the Sixth Amendment requires. *Id.* at 848 (Blackmun, J., dissenting); *see, e.g.*, Corinis, *supra* note 25, at 283. In the context of waivers, competence refers only to the technical expertise a

in the holding, but only in stating that Faretta himself was a competent individual.[83] This raises the question of what level of competence is used in waiver decisions.

In *Dusky v. United States*,[84] the Supreme Court stated that in order for a person to be competent to stand trial, she must have a "present ability to consult with [her] lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against [her]."[85] Later, the Court in *Godinez v. Moran*[86] applied this rule to those who wish to represent themselves, holding that it does not see any reason why a defendant who waives the right to counsel should be held to a higher standard than those who do not.[87]

However, the Court also held that competency is not the end of the inquiry: in a proper waiver inquiry, the trial court must also determine whether the defendant is waiving counsel *knowingly* and competently.[88] Other courts have picked up on this

trained lawyer may have. Corinis, *supra* note 25, at 283. The defendant's competency is often presumed. *See generally* David Forestier, Jr., Project, *District of Columbia Court of Appeals Project on Criminal Procedure: VI. Competency to Stand Trial*, 28 HOW. L.J. 139, 151 (1985).

83 *See Faretta*, 422 U.S. at 835 (noting that *Faretta* was "literate, competent, and understanding, and was voluntarily exercising his informed free will"); *see also* Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 82 n.43 (2002) (noting that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation"); Jane L. McClellan, Comment, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L. J. 201, 212 (1994) (describing "*Faretta*-type evaluation" as making showing that "defendant made a knowing, intelligent and voluntary waiver").

84 362 U.S. 402 (1960).

85 Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that it is not enough that defendants be "oriented to time and place and [have] some recollection of events").

86 509 U.S. 389 (1993).

87 *See id.* at 399. The court notes that defendants who are represented often face the same kinds of decisions as defendants who represent themselves. *Id.* at 398. In addition, the rights of the defendant who stands trial are the same as the defendant who pleads guilty, including the right against self-incrimination, the right to a trial by jury, and the right to face accusers. *Id.* Finally, the Court holds that waiving the right to counsel does not "require an appreciably higher level of mental functioning than the decision to waive other constitutional rights," *Id.* at 399. Thus, there really is no difference between the competency standard for trials and for pleas. *See, e.g.*, Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55, 61 (2001). In this way, the Court refuses to "differentiate varying standards of competence," unlike psychologists and other professionals. *See generally* Richard E. Redding and Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 359 (2001).

88 *See* Godinez v. Moran, 509 U.S. 389 400–01 (1993) (noting that while inquiries into knowledge and intelligence might lead one to claim that waiving self-representation requires some kind of "heightened standard" of inquiry, that presumption would be incorrect); *see also* Brian R. Boch, *Fourteenth Amendment - The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand*

statement and applied it in the trial court setting by stressing the "knowingly" prong, but not the "competency" prong.[89]

Godinez has been met with a wide array of criticism.[90] For instance, some have suggested that this lower standard for competency can lead to the absurd result of a mentally ill person being able to represent herself.[91] The *Dusky* standard does not take mental competence into account, much to the ire of some commentators.[92] However, courts in general have held in accordance with *Godinez*, saying that an inquiry into one's competency for self-representation purposes is not necessary.[93]

Trial, 84 J. CRIM. L. & CRIMINOLOGY 883, 901 (1994) (noting that heightened waiver standards to plead guilty and stand trial exist, but only because waiver needs to be "knowing and voluntary," not because competency standards are any higher) (quoting Godinez v. Moran, 509 U.S. 389, 400 (1993)). *But see* Patricia A. Zapf and Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, 37 COURT REV. 28, 32 (2000) (proposing that some defendants may be competent to stand trial in one case, but not in others).

89 *See* United States v. Coomes, 106 Fed. Appx. 967, 968 (6th Cir. 2004) (noting that defendant must possess "a rational, factual understanding of the criminal proceedings against him"); Shafer v. Bowersox, 329 F.3d 637, 650 (8th Cir. 2003) (holding that waiver inquiries involve a two part inquiry: 1) whether defendant is competent to waive right to counsel and 2) whether defendant actually "understands the consequences of a particular decision"); Van Lynn v. Farmon, 347 F.3d 735, 740 (9th Cir. 2003) (noting that defendant must have "a 'rational understanding' of the proceedings") (quoting Godinez v. Moran, 509 U.S. 389, 397–98 (1993)).

90 *See* David L. Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177, 178 (1997) (opining that *Godinez* is contrary to prior Supreme Court decisions); Bruce J. Winick, *Reforming Competency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 619 (1995) (arguing that clinical evaluators are afforded wide discretion in competency decisions due to *Godinez*); Corinis, *supra* note 25, at 269 (asserting that *Godinez*'s flaw was that it used *Dusky*'s overly-simplified standard).

91 *See* Corinis, *supra* note 25, at 280 (noting that Colin Ferguson's trial exemplifies this problem); *see also* Pickles, *supra* note 57, at 624 (noting that contextual approach should be used to determine waiver competency). *See generally* Godinez v. Moran, 509 U.S. 389, 413 (1993) (Blackmun, J., dissenting) (stating that competency decisions cannot be made in "a vacuum").

92 *See* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM L. & CRIMINOLOGY 419, 422–23 (1990) (arguing that competency of someone with mental illness to conduct their own defense is "marginal at best"); *see also* Shelia Taub, *Competency Standard Clarified*, NAT'L L.J., Oct. 18, 1993, at 25 (noting that *Godinez* did not consider situations where defendants are too depressed to care about what happens to them). *See generally* Corinis, *supra* note 25, at 283–84 (suggesting that before being able to waive their right to counsel, defendants should be required to pass competency tests).

93 *See* United States v. Egwaoje, 335 F.3d 579, 586 (7th Cir. 2003) (holding that courts must "distinguish" between defendant's competency to waive her right to counsel and competency to "conduct" her defense, and stating that courts should not be concerned with "whether [defendant] can survive the fall"); Hayes v. Woodford, 301 F.3d 1054, 1078 n.28 (9th Cir. 2002) (quoting *Godinez* and suggesting that inquiries into competence should only be conducted if defendant's competency is reasonably in question). *See generally* Godinez v. Moran, 509 U.S. 389, 400 (1993) (concluding that one's legal knowledge is not relevant to whether one is competent to waive her right to counsel).

E. Introduction to Standby Counsel

Standby counsel functions to assist the *pro se* defendant during trial. They must be ready to stand in for the defendant if the defendant ceases to represent himself, and can be used by the court to "enforce" courtroom procedures.[94] *Faretta v. California* states, relying on *United States v. Dougherty*,[95] that a court may appoint standby counsel even over the defendant's objection.[96] However, other cases have held that standby counsel must not be allowed to interfere with the defendant when she is providing her own defense since doing so would erode the jury's image of the defendant representing herself.[97] In addition, even in the presence of standby counsel, the *pro se* defendant has the right to retain control over her own defense.[98] Finally, *McKaskle v. Wiggins*[99] states that there is no right for a defendant to have "hybrid counsel" or an attorney that fades in and out of full representation while the defendant is proceeding pro se.[100]

94 *See* McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) (explaining that standby counsel unburdens trial judge); Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (implying that standby counsel helps to prevent defendants from "[using] the courtroom for deliberate disruption of their trials"); United States v. Bertoli, 994 F.2d 1002, 1018–19 (3d Cir. 1993) (noting that standby counsel exists to protect defendants' rights and make sure trial procedure is followed).

95 473 F.2d 1113 (D.C. Cir. 1972).

96 *See Faretta*, 422 U.S. at 824 n.46 (noting that defendant may conduct his case "at his own detriment"); *see also* United States v. Dougherty, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972) (holding that judges must seek to cooperate with defendants and that standby counsel can alleviate some procedural problems). *But see* Lee v. Alabama, 406 F.2d 466, 469 (5th Cir. 1968) (noting that defendant has "no right to a hybrid representation partly by himself and partly by counsel").

97 *See McKaskle*, 465 U.S. at 178 (holding that defendant retains control over her own case); United States v. Gutierrez, 351 F.3d 897, 903 (8th Cir. 2003) (Arnold, J. dissenting) (noting that any interference violates defendant's Sixth Amendment rights); Myers v. Johnson, 76 F.3d 1330, 1334 (5th Cir. 1996) (stating that this principle also applies to cases on appeal).

98 *See McKaskle*, 465 U.S. at 178 (holding that standby counsel must not interfere with jury's impression that defendant is handling his own case); Buhl v. Cooksey, 233 F.3d 783, 802 (3d Cir. 2000) (implying that standby counsel's existence may jeopardize defendant's right to self-representation). *See generally* Martinez v. Court of Appeal of California, 528 U.S. 152, 161–62 (2000) (noting that defendant's right to represent herself is not "absolute")."

99 465 U.S. 168 (1984).

100 *See* McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (stating that "a defendant does not have the constitutional right to choreograph special appearances by counsel"); *see* United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994) (holding defendants do not have "a constitutional right to 'hybrid' representation"); Barbara Zolot, *Defining the Difficult Task of Standby Counsel in Criminal Cases*, N.Y.L.J., Sept. 4, 1998, at 1 (noting that requests to have counsel perform tasks at trial may be summarily denied).

Standby counsel has its advantages at trial simply because most *pro se* defendants are "ill equipped" to handle their own cases.[101] Counsel serving in a standby position, "can assist a defendant about procedural matters, legal issues, and trial strategy and tactics."[102] This is useful because having a defendant proceed *pro se* often results in lengthy trial delays, disorderly procedures, and the possibility that the *pro se* defendant is simply trying to manipulate the court.[103] Finally, it is well recognized that a *pro se* defendant probably requires assistance in presenting her case, and that task should not be a burden upon the judge.[104] Standby counsel fits this role, by relieving the judge of assisting the *pro se* defendant.[105]

However, the presence of standby counsel can also have its disadvantages. Some commentators argue that having counsel standing by means that the *pro se* defendant will not be able to present her own defense and use her own tactics.[106] This

101 *See* Colquitt, *supra* note 57, at 72 (noting that attorneys are simply more familiar with trial procedure and rules). *See generally* Faretta v. California, 422 U.S. 806, 834 (1975) (observing that defendants are often "unskilled" at self-representation); Randall B. Bateman, Comment, *Federal and State Perspectives on a Criminal Defendant's Right to Self-Representation*, 20 J. CONTEMP. L. 77, 110 (1994) (implying that standby counsel can assist defendants on procedural matters).

102 Colquitt, *supra* note 57, at 72 (discussing reasons why appointing standby counsel is necessary to help ill-equipped *pro se* litigants). *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 678 (2000) (stating that standby counsel "should not view themselves as a passive resource").

103 *See* Colquitt, *supra* note 57, at 64 (noting that concern for orderly administration of justice is sometimes impeded by *pro se* defendants who are unassisted by counsel); Poulin, *supra* note 102, at 677–78 (suggesting that judges might see self-representation as "dilatory" tactic). *See generally* United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982) (holding that plaintiff's actions in firing standby counsel and replacing them with full counsel was meant to mislead court).

104 *See* Colquitt, *supra* note 57, at 69 (noting that judges need to remain impartial during trials); Poulin, *supra* note 102, at 677 (noting "[c]ourts often provide standby counsel to alleviate the burden of presiding over the trial of a *pro se* criminal defendant and possibly to avert an unfair trial"); Williams, *supra* note 46, at 805 (positing that appointing standby counsel relieves judge of appearance of lack of impartiality which results when judge instructs *pro se* defendant on legal procedure and right against self-incrimination).

105 *See* Colquitt, *supra* note 58, at 71–72 (suggesting that, as opposed to judges, standby counsel can appropriately intervene when *pro se* defendant requires assistance putting on case); Poulin, *supra* note 103, at 735 (concluding that standby counsel can be used by judges to ensure fairness and relieve burdens on judges); *see also* Williams, *supra* note 46, at 794 (explaining that standby counsel can also be useful for *pro se* litigant who later decides he wants to be represented by counsel).

106 *See* McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) (holding that *pro se* defendant is entitled to keep control over his own trial); Colquitt, *supra* note 57, at 73 (suggesting that control is major issue); Williams, *supra* note 46, at 806–07 (noting that defendant feels he is losing his rights when working with standby counsel).

suggests that standby counsel, whose role in these cases is sometimes amorphous, must defer to the wishes of the defendant, no matter how bad they might be.[107] Most of the problems with standby counsel relate to the decision of the trial court to appoint counsel.[108] Finally, the right to waive counsel can be "effectively denied" if appointed standby counsel interfere in the *pro se* defendant's case in any way.[109] Thus, while standby counsel can benefit the defendant, problems may cause "animosity between standby counsel and the defendant."[110]

II. THE NEED FOR A BETTER STANDARD OF INQUIRY

A. The Current Standard of Inquiry

In dicta, *Faretta* stated that the defendant "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel."[111] The Court stated that the defendant, in order to properly represent himself, does not need to have the knowledge of a lawyer.[112] In addition, in *North*

107 *See* Colquitt, *supra* note 57, at 73 (implying standby counsel might end up wasting time); Poulin, *supra* note 102, at 676 (noting that standby counsel occupies an "uncomfortable twilight zone of law"); Williams, *supra* note 46, at 807 (hypothesizing that standby counsel situation is problematic because many attorneys do not want to sit idly by and because more intervention by attorneys might deprive defendant of right to represent himself).

108 *See* Poulin, *supra* note 102, at 686 (discussing varied problems that arise during appointment of standby counsel). *See generally* Colquitt, *supra* note 57, at 73 (positing that there may also be problem of inequity in the very assigning of standby counsel since indigent *pro se* defendants are more likely than wealthy *pro se* defendants to have standby counsel); Williams, *supra* note 46, at 804 (describing need to explain to standby counsel that defendant has elected to represent himself and that too much "help" may deprive defendant of his right to represent himself).

109 *See* Myers v. Johnson, 76 F.3d 1330, 1334 (5th Cir. 1996) (noting that denying *pro se* defendant access to trial transcripts constitutes substantial interference); *see also* Poulin, *supra* note 102, at 678 (explaining how courts must walk fine line between a defendant's right to representation and his right to represent himself when appointing standby counsel); Williams, *supra* note 46, at 804 (noting that mere appointment of standby counsel does not offend defendant's right to self-representation, but that this right may be infringed if standby counsel is subsequently too helpful to defendant).

110 Williams, *supra* note 46, at 807 (suggesting that right to fair trial can be infringed when defendant feels she is losing control over her own defense).

111 Faretta v. California, 422 U.S. 806, 835 (1975).

112 *See* Faretta, 422 U.S. at 835 (noting one can competently represent himself without expertise of lawyer). *But see* Colquitt, *supra* note 58, at 66–67 (noting that self representation is fraught with dangers, thus judge instructing defendant on right to self representation must make sure that defendant understands all perils involved); Poulin, *supra* note 103, at 677 (finding that most often *pro se* representation creates disorder in court due to defendant's lack of knowledge of courtroom etiquette and law).

Carolina v. Butler,[113] the Court stated that waiver decisions must be based on a case's facts and circumstances.[114] This follows *Johnson v. Zerbst*,[115] which states that the "determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[116] Finally, this opinion is repeated later in *Edwards v. Arizona*,[117] which suggests a totality of circumstances test.[118] As a whole, the Circuit Courts are in agreement that the totality of circumstances test should be used in determining waiver validity.[119]

B. The Benefits of the Totality of Circumstances Standard

Totality of circumstances jurisprudence is primarily based on the desire to abandon a mechanistic test for waiver validity.[120] In

113 441 U.S. 369 (1979).

114 *See* North Carolina v. Butler, 441 U.S. 369, 374–75 (holding that oral waiver of right to counsel may be knowing and intelligent and suffice in form to constitute waiver of right to counsel). *But see* Colquitt, *supra* note 57, at 65–66 (discussing waiver of counsel process as "exceedingly delicate"); Williams, *supra* note 46, at 800 (noting that courts have developed "detailed and exacting test" to determine if there has been effective waiver).

115 304 U.S. 458 (1938).

116 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

117 451 U.S. 477 (1981) (holding that defendant who was advised of his rights and then began to incriminate himself without counsel present had not necessarily made knowing and intelligent waiver of his rights).

118 *See* Edwards v. Arizona, 451 U.S. 477, 482 (1981) (noting waiver decisions must be based on defendant's "background, experience, and conduct"); Dallio v. Spitzer, 343 F.3d 553, 563 (2d Cir. 2003) (noting Supreme Court's suggestion that the totality of circumstances test is appropriate for deciding whether defendant has waived his right to counsel); United States v. Joseph, 333 F.3d 587, 590 (5th Cir. 2003) (listing age, education, background, experience, and conduct as relevant factors in determining whether accused has voluntarily and intelligently waived his right to assistance of counsel).

119 *See Dallio*, 343 F.3d at 563 (noting that Supreme Court mandated that these decisions should be based on "totality of circumstances"); *see also Joseph*, 333 F.3d at 590 (listing personal characteristics important for determining effective waiver); United States v. Kimball, 291 F.3d 726, 730–31 (11th Cir. 2002) (considering eight factors weighed in waiver situations); United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988) (stating that judges need only make determinations based on record as whole); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (holding that decision turns on all circumstances of case).

120 *See* North Carolina v. Butler, 411 U.S. 369, 373 (1979) (noting question of waiver is not "one of form"); *see also Dallio*, 343 F.3d at 563 (cautioning against use of mechanical formulas in determining constitutional waivers); *Gallop*, 838 F.2d at 110 (explaining that totality approach replaces 'formalistic' inquiry).

Adams v. United States ex rel McCann,[121] Justice Frankfurter stated that the competence of a defendant cannot be determined by a simple set of rules for the court to follow.[122] In that case, the Court considered the prosecution's position that a defendant's competence can be determined simply by holding that one who has pled guilty, without seeking an attorney's opinion, is per se incompetent.[123] The Court reasoned that validating such a requirement would be a "gratuitous dislocation of the processes of justice."[124] Similar reasoning, which takes the defendant's rights into consideration, was used in *Riggins v. Nevada*[125] where the Supreme Court stated that the relationship between the defendant and counsel can be affected when the defendant has been medicated.[126] This is a fact that would not be considered if a rigid rule for determining a defendant's competency had been used. Further, in *United States v. Hayes*,[127] the Ninth Circuit stated that implementing a rigid rule for the purpose of highlighting the dangers and disadvantages of self-representation to the defendant is unwise,[128] reasoning that the court cannot become a source of "tutelage and legal advice" for the defendant.[129] The court emphasized that the explanation

121 317 U.S. 269 (1942). McCann, on trial for mail fraud, stated that his familiarity with the complicated facts of his case was such that no attorney could provide as proficient a representation as he himself could. *See id.* at 270.

122 *Id.* at 277 (announcing that question in each case must rest on exercise of intelligent and informed judgment).

123 *See id.* at 276–79 (discussing issue of whether accused can waive his trial as *pro se* litigant). *See generally* Bateman, *supra* note 101, at 90–91 (explaining *Adams* Court found right to proceed *pro se*); Jeffrey P. Willhite, Note, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro se in Iowa*, 78 IOWA L. REV. 205, 210 (1992) (analyzing issues set forth in *Adams*).

124 *Adams*, 317 U.S. at 277 (holding that Constitution could not force accused to stand trial against his wishes).

125 504 U.S. 127 (1992).

126 Riggins v. Nevada, 504 U.S. 127, 137–38 (1992) (noting expert testimony as to effects of medication is not enough to overcome taint on defendant's relationship with his client); *See* Willis v. Cockrell, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 15950 at *47 (W.D. Tex. 2004) (discussing that medication affected defendant's ability to assist in his defense in violation of his right to counsel). *But see* United States v. Weston, 255 F.3d 873, 876, (D.C. Cir. 2001) (noting that medication may not interfere with fair trial where it improves client's mental function).

127 231 F.3d 1132 (9th Cir. 2000).

128 *See* United States v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000) (implying such a warning can be "lengthy and pedantic," yet sufficient as an explanation of dangers of self-representation still must be given). *See generally* Lopez v. Thompson, 202 F.3d 1110, 1119 (9th Cir. 2000) (refusing to apply rigid rule); U.S. v. Keen, 104 F.3d 1111, 1114 (9th Cir. 1996) (stating "we have never demanded an ironclad approach to this situation").

129 *See* McKaskle v. Wiggins 465 U.S. 168, 183–84 (1984) (noting that judges are not required to take over chores normally performed by counsel); *see also* Faretta v.

"should not be as complex . . . as is now required in the taking of a guilty plea,"[130] potentially further confusing the defendant.

The benefits of the totality of circumstances approach is best highlighted by the disadvantages of a rigid rule on how to question potential *pro se* defendants. Any kind of "mechanistic" approach to the waiver question invites restrictions on the judge's ability to be flexible.[131] In fact, it is likely that the defendant can simply memorize the answers to waiver questions, thus making it difficult for the judge to determine which defendants are being disingenuous.[132] Some sources state that having a rigid rule in place would save the judge from such hazards as trying to determine whether a waiver is valid from an ambiguous record.[133] However, even if questioning with a rigid format must be used, the analysis must take into account such factors as the defendant's experience, age, and conduct to make the preliminary decision as to whether she is competent.[134]

California, 422 U.S. 806, 835–36 (1975) (holding defendant's lack of technical legal knowledge as irrelevant); *Hayes*, 231 F.3d at 1138 (explaining judge should not become surrogate lawyer for defendant).

130 United States v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000).

131 *See* Gallun, *supra* note 14, at 601 (discussing potential dangers of "mechanistic" approach, rejecting "record as a whole" approach, and recommending rigid rules for determining defendant's competency); Recent Case, *Second Circuit Holds That the Sixth Amendment Does Not Clearly Require Judges to Warn Defendants About the Risks of Proceeding Pro se*, 117 HARV. L. REV. 1725, 1732 (2004) (noting 'flexibility' of "totality of the circumstances" approach) [hereinafter *Second Circuit*]. *See generally* Fare v. Michael C., 442 U.S. 707, 725 (1979) (explaining that detailed inquiry is permitted by "totality of the circumstances" approach).

132 *See* Dortch v. State, 651 So.2d 154, 158 (Fla. Ct. App. 1st Dist. 1995) (Barfield, J., dissenting) (warning that defendants will respond with "intelligence of an amoeba" to litany), *overruled by* Potts v. State, 718 So.2d 757 (Fla. 1998). *See generally* Tuitt v. Fair, 822 F.2d 166, 175 (1st Cir. 1987) (fearing courts will be "whipsawed" by wry defendants who "record an unequivocal response" to engage in self-representation, relying on error despite ruling); Gallun, *supra* note 14, at 568 (noting various dangers involved in "mechanistic" approach).

133 *See Tuitt*, 822 F.2d at 176 (surmising that lack of specific warnings has increased abuse of 'claimed deprivations' on appeal); *see also* Willhite, *supra* note 123, at 217 (noting manipulation of silent record); Wright, *supra* note 16, at 802 (explaining that appellate courts will no longer have to speculate on defendant's waiver).

134 *See* Von Molkte v. Gillies, 332 U.S. 708, 724 (1948) (holding that trial court must engage in "penetrating" session of questioning when determining waiver validity); *see also* United States. v. Ross, 503 F.2d 940, 945 (5th Cir. 1974) (noting pivotal role of judge in exercising penetrating interrogation); Wright, *supra* note 16, at 795 (acknowledging that these characteristics are harder to take into account when utilizing standardized inquiry).

C. Universal Acceptance of the Test

The totality of circumstances test has been used with approval in Sixth Amendment cases concerning issues other than waiver of counsel.[135] In *Strickland v. Washington*,[136] the Supreme Court held that when a convicted defendant wishes to claim ineffective trial counsel, the Court must find that the attorney's actions were far outside the range of competence.[137] This is done by taking into account different circumstances surrounding counsel's actions.[138] The Court, in these situations, considers the counsel's actions in light of prevailing norms, with a strong presumption in favor of counsel's actions.[139] The Court has also implied that a totality of circumstances test should be used to

135 *See* Mark C. Grafenreed, Note, *The Role of Jury Discrimination in Sixth Amendment Impartiality: Truth or Myth?*, 28 T. MARSHALL L. REV. 289, 290 (2003) (noting application of 'totality of the circumstances' test to determine violations of defendant's Sixth Amendment right to speedy trial); Rob A. Justman, Note, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel: Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony"*, 2004 UTAH. L. REV. 701, 724 (2004) (discussing application of 'totality of the circumstances' test to ineffectiveness of counsel); Amanda N. Montague, Comment, *Recognizing All Critical Stages in Criminal Proceedings: The Violation of the Sixth Amendment by Utah in Not Allowing Defendants the Right to Counsel at Parole Hearings*, 18 BYU J. PUB. L. 249, 257 (2003) (explaining Court's rationale for finding 'totality of the circumstances' as key reason line-ups violate Sixth Amendment right to counsel).

136 466 U.S. 668 (1984).

137 *See* Florida v. Nixon, 125 S.Ct. 551, 563 (2004) (holding that if counsel's strategy fulfills *Strickland* standard in capital case, where counsel analyzes guilt and penalty phases in determining best way to proceed, claim of ineffective counsel would be unavailable); Strickland v. Washington, 466 U.S. 668, 686 (1984) (indicating that determinative factor of ineffectiveness "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). *But see* Lara-Torres v. Ashcroft, 383 F.3d 968, 974 (9th Cir. 2004) (rejecting use of *Strickland* standard in civil immigration context).

138 *See Strickland*, 466 U.S. at 681 (noting circumstances taken into account include "the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense."); *see also* Deborah Cirilla, Note, *A Caribbean Fantasy? The Case of the Juror who Misbehaved and the Attorney Who Let Him Get Away With It: Violation of Sixth Amendment Right to an Impartial Jury and Effective Assistance of Counsel in* Government of the Virgin Islands v. Weatherwax, 47 VILL. L. REV. 275, 275 n.1 (1997) (discussing right to effective counsel and noting that ineffective assistance of counsel decision is made based upon totality of circumstances); Levinson, *supra* note 18, at 155 (discussing court's examination of defendant's burden of proof and determination that outcome probably would have been different but for attorney's errors).

139 *See Strickland*, 466 U.S. at 689 (arguing that highly deferential review of attorney's actions is necessary due to defendant's temptation to doubt attorney's performance after adverse ruling has occurred); *see also* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L. REV. 1241, 1273–74 (2001) (commenting on deference afforded to counsel's performance and on how *Strickland* standard is ineffective); Levinson, *supra* note 18, at 155 (suggesting court's reviewing power must begin with presumption in favor of attorney).

determine whether a confession was brought on coercively.[140] In *Spano v. New York*,[141] the Court noted that the defendant was subjected to fatigue, as his questioning began in the evening, continued through the night, and was conducted by powerful figures (both public and private) such as the district attorney, several detectives, a police lieutenant, an inspector, and a childhood friend of the defendant.[142] Finally, in *Hatfield v. State*,[143] the Arkansas Supreme Court found that – in situations involving standby counsel – whether such counsel has risen to the level of regular counsel is determined by using a totality of circumstances analysis.[144]

The totality of circumstances test has been used in other constitutional circumstances as well.[145] It has been used, for

[140] *See* Spano v. New York, 360 U.S. 315, 323–24 (1959) (noting that defendant's confession cannot withstand Fourteenth Amendment challenge); *see also* Hopkins v. Cockrell, 325 F.3d 579, 584–85 (5th Cir. 2003) (finding procedures used to obtain confession met level reached in *Spano* when observed under totality of circumstances, yet allowing confession due to overwhelming circumstantial evidence), *cert. denied*, 540 U.S. 968 (2003); United States v. Long, 977 F.2d 1264, 1275 (8th Cir. 1992) (distinguishing defendant in *Spano* by examining totality of circumstances and finding defendant was not overtly coerced).

[141] 360 U.S. 315 (1959).

[142] *Id.* at 322–23. Defendant was represented by counsel at the time of the interview, but was left alone with the interrogators with instructions to tell them nothing without his attorney present. *Id.* at 317. The defendant apparently followed his attorney's advice, and only began to reveal information when being questioned by his friend Bruno. *Id.* at 317–19.

In *United States v. Muzychka*, 725 F.2d 1061, 1065 (3d Cir.1984), defendant was arrested for possession of illegal drugs, but was neither arraigned nor provided with a preliminary hearing on the drug charge until after the officer had already elicited information from him. *Id.* The defendant's motion to suppress was consequently denied. *Id.*

The court in *Massiah v. United States*, 377 U.S. 201, 201–03 (1964), found differently, however. Here, the defendant, who had obtained a lawyer, pleaded not guilty, was released on bail, and was then caught making numerous incriminating statements to another man involved with the crimes at issue through use of a wiretap arranged by an agent who then used such testimony at trial. *Id.* His motion to suppress was granted. *Id.*

[143] 57 S.W.3d 696 (Ark. 2001).

[144] *See id.* at 703 (announcing that for defendants to be deemed to have counsel, "assistance must be substantial, such that counsel was effectively conducting a defense"). *See generally* Taylor v. State, 75 S.W.3d 708, 711 (Ark. 2002) (setting forth that assistance by stand-by counsel can rise to sufficient level where assertion of involuntary waiver of right to counsel is mooted); Oliver v. State, 918 S.W.2d 690, 693–94 (Ark. 1996) (holding that defendant was denied right to counsel and that such counsel provided effective assistance).

[145] *See* Moran v. Burbine, 475 U.S. 412, 421 (1986) (discussing use of totality of circumstances test to determine if valid *Miranda* waiver exists); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (noting that when certain circumstances such as deprivation of counsel and eliciting of incriminating statements are present, such statements cannot be admitted at trial); Lucero v. State, 91 S.W.3d 814, 818 (Tex. 2002) (Quinn, J., concurring) (concluding that totality of circumstances test determines whether defendant was coerced into waiving Fifth Amendment rights when taking stand in court).

instance, to determine whether an interrogation of a juvenile was proper, where the issue was whether the juvenile waived his Fifth Amendment protection against self-incrimination.[146] In *Fare v. Michael C.*, the defendant, a juvenile, was questioned in connection with a murder.[147] At the time of his questioning, he requested to see his probation officer.[148] When that request was denied, he incriminated himself, with regard to the murder, without an attorney present.[149] The court determined that a totality of circumstances test should be used to determine whether the defendant's statements should be suppressed,[150]and ultimately decided that he made a free decision to waive his Fifth Amendment rights.[151] Additionally, when officers are allowed to take into consideration the characteristics of their surroundings when determining whether a situation is suspicious enough to justify an arrest, the totality of the circumstances test is at work.[152] Finally, in *Florida v. Bostick*,[153] a totality of circumstances test was used to determine whether a police officer

146 Fare v. Michael C., 442 U.S. 707, 725 (1979) (concluding that totality of circumstances test is appropriate in determining whether waiver has been provided by juvenile by looking at juvenile's age, education, background, intelligence, capacity to understand warnings issued, nature of Fifth Amendment rights, and consequences resulting from waiver of such rights); *see also* Gachot v. Stadler, 298 F.3d 414, 418–19 (5th Cir. 2002) (stating totality of circumstances approach is applicable to juvenile waiver issues); Hardaway v. Young, 302 F.3d 757, 762 (7th Cir.2002) (finding totality of circumstances test applicable to both juveniles and adults in evaluating voluntary nature of confessions made).

147 *See Michael C.*, 442 U.S. at 710 (noting that respondent had been on probation for more than four years when he was taken into custody for questioning due to numerous previous offenses including burglary of guns and purse snatching).

148 *Id.* at 710 (noting that full disclosure of *Miranda* rights had occurred prior to questioning).

149 *Id.* at 711 (detailing how respondent was fully aware that he was providing answers to police questions without his attorney present).

150 *Id.* at 725 (considering totality of circumstances involved with investigation at issue to determine whether respondent provided knowing and voluntary waiver of *Miranda* rights during questioning).

151 Fare v. Michael C., 442 U.S. 707, 726–27 (1979) (concluding that Juvenile Court holding was proper because interrogators properly ensured that *Miranda* rights were comprehended by respondent in relation to his questioning and that no additional factors, such as respondent's age, prohibited him from such comprehension).

152 *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding officers are permitted to consider "relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation"); Adams v. Williams, 407 U.S. 143, 147 (1972) (holding that officers can take into consideration their personal observations as well as tips provided by informant); Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (noting central inquiry in search and seizure case is the circumstances of invasion at issue).

153 501 U.S. 429 (1991).

had properly communicated to a person that they were not at liberty to ignore a police order.[154]

III. WARNING THE DEFENDANT OF THE DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION

Case law has made it clear that a waiver of counsel involves the deprivation of serious constitutional rights. *United States v. Vonn*[155] provides an illustration of this point. In *Vonn,* the Supreme Court stated that when it comes to a plea hearing under the Federal Rules Criminal Procedure Rule 11,[156] any deviation from the requirements of the rule, when not dealing with a defendant's substantial rights, is subject to harmless error doctrine; meaning that the government has the opportunity to show that the deviation did not affect the defendant's substantial rights to the extent that the deviation requires reversal.[157] However, when the deviation affects the defendant's substantial rights, plain error doctrine must be used.[158] One of the procedures stated in Rule 11 is that the judge, where the defendant is not represented by counsel, must advise the

154 *See id.* at 437 (noting simple refusal to cooperate does not give police officer reason to detain someone absent other suspicious circumstances); *see also* Michigan v. Chesternut, 486 U.S. 567, 572 (1988) (noting that any seizure involving Fourth Amendment requires application of totality of circumstances test); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (concluding "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

155 535 U.S. 55 (2002).

156 *See* FED. R. CRIM. P. 11(h) (reading "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights").

157 *See* United States v. Vonn, 535 U.S. 55, 62 (2002) (explaining government has burden of showing defendant's substantial rights were not affected); United States v. Jimenez-Dominguez, 296 F.3d 863, 866 (9th Cir. 2002) (noting that "[t]he harmless error standard, which imposes the burden upon the government to show that the error had no effect on the defendant's substantial rights, applies to any transgression of Rule 1 raised before the trial court"). *See generally* FED. R. CRIM. P. 52(a) (stating that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded").

158 *See Vonn,* 535 U.S. at 62–63 (stating that "[w]hen an appellate court considers error that qualifies as plain, the tables are turned on demonstrating the substantiality of any effect on a defendant's rights"); *see also* United States v. Olano, 507 U.S. 725, 736 (1993) (noting courts should correct a plain error that causes conviction or sentencing of innocent defendant); United States v. Atkinson, 297 U.S. 157, 160 (1936) (explaining courts may notice errors "if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings").

defendant that she has the right to counsel.[159] Since this is a substantial right, if the defendant does not object to the fact that it was not brought up at a plea hearing, the burden of proof is on the defendant to show that her substantial rights were affected.[160] Thus, in choosing self-representation, the defendant may be making it more difficult for herself when it comes time for appeal.

Johnson v. Zerbst[161] makes clear the gravity of a decision to waive counsel. Quoting from *Powell v. Alabama,*[162] the Court states

> The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'[163]

This argument not only strongly advocates the inclusion of counsel, but also effectively lays out every roadblock and danger that faces the *pro se* defendant.[164] The remainder of this Part is

159 *See* FED. R. CRIM. P. 11(b)(1)(D) (providing that defendant must be told she has right to be represented by attorney); *Vonn*, 535 U.S. at 60 n.2 (stating pre-amended Rule which is substantively identical, but has been moved from 11(c)(2) to 11(b)(1)(D)); *see also* United States v. Saft, 558 F.2d 1073, 1079 (2d Cir. 1977) (outlining Rule 11 procedure for addressing defendants before they accept guilty pleas).

160 *See Vonn*, 535 U.S. at 63 (noting that defendant who is silent at trial has burden of showing her "substantial rights" were affected); United States v. Bevis, 46 Fed. Appx. 470, 470 (9th Cir. 2002) (stating that "defendant who lets a Rule 11 error pass without objection at the trial court stage must satisfy Rule 52(b)'s plain-error rule and show that the plain error affected his substantial rights"); *see also Jimenez-Dominguez*, 296 F.3d at 866 (asserting burden is on defendant to demonstrate that error affected his substantial rights).

161 304 U.S. 458 (1938).

162 287 U.S. 45 (1932).

163 Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

164 *See Zerbst*, 304 U.S. at 462–63 (stating "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel"); *see also Powell*, 287 U.S. at 69 (noting court's refusal to hear party by counsel

devoted to whether a judge must warn the defendant of these dangers, and if so, to what degree, in what setting, and what factor should the defendant's competency play in this decision.

In relevant part, *Faretta* states that "[the defendant] *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.'"[165] The most notable instance of a mischaracterization of this statement came in *Martinez v. Court of Appeal of California*,[166] where the Supreme Court, citing *Faretta*, stated that a court *must* make the defendant aware of the dangers and disadvantages of self-representation.[167] This problem has continued in other cases, such as the Supreme Court's decision in *Godinez v. Moran*.[168] Numerous Court of Appeals cases have based their decisions on the fact that *Faretta* states that there *should* be a warning of the dangers and disadvantages of self-representation.[169] It was not until *Dallio v. Spitzer*[170] that the Second Circuit realized the

amounts to denial of hearing and due process). *See generally* Wright, *supra* note 16, at 794 (discussing different approaches which circuits employ since *Powell* when warning defendants of dangers and disadvantages in proceeding *pro se*).

165 Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942)) (emphasis added).

166 528 U.S. 152 (2000). The defendant in this case argued that he had a right to self-representation in his appeal from a conviction for converting client money from a law firm he was employed at, which under California's "Three Strikes" law, carried a punishment of twenty-five years to life. *Id.* at 155. The Court stated that there is no right to self-representation on an appeal, affirming the reasoning of the California Supreme Court which stated that *Faretta* was based on the Sixth Amendment, whereas the right to appeal takes into consideration due process and equal protection concerns embodied in the Fourteenth Amendment. *Id.*

167 *See id.* at 162. Since the Court does not include "must" in its quotation of *Faretta*, perhaps it wishes to leave its interpretation out of *Faretta*'s meaning. *See id.* However, the Court, citing to *Faretta*, has recently stated that "before a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead." Iowa v. Tovar, 124 S. Ct. 1379, 1387 (2004). Previously, the Court suggested that judges should ensure that defendants are made aware of these dangers and disadvantages. *See* Raulerson v. Wainwright, 469 U.S. 966, 969 (1984).

168 509 U.S. 389, 401 (1993) (quoting *Faretta* in similar fashion as *Martinez*, leaving term "must" outside of *Faretta*'s words).

169 *See* United States v. Fore, 169 F.3d 104, 108 (2d. Cir. 1999) (suggesting that judge and defendant "should engage in a colloquy on the record, but there is no scripted procedure for this discussion"); United States v. Klat, 156 F.3d 1258, 1265 (D.C. Cir. 1998) (holding that trial court should make dangers and disadvantages of self-representation known to defendant). *But see* United States v. Thomas, 357 F.3d 357, 362 (3rd Cir. 2004) (noting dangers and disadvantages of self-representation "must" be made known to the defendant).

170 343 F.3d 553 (2d Cir. 2003).

"should/must" problem and held that a judge does not need to give a warning because *Faretta* did not strictly mandate it.[171]

In *Dallio,* the defendant, Thomas Dallio, admitted during a police interrogation that he had murdered Loni Berglund, a young woman residing in Forest Hills, New York.[172] Before trial, Dallio, acting as his own attorney, requested that his incriminating statements be suppressed.[173] With standby counsel John J. O'Grady present at his suppression hearing, Dallio repeatedly questioned witnesses improperly.[174] His request for suppression was eventually denied on the grounds that he made his statements knowingly and intelligently after having waived his right to counsel.[175] On a *habeas corpus* petition to the Eastern District of New York, Dallio sought to get his eventual conviction reversed on the grounds that, *inter alia,* he was not advised of the dangers and disadvantages of self-representation.[176] The District Court denied his motion.[177]

The Second Circuit, in affirming the Eastern District's decision and Dallio's conviction, stated that *Faretta's* observation that a judge should make the defendant aware of the dangers and disadvantages of self-representation was only dictum, and that this part of the opinion does not "constitute 'clearly established federal law, as determined by the Supreme Court.'"[178] The court

171 *See id.* at 555 (finding such warnings are not constitutionally mandated by federal law as prerequisite to knowing and intelligent waiver); Wilder v. Herbert, No. 03 Civ. 397, 2003 U.S. Dist. LEXIS 16869, at *40 n.25 (S.D.N.Y. Sept. 26, 2003) (noting Second Circuit established that trial judge is not constitutionally required to advise defendant about advantages and disadvantages of self-representation); *Second Circuit, supra* note 131, at 1726 (suggesting court's decision in *Dallio* demonstrated confusion surrounding right to counsel and self-representation).

172 Dallio v. Spitzer, 343 F.3d 553, 555–56 (2d Cir. 2003) (noting crime went unsolved for over five years, until new computer technology matched defendant's fingerprints with those lifted from murder scene).

173 *Id.* at 556 (noting Dallio told police he had committed murder in "drug-crazed" state and that he thought it would carry charge of manslaughter rather than murder).

174 *Id.* at 557 (explaining how Dallio improperly questioned witness).

175 *Id.* at 557 (noting New York Supreme Court's prior finding that Dallio's statements were made knowingly and voluntarily).

176 *Id.* at 558. Before this proceeding, Dallio through his new attorney Jonathan Latimer, plead guilty to the murder, and a conviction was entered. *Id.* Dallio appealed to the New York Supreme Court Appellate Division, Second Department, which affirmed his conviction. *Id.*

177 Dallio v. Spitzer, 343 F.3d 553, 559 (2d Cir. 2003). The district court concluded "the trial court's failure 'to warn Dallio of the dangers and disadvantages of proceeding *pro se* did not have a substantial and injurious effect on the outcome of the hearing' and that any Sixth Amendment violation was harmless error." *Id.* (internal citations omitted).

178 *Id.* at 561–62 (discussing force of relevant Supreme Court precedent in *Faretta*).

then embarked on a semantic journey ending in the decision that the term "should," as used by the Supreme Court in *Faretta*, does not constitute a "legal mandate."[179] In addition, the Second Circuit cited cases such as *Adams v. United States ex rel McCann*[180] and *Edwards v. Arizona*[181] to show that the Supreme Court cautions against using an prophylactic rule to determine whether a waiver of self-representation is valid.[182] Thus, the court stated that the case cannot be remanded simply because a warning was not given, basing its decision on its belief that the totality of the circumstances involved in Dallio's waiver is paramount.[183]

One must take into account, however, that *Dallio* was determined in the context of a suppression hearing and a plea allocution,[184] neither of which is a trial, which was the concern in *Faretta*.[185] Therefore, *Dallio* is distinguishable. This case was also decided one year before the Supreme Court's decision concerning a plea hearing in *Iowa v. Tovar*.[186] In that case, the

179 *Id.* at 562 (noting "shall" is used in legal terms as imperative and despite fact that "should" is simply past tense of "shall," "should" is merely suggestive).

180 317 U.S. 269 (1942). The Court held that a waiver of the right to counsel must be made freely and intelligently. *See id.* at 281.

181 451 U.S. 477 (1981). Here, defendant's statement did not amount to waiver of the right to counsel, *see id.* at 482.

182 *See* Dallio v. Spitzer,, 343 F.3d 553, 563 (2d Cir. 2003) (noting how Supreme Court rejects strict tests that do not take into account totality of facts); *see also* Edwards v. Arizona, 451 U.S. 477, 482 (1981) (noting that applicable standard to determine whether waiver is correctly given requires "knowing and intelligent relinquishment or abandonment" of right); Adams v. United States *ex. rel.* McCann, 317 U.S. 269, 280–81 (1942) (explaining how defendant has natural right to present his case without aid of counsel, provided his choice to do so is made "freely and intelligently").

183 *See Dallio,* 343 F.3d at 564–65 (holding state court's rejection of Dallio's waiver claim to be within federal law); *see also* United States v. Fore, 169 F.3d 104, 107 (2d Cir. 1999) (emphasizing district courts are not bound by specific guidelines for finding waiver of council from a defendant); United States v. Tracy, 12 F.3d 1186, 1191–92 (2d Cir. 1993) (explaining procedure and coinciding concerns accompanying waiver of counsel by defendant).

184 *See Dallio*, 343 F.3d at 556, 558 (stating that Dallio plead guilty after failing to succeed on suppression motion and on keeping inculpatory statements out of court); *see also* Lott v. Coyle, 261 F.3d 594, 621 (6th Cir. 2001) (addressing limitations on defendant's ability to waive counsel at suppression hearing); Henderson v. Frank, 155 F.3d 159, 165 (3d Cir. 1998) (stating defendant can waive his right to counsel at a suppression hearing if waiver is "voluntary, knowing and intelligent").

185 *See* Faretta v. California, 422 U.S. 806, 811 (1975) (noting pre-appeal discourse between judge and defendant whereby defendant was denied the right to represent himself at trial); *see also* People v. Sharp, 499 P.2d 489, 498–99 (Cal. 1972) (holding California state constitution not to guarantee defendants right to appear *pro se*). *See generally* CAL. CONST. of 1849, app. I, Art. I, § 8 (2005) (declaring accused in California criminal prosecution has right "to appear and defend in person and with counsel").

186 541 U.S. 77 (2004) The Court held here that states are free to adopt as they see fit guidelines for the acceptance of an uncounseled plea. *Id.* at 94.

Court held that the State of Iowa did not need to make sure that, first, defendant Tovar knew of the dangers and disadvantages of self-representation and, second, that there were defenses to his charges of which he may not have be aware.[187] While making its decision, *Tovar* held that the court does not need to provide a warning at the stages before trial.[188] The Court speculated, however, that this is not true at trial, because a trial is more complicated and *Faretta* mandates a warning at trial.[189] This case seems to make *Dallio* inapplicable to the case at hand.

Additionally, the Supreme Court in *Powell v. Alabama*[190] states, essentially exactly as is stated in *Tovar*, that "at trial, counsel is required to help even the most gifted layman adhere to the rules of procedures and evidence," suggesting that a warning must be given.[191] A mandated warning was espoused by the Eighth Circuit in at least three cases.[192] Finally, Justice

[187] In Iowa v. Tovar, 541 U.S. 77, 91 (2004), the court states:

> [T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked, . . . [and] . . . [t]he defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

Id. District courts are not bound by specific guidelines for acquiring waiver of council from defendants. *See Fore*, 169 F.3d at 107. There "is also no "talismanic procedure" to find waiver. *See* Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998). The record as a whole must only must show defendant waived right knowingly and intelligently. *Id.*

[188] *See Tovar*, 541 U.S. at 89 (stating that less "searching or formal colloquy" is required when defendant waives his right to counsel prior to trial) (quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988)); *see also Patterson*, 487 U.S. at 299 (noting "more formal and searching inquiry" is necessary before allowing a defendant to waive his right to counsel at trial than at post-indictment, pre-trial questioning). *See generally* Brewer v. Williams, 430 U.S. 387, 404 (1977) (stating waiver of right to counsel must embody "intentional relinquishment and abandonment of a known right" even at pretrial stages) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[189] *See Tovar*, 541 U.S. at 89 (emphasizing warning must be "rigorously conveyed" at trial due to complexities of trial (quoting *Patterson*, 487 U.S. at 299)); *see also* Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101, 130–32 (2004) (discussing waiver of right to counsel at trial and noting some form of warning of dangers associated with such waiver is required by trial courts). *See generally* Decker, *supra* note 17, at 514–17 (examining how circuits have applied requirement of warning more or less stringent depending on factual circumstances).

[190] 287 U.S. 45 (1932).

[191] Iowa v. Tovar, 541 U.S. 77, 89 (2004) (quoting Patterson v. Illinois, 487 U.S. 285, 299 n. 13 (1988).

[192] *See* Young v. Lockhart, 892 F.2d 1348, 1352 (8th Cir. 1989) (holding "to constitute a valid waiver of counsel, the trial judge must apprise the defendant on the record of the advantages and disadvantages of self-representation"); Berry v. Lockhart, 873 F.2d 1168, 1170 (8th Cir. 1989) (noting court should determine based on what point trial is at what warnings are needed to apprise defendant of her rights); Meyer v. Sargent, 854 F.2d 1110,

Thurgood Marshall in a dissent from a denial of certiorari in *Raulerson v. Wainwright*[193] stated that a court must assure that a warning as to the dangers and disadvantages of self-representation be given.[194] All of this authority seems to counsel that the "should" must be changed to a definitive "must".

As mentioned above, *Iowa v. Tovar* stated that trials are much more complicated than plea hearings.[195] In this context, a warning would be highly beneficial to a defendant. However, probably the best reason to mention the dangers and disadvantages of self-representation comes from *Martinez v. Court of Appeal of California*.[196] There, the Court stated that a *pro se* defense is almost never a good one, and that the results are comparatively worse than those realized when experienced counsel is used.[197] In addition, the totality of circumstances approach, while it is a beneficial approach, allows more defendants to waive their rights, creating the need for more appeals.[198] As *Martinez* suggests, a distinct warning would allow defendants the time to take in these risks and permit them to make a more reasoned decision.

1116 (8th Cir. 1988) (espousing agreement with Arkansas courts, which note that warning is preferable, but adding that it may be disposed with if record shows that defendant does not require such warning).

193 469 U.S. 966 (1984) (Marshall, J., dissenting).

194 *See id.* at 966. Though, as in *Martinez*, the word "must" is handled outside of a quote from *Faretta*, it is clear in these cases that the Justices, even twenty-five years after *Faretta*, interpret the term "should" to operate the same as "must."

195 *See* 541 U.S. 77, 90 (2004) ("We require less rigorous warnings pretrial, *Patterson* explained, not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation . . . . are less substantial and more obvious to an accused than they are at trial'") (quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988)).

196 528 U.S. 152 (2000). *See supra* note 166 and accompanying text for the facts of this case.

197 *See* Martinez v. Court of Appeal of California, 528 U.S. 152, 161 (2000) (stating "it is reasonable to assume that counsel's performance is more effective [when unskilled] than what the unskilled [defendant] could have provided for himself"); *see also* Decker, *supra* note 17, at 598 (hypothesizing that self-representation is generally a bad idea); Kenneth S. Sogabe, Note, *Exercising the Right to Self-Representation in* United States v. Farhad*: Issues in Waiving a Criminal Defendant's Sixth Amendment Right to Counsel*, 30 GOLDEN GATE U. L. REV. 129, 150 (2000) (noting that *Martinez* represents "shift in the Court's application of *Faretta*").

198 *See* Tuitt v. Fair, 822 F;2d 166, 174–76 (1st Cir. 1987) (fearing that complex constitutional issues presented by standard may lead to more frequent trial court error and hence more appeals); Willhite, *supra* note 123, at 219 (noting that defendants will attack their convictions on Sixth Amendment grounds). *See generally* United States v. McDowell, 814 F.2d 245, 248 (6th Cir. 1987) (finding that appeal arose from failure to have "formal colloquy").

The most vehement objections to a lengthy discussion of the dangers and disadvantages of self-representation comes from the Seventh Circuit. In *United States v. Oreye*,[199] Judge Posner stated that, "if a judge exaggerates either the advantages of being represented or the disadvantages of self-representation, he will be accused of having put his thumb on the scale and prevented the defendant from making an informed choice."[200] Later, Judge Posner states that a judge is limited to ensuring only that the defendant knows his rights.[201] In *United States v. Goad*,[202] the court proclaimed that there cannot be a hard and fast rule in determining whether a waiver is valid, stating that "the ultimate question is not what was said or not said to the defendant but rather whether he in fact made a knowing and informed waiver of counsel."[203] However, each of these cases concedes that some sort of waiver warning should be required.[204] Thus, with all this information taken together, it is reasonable to infer that warnings should be given by the trial judge when a defendant requests to represent herself.

IV. METHOD OF DETERMINING WAIVER VALIDITY

Faretta does not give an indication of what method should be used to determine whether a waiver of counsel is valid, except to say that an inquiry should be had "so that the record will establish that '[the defendant] knows what he is doing and his

199 263 F.3d 669 (7th Cir. 2001).

200 United States v. Oreye, 263 F.3d 669, 672 (7th Cir. 2001).

201 *See id.* (opining that "'All a judge can do as a practical matter – all a judge need do as a legal matter – is ensure that the defendant knows his rights'") (quoting United States v. Hill, 252 F.3d 919, 928 (7th Cir. 2001)).

202 44 F.3d 580 (7th Cir. 1995). The defendant in this case was only briefly questioned by the trial judge, who asked him if he understood that he would be representing himself and that his former attorney would be acting as standby counsel. *Id.* at 582. After the defendant responded in the affirmative, the judge allowed him to proceed *pro se*. *Id.*

203 United States v. Goad, 44 F.3d 580, 587 (7th Cir. 1995) (quoting United States v. Moya-Gomez, 860 F.2d 706, 734 (7th Cir. 1988).

204 In *Oreye*, Judge Posner infers that some kind of warning is necessary when he states that though the warnings given in this case were short, they satisfied the requirement that the judge ensures "that the defendant knows his rights and avoids hasty decisions." *Oreye*, 263 F.3d at 672. In *Goad*, the court states that the defendant must be made aware of the advantages of being represented by counsel and the pitfalls of representing oneself at trial, warning about "the fact that it is unwise for one not trained in the law to try to represent himself." *Goad*, 44 F.3d at 586. However, in Iowa v. Tovar, 77 (2004), the Court states that the trial court merely needs to "inform" the accused of nature of plea, right to counsel, and possible punishments. *Id.* at 81.

choice is made with eyes open.'"[205] The only other guidance that one can garner from the decision is the actual determination the court made with regard to Faretta.[206] When stating that Faretta should not have had an attorney forced upon him, the Court stated that the record showed Faretta was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will."[207] From this, it could be determined that a decision of waiver validity can be made simply from the record. Thus, two generally accepted methods of determining waiver validity have come about: the record approach and the formal inquiry approach.[208]

A. The Record Approach

The record approach does not require a district court to hold an inquiry into the defendant's qualifications for asserting a waiver of counsel.[209] This approach requires that the trial judge develop the record as a whole to determine whether a defendant should be able to proceed without counsel.[210] This approach has been

205 Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). The Court here further states that the defendant does not need to have the skill of an attorney to represent himself, only that he must know what he is getting himself into. S*ee id.*

206 *See Faretta*, 422 U.S. at 835–36 (holding that it was improper of judge to tell Faretta that it was bad idea not to take counsel and that he would be held to rules of Court). *See generally* Gallun, *supra* note 14, at 565 (pointing out that trial judges have not adopted universal standard that satisfactorily warns defendant of harm in proceeding *pro se*); Pickles, *supra* note 56, at 607 (noting how Court was silent as to applicable test for finding competency in self-representation).

207 *Faretta*, 422 U.S. at 835.

208 *See Second Circuit*, *supra* note 131, at 1725 (noting split among Federal courts of appeals over whether defendants are entitled to express warnings of dangers of proceeding *pro se* or if judge determines for himself whether defendant has made choice knowingly and willingly); Wright, *supra* note 16 at 794 (giving two kinds of inquiry methods and authority that supports them); Gallun, *supra* note 14, at 601 (noting trial courts either use "record as a whole" or "formal inquiry" approach, depending on what law the jurisdiction favors).

209 *See* Wright, *supra* note 16, at 794 (stating hearing conducted by judge is not required to determine validity of waiver); *see also* Gallun, *supra* note 14, at 569 (highlighting how "record as a whole" approach allows judge to decide whether to conduct inquiry or to forego one); Rieder, *supra* note 42, at 141–42 (stating defendant must be informed of costs of proceeding *pro se*).

210 *See* United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988) (noting features such as defendant's education, age, and general competence should be taken into account in record review); Wright, *supra* note 16, at 794 (recognizing that judge determines whether defendant is able to proceed *pro se*); *see also* Gallun, *supra* note 14, at 567–68 (stating that judges need to make it known to defendant whether self-representation is good idea).

used by a number of the circuits,[211] and was approved of by the Supreme Court in *Johnson v. Zerbst*.[212]

Various states have also noted that the record approach is a beneficial approach for waiver decisions.[213] For instance, the court in *People v. Providence*[214] held that when a reviewing court must decide whether the trial court made a proper waiver decision, it may look to the trial record rather than simply the inquiry engaged in by the trial judge.[215] This suggests that the record may be more important than the inquiry itself.[216]

B. The Formal Inquiry Approach

Some courts and authorities favor the formal inquiry approach over the record approach. This approach forces a trial judge to conduct a searching, formal inquiry into the defendant's waiver to determine if the defendant is competent enough to represent himself. [217] The application of this approach is well stated by the

[211] *See* United States v. Erskine, 355 F.3d 1161, 1169 (9th Cir. 2004) (noting court must take into account what defendant knew at time of purported waiver); Berry v. Lockhart, 873 F.2d 1168, 1170 (8th Cir. 1989) (noting "[t]he record as a whole must be reviewed for circumstances indicating a knowing and intelligent waiver of the right to counsel"); United States v. Pilla, 550 F.2d 1085, 1093 (8th Cir. 1977) (clarifying defendant was fully aware that he would go to trial without counsel and that he did not know how to represent himself at his criminal trial); Wright, *supra* note 16, at 797 (discussing circuits which adopted record approach).

[212] 304 U.S. 458 (1938) Here, the court held that courts must take into account all circumstances to see if defendant made a knowing and intelligent waiver. *Id.* at 464.

[213] *See* Evans v. State, 822 P.2d 1370, 1374 (Alaska Ct. App. 1991) (holding that court can determine waiver validity from record in some circumstances); McClinton v. United States, 817 A.2d 844, 855 (D.C. 2003) (holding that waiver decision should take into consideration all circumstances on record); Cerkella v. State, 588 So.2d 1058, 1059 (Fla. Dist. Ct. App. 1991) (stating that formal inquiry is not necessary where court can point to record as evidence of defendant's ability to represent herself); *see also* Wright, *supra* note 17, at 796 (noting trial judge shall look at all surrounding circumstances when determining whether defendant may proceed *pro se*).

[214] 813 N.E.2d 632 (N.Y. 2004).

[215] *See id.* at 635 (stating that "reviewing court may look to whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel").

[216] As stated earlier in this paper, courts will use a totality of circumstances approach in determining whether a waiver is valid. *See, e.g.*, Adams v. United States ex rel. McCann, 317 U.S. 269 (1942); United States v. Joseph, 333 F.3d 587 (5th Cir. 2003); Dallio v. Spitzer, 343 F.3d 553 (2nd Cir. 2003); United States v. Kimball, 291 F.3d 726 (11th Cir. 2002). Having the court answer questions concerning the defendant's education, age, and character may be repetitive when the answers to these questions may already appear in the record.

[217] *See* Jennifer Elizabeth Parker, United States v. Goldberg*: The Third Circuit's Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel*, 41 VILL. L. REV. 1173, 1190 (1996) (discussing hearing conducted by trial judge in order to warn defendant of dangers of proceeding *pro se* and to determine whether defendant understood disadvantages and consequences); Wright, *supra* note 16, at 794 (noting in absence of

Third Circuit in *United States v. Salemo*.[218] There the court stated that a "searching inquiry" must be made either at trial or sentencing, though a procedure for this inquiry does not need to follow any formalistic standards.[219] In *Von Moltke v. Gillies*,[220] the Supreme Court stated that the Court must make a "penetrating and comprehensive examination" of the defendant.[221] The need for a searching inquiry is obvious when one considers that a simple review of the record is mechanistic, and that one cannot get a complete view of the issue unless the defendant is present to be questioned about his decision.[222]

However, this is not an absolute rule. It is true that many circuits do require some kind of searching inquiry.[223] However, the majority of circuits, if no formal inquiry is completed, will not reverse the case and remand to the trial court if it finds that the record shows that a knowing and intelligent waiver has been

inquiry, court will remand case to trial court); *See* Gallun, *supra* note 14, at 568 (noting "[t]he 'formal inquiry' approach ensures that courts take 'all reasonable steps' to inform defendants of the consequences of waiving the Sixth Amendment right to counsel").

218 61 F.3d 214 (3d Cir. 1995).

219 *See id.* at 220 (noting defendant's waiver is effective only when district court makes inquiry that shows voluntariness of waiver).

220 332 U.S. 708 (1948).

221 *See id.* at 724 (stating judge makes examination of all circumstances surrounding defendant's plea); *see also* Wright, *supra* note 16, at 795 (opining that judge can only make proper determination of whether waiver was made knowingly and intelligently if he conducts formal hearing).

222 *See* Wright, *supra* note 16, at 795 (noting formal inquiry approach requires questioning between judge and defendant, ensuring that defendant will always be told of dangers and disadvantages of self-representation); John R. Quinn, *Article: "Attitudinal" Decision Making in the Federal Courts: A Study of Constitutional Self-Representation Claims*, 33 SAN DIEGO L. REV. 701, 714–15 (1996) (discussing judge-conducted inquiry of defendant to see if his request to proceed is willful); Gallun, *supra* note 14, at 568 (noting that record approach can also result in defendant giving prepared answers to questions she knows are going to be asked).

223 *See* McGovern, *supra* note 56, at 436 (suggesting that courts following formal inquiry approach are taking cues from Supreme Court). *See generally* Wright, *supra* note 16, at 797 (discussing circuits that follow "record as a whole" approach and those that follow formal inquiry approach); Gallun, *supra* note 14, at 565 (highlighting federal appellate court split over which approach to use when deciding if defendant can proceed in self-representation).

made.[224] Some state courts, however, have taken the position that a searching inquiry must be made.[225]

C. *The Inquiry Approach and the Warning of Dangers and Disadvantages*

Earlier in this Note, the conclusion was reached that a warning of the dangers and disadvantages of self-representation should be given at trial.[226] One cannot help but notice that if a record approach were used, there would be no opportunity for the court to give such a warning.[227] Thus, it seems that the formal inquiry approach is the only method that can be used to determine waiver validity. On the other side, however, some have said that using the formal inquiry approach introduces a standard that is too "rigorous" for a constitutionally protected right.[228] One commentator suggests a compromise, citing the District of Columbia's handling of the matter, which suggests that a formal inquiry approach can still be used, but that it should consist of a "short discussion" with the defendant rather than a full blown

224 *See* Parker, *supra* note 217, at 1187 (discussing importance of informing defendant of dangers of self-representation); McGovern, *supra* note 56, at 436–38 (noting that if there is review of record that shows that waiver was not knowing and intelligent, reviewing court will either require reversal, or apply harmless error doctrine to see if reversal is required). *See generally* Jean D'Alessandro, *New York State Constitutional Decision: 2002 Compilation: Assistance of Counsel: Court of Appeals of New York:* People v. Arroyo *(Decided June 11, 2002),* 19 TOURO L. REV. 201, 213 (2003) (mentioning knowing and intelligent test).

225 *See* City of St. Peters v. Hodak, 125 S.W.3d 892, 895 (Mo. Ct. App. 2003) (stating that formal inquiry is necessary "as a practical matter" and not conducting one is "insufficient"); State v. Wiggins, 677 A.2d 800, 805 (N.J. Super. Ct. App. Div. 1996) (holding that that searching inquiry is necessary for reviewing court to determine whether waiver was knowing and voluntary); People v. Smith, 705 N.E.2d 1205, 1207 (N.Y. 1998) (noting "searching inquiry" is needed to waive "fundamental right" and to make sure that waiver is "unequivocal").

226 *See supra* notes 155–204 and accompanying text.

227 *See* Gallun, *supra* note 14, at 568 (noting that formal inquiry approach allows reviewing court to automatically see if warning of self-representation's dangers and disadvantages was given by judge). *See generally* Melinda A. Nicholson, Comment, *The Constitutional Right to Self-Representation: Proceeding Pro se and the Requisite Scope of Inquiry When Waiving Right to Counsel,* 79 TUL. L. REV. 755, 756 (2005) (proposing that Supreme Court should adopt formal inquiry approach); Wright, *supra* note 16, at 795 (stating that formal inquiry approach will ensure defendants are apprised of dangers and disadvantages of proceeding *pro se*).

228 *See* Wright, *supra* note 16, at 795 (noting that circuits that apply the formal inquiry approach also state that trial judges should note dangers and disadvantages of self-representation). *See generally* Gallun, *supra* note 14 at 568 (recognizing danger of such a severely "mechanistic" approach); Reed Harvey, Note, *Waiver of the Criminal Defendant's Right to Testify: Constitutional Implications,* 60 FORDHAM L. REV. 175, 196 (1991) (suggesting at minimum that courts engage in case by case inquiry rather than record approach).

warning of the dangers and disadvantages of self-representation.[229] This ensures that the dangers are being discussed with the defendant, which is something that is usually not done using the record approach, but also means that the inquiry will not be so pervasive as to deny the defendant his constitutional rights.[230] This Note endorses the abbreviated formal inquiry view precisely for this reason: the formal inquiry approach makes sure the defendant, in determining whether a waiver is knowing and intelligent, knows the dangers and disadvantages of self-representation.[231]

V. ADMISSION OF STANDBY COUNSEL

A. Consideration of Standby Counsel in Waiver Decisions

Due to standby counsel being officially sanctioned in *Faretta* and *McKaskle v. Wiggins*, standby counsel has become increasingly present in waiver situations.[232] The trouble comes when courts try to decide questions of waiver validity when

229 *See* Wright, *supra* note 16, at 795 (noting two other circuits that use record approach have also mandated that their judges warn defendants of dangers of self-representation). *See generally* United States v. Brown, 823 F.2d 591, 599 (D.C. Cir. 1987) (stating that court must ensure that defendant's waiver was knowing and intelligent); Parker, *supra* note 217, at 1190 (discussing process by which court informs defendant).

230 *See* United States v. Maldonado-Rivera, 922 F.2d 934, 977 (2d Cir. 1990) (holding that questioning defendant is not absolute and that all court needs to find is that waiver is knowing and intelligent); *see also* Wright, *supra* note 16, at 794 n.71 (listing cases that allow for record approach). *See generally* Nicholson, *supra* note 227, at 767 (discussing courts which follow formal inquiry approach).

231 *See* Cooley v. English, 74 Fed. Appx. 227, 233 (3d Cir. 2003) (holding that, in formal setting, court must make defendant aware of technical problems which self-represented litigants face); Lucero v. Kennard, 89 P.3d 175, 183 (Utah Ct. App. 2004) (noting that defendant, in formal inquiry setting, must be made aware of risks of self-representation). *See generally* Nicholson, *supra* note 227, at 775 (stating formal inquiry approach should be adopted by Supreme Court so uniformity may exist between circuits).

232 *See* Joshua L. Howard, *Annual Survey of South Carolina Law: Criminal Law: Hybrid Representation and Standby Counsel: Let's Clear the Air for the Attorneys of South Carolina,* 52 S.C. L. REV. 851, 855 (2001) (stating that many courts have chosen to use standby counsel to ensure procedural and evidentiary rules are followed); Meghan H. Morgan, Article, *Standby Me: Self-Representation and Standby Counsel in a Capital Case,* 16 CAP. DEF. J.. 367, 368 (2004) (discussing "evolution of the phenomenon of standby counsel"); Higgins Williams, *supra* note 46, at 793 (noting how judges often appoint standby counsel to help solve problems associated with self-representation).

standby counsel is present.[233] In Florida, the District Court of Appeals has decided that judges should give the same warnings to defendants who have standby counsel as to those who do not have standby counsel.[234] This is due to the fact that the court cannot divide how much of the trial the defendant is going to conduct himself.[235] This differs from the Maryland approach, which looks at the issue retroactively to see how much of the defense the *pro se* defendant actually conducted himself.[236]

Taking a middle ground between these two opinions is the Eleventh Circuit in *United States v. Cash*.[237] There, the court laid out eight factors to determine whether a proper waiver was made, one of those being "whether standby counsel was appointed and the extent to which that counsel aided the defendant."[238] The same approach was taken by the Rhode Island

233 The dissent in *Faretta v. California*, 422 U.S 806 (1975), first posited the question as such: If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? *See id.* at 852 (Blackmun, J. dissenting). This followed the majority opinion which stated that a state may appoint standby counsel, but stopped short of saying that standby counsel was a right afforded to the defendant. *Id.* at 834. Since then, some courts have stated that standby counsel does not fulfill the Sixth Amendment right to counsel and thus, a waiver is still valid. *See, e.g.*, United States v. Davis, 269 F.3d 514, 520 (5th Cir. 2001). Others imply that the presence of standby counsel can affect waiver validity. *See, e.g.*, United States v. Cash, 47 F.3d 1083, 1188–89 (11th Cir. 1995).

234 *See* Dortch v. State, 651 So.2d 154, 157 (Fla. Dist. Ct. App. 1995) (stating factors trial court should advise defendant of, even if standby counsel is present); *see also* Gallun, *supra* note 14, at 570 (noting that standby counsel was underlying issue throughout case). *See generally Faretta*, 422 U.S. at 835 (holding Court can appoint standby counsel even over defendant's objections).

235 *See* State v. Frye, 617 A.2d 1382, 1386 (Conn. 1992) (noting judge's difficulty in determining waiver questions when they can not predict defendant's role in their defense); Payne v. State, 642 So.2d 111, 113 (Fla. Dist. Ct. App. 1994) (stating "at the time the trial court is faced with the request from the defendant to represent himself, the court can not predict how much of his own defense a defendant will conduct"); *see also* Gallun, *supra* note 14, at 570–71 (discussing Florida's interpretation of difficulty of predicting defendant's role in his own defense).

236 *See* Parren v. State, 523 A.2d 597, 614 (Md. 1987) (noting standby counsel stated, after putting on his case, that defendant had been researching most of his defense himself); *see also* Gallun, *supra* note 14, at 571 (stating that this retroactive approach "forces an appellate court to study the record meticulously"). *See generally* Howard, *supra* note 232, at 864 (discussing Maryland's approach).

237 47 F.3d 1083 (11th Cir. 1995). After the court allowed the defendant to represent himself, the judge requested that one of the defendant's lawyers remain to consult with the defendant. *Id* at 1089. The attorney did not give any advice to the defendant. *Id.*

238 United States v. Cash, 47 F.3d 1083, 1088–89 (11th Cir. 1995). *But see*, Shafer v. Bowersox, 329 F.3d 637 (8th Cir. 2003) (noting that Eight Circuit acknowledged that

Supreme Court in *State v. Briggs*.[239] However accepted in some courts, the danger of having an overly pervasive standby counsel is stated in Arkansas's *Bledsoe v. State*,[240] which holds that standby counsel can rise to the level of regular counsel.[241] If this happens, the defendant cannot claim on appeal that she was denied the right to counsel.[242]

However, all of this can be problematic, as standby counsel is not like the right to counsel in that there is no right to standby counsel, leaving the trial judge with the ultimate decision of whether to grant standby counsel.[243] Thus, the standby counsel consideration is based on an uncertain system, and most likely should not be included in a waiver validity inquiry.

B. Mandating Standby Counsel

One way to alleviate the problem of uncertainty in the standby counsel system is to mandate that all criminal defendants take court appointed standby counsel. One commentator opines that "[m]andatory standby counsel offers a means for meeting the

these requirements existed, but chose to disregard them in favor of the vague requirements set forth in *Faretta* and *Von Molkte*).

239 787 A.2d 479 (R.I. 2001). Here, the Rhode Island Supreme Court named this as one of six factors to be used, though said that this was not a mandatory list. *See id.* at 486.

240 989 S.W.2d 510 (Ark. 1999).

241 *See* Bledsoe v. State, 989 S.W.2d 510, 514 (Ark. 1999) (noting that when deciding whether standby counsel has risen to level of regular counsel, court must use totality of circumstances approach).

242 *See Bledsoe*, 989 S.W.2d at 514 (stating that aid of standby counsel can rise to level where defendant is considered to have had counsel for his defense, thus mooting any later assertion of involuntary waiver); *see also* Oliver v. State, 918 S.W.2d 690, 694 (Ark.1996) (affirming defendant's convictions and holding that defendant effectively waived issue of denial of counsel because he did not raise it on direct appeal); Calamese v. State, 635 S.W.2d 261, 262 (Ark. 1982) (concluding that facts of each case must be examined in their entirety when determining whether accused has been adequately represented).

243 *See* Gallun, *supra* note 14, at 570 (stating that standby counsel's main purpose is to assist defendant in "routine matters" that defendant might not be able to handle on his own). *See generally* Naomi Gaynor, Note, People v. Dennany: *The Right to Self Representation*, 1995 DET. C.L. REV. 255, 263 (1995) (asserting that "standby counsel also ensures that the defendant complies with courtroom procedures"); Stacey A. Giulianti, Comment, *The Right to Proceed Pro se at Competency Hearings: Practical Solutions to a Constitutional Catch-22,* 47 U. MIAMI L. REV. 883, 909 (1993) (analyzing conflict that arises when incompetent defendant seeks to represent himself).

interests of all parties to the judicial process."[244] In addition, allowing standby counsel to question victims will prevent the "unseemly" problem of defendants cross-examining victims.[245] In addition, in *People v. Joseph*,[246] the California Supreme Court noted that "the state has an interest in the proceedings that cannot be extinguished."[247] Society's duty to provide fairness in a trial and also to ensure the integrity of the proceedings militates in favor of mandating standby counsel.[248] Furthermore, introduction of standby counsel will facilitate judicial economy, as the judge will no longer feel compelled to educate the defendant on legal procedure.[249]

However, one must balance this with the problems that standby counsel presents. The largest problem is that of hybrid representation.[250] One commentator suggests that, although

244 John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 719 (1984) (concluding that defendants will be able to maintain control over their own defenses).

245 *See* Willams, *supra* note 46, at 811–12 (discussing cross examination of all nineteen victims of December, 1993 Long Island Rail Road shooting at Merillon Avenue station in Garden City, New York by self-represented litigant Colin Ferguson); *see also* Stanley S. Arkin & Katherine E. Hargrove, *Justice Mocked When Madman Defends Himself*, L.A. TIMES, Feb. 12, 1995, at M1 (assessing Colin Ferguson's *pro se* defense and likelihood of his incompetence); Larry McShane, *Ferguson's Trial Antics May Set Stage for Appeal*, CHI. SUN TIMES, Feb. 19, 1995, at 3 (describing manner by which defendant Colin Ferguson represented himself at trial).

246 671 P.2d 843 (Cal. 1983).

247 People v. Joseph, 671 P.2d 843, 851 (Cal. 1983).

248 *See* Pearson, *supra* note 244, at 710 (noting that society's strong interests deserve protection that counsel can afford). *See generally* CAL. PENAL CODE §1239(b) (West 2005) (demonstrating that in response to society's interest in fairness and accuracy of trials, some states have passed laws mandating automatic appeal of all death penalty cases); Williams, *supra* note 46, at 795 (stating that "the American legal system aspires to provide every criminal defendant with a fair trial").

249 *See* Williams, *supra* note 46, at 811 (stating that judges attempt "to walk the fine line between giving free legal advice and wasting court time"); *see also* Laura Parker & Gary Fields, *Do-It-Yourself Law Hits Courts*, USA TODAY, Jan. 22, 1999, at 3A (asserting that judges find themselves somewhere in between "giving free legal advice and allowing an amateur litigator to tie up the courtroom"). *See generally* Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro se Cases: A Study of the Pro se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306 (2002) (noting *pro se* litigants often turn to court for guidance when faced with complexities of legal system, leaving judges and court staff feeling frustrated by litigant's inability to grasp legal concepts or to comply with rules of civil procedure).

250 *See* Colquitt, *supra* note 57, at 77 (stating that although there is no right to hybrid representation, courts can allow it; yet if denied, the denial will most likely be affirmed on appeal); Williams, *supra* note 46, at 812 (noting that "hybrid representation only confuses many of the parties involved and prevents that establishment of clear roles for the parties

hybrid representation should not be allowed, it should be permitted both when a defendant takes the stand and when a defendant wishes to cross-examine a witness.[251] Neither one of these possibilities is acceptable because a defendant has a right to counsel and a right to self-representation, but not both at the same time.[252] This led the Court of Appeals of Maryland to hold that the court cannot force public defenders into a standby counsel role.[253] In addition, mandating standby counsel still poses the problem of animosity between the defendant and standby counsel, as laid out earlier in this note.[254] Thus, mandating standby counsel would cause more problems than it is worth, and should not be recommended.

involved"). *See generally* McKaskle v. Wiggins, 465 U.S. 168, 171(1984) (demonstrating confusion that arises when hybrid representation is utilized).

[251] *See* Willams, *supra* note 46, at 813 (arguing that "reasons of policy and practicality make it justifiable for standby counsel to conduct the questioning"). *See generally* State v. Taylor, 562 A.2d 445, 454 (R.I. 1989) (asserting notion that "where a defendant states at an early date and in an unequivocal manner that he or she wishes to proceed *pro se*, standby counsel will be appointed to conduct the examination of the child victim"); Bateman, *supra* note 101, at 97 (stating that trial courts are authorized to appoint standby counsel to help *pro se* litigants upon request and/or to represent litigants if court terminates right of self-representation).

[252] *See* Faretta v. California, 422 U.S. 806, 825 (1975) (stating that right to counsel always came with right to counsel and the right to self-representation); *see also* Harris v. State, 687 A.2d 970, 973 (Md. 1997) (holding that both rights cannot be invoked at same time); Parren v. State, 523 A.2d 597, 599 (Md. 1987) (noting that the two rights are mutually exclusive); Colleen Halloran, Recent Development, Harris v. State*: Trial Court Cannot Order Public Defender's Office to Appoint Standby Counsel at Pro se Defendant's Request*, 27 U. BALT. L. F. 67, 67 (1997) (stating that court in *Harris* "limited" its "broad interpretation" of *Faretta v. California*).

[253] *See Harris*, 687 A.2d at 977 (holding that services provided by public defender do not include standby counsel). *See generally* Halloran, *supra* note 252 (discussing outcome of *Harris v. State* and its effect on public defender's appointment as standby counsel); Poulin, *supra* note 102, at 696–99 (offering analysis of role of standby counsel, including role of Office of Public Defender).

[254] *See supra* notes 106–10 and accompanying text for discussion of potential antagonistic relationship between *pro se* litigant and standby counsel. *See generally* Williams, *supra* note 46, at 794 (assessing role that the standby counsel plays when *pro se* litigant requests his or her assistance at trial); Shelly Messerli, Comment, *The Poor Man's Burden: Why Texas Should Provide Interim Counsel for Indigent Defendants When They Request A Substitute in Their Appointed Counsel*, 11 TEX. WESLEYAN L. REV. 157, 173–76 (2004) (analyzing several cases where *pro se* litigants filed motions to dismiss counsel appointed by court because animosity developed).

CONCLUSION

While *Faretta v. California* affirms the right to self-representation and attempts, in *dicta*, to draw guidelines as to how those rights are to be implemented, the questions of warning, forums, and standby counsel remain pervasive. A warning of the dangers and disadvantages of self-representation should be given, but such a warning should not be so harsh as to scare away a defendant from the forum of self-representation. This warning should be tailored only to make sure the defendant is heading into the decision "knowingly and intelligently."[255] In order to facilitate this warning, the court should conduct a formal inquiry into the validity of the defendant's waiver. Finally, standby counsel, while helpful to the defendant, poses too many problems for all parties involved, and should not be mandated by the court.

Competency issues still pose problems when it comes to a decision of waiver validity.[256] The application of *Godinez* will most likely be confined to the *Dusky* standard. However, since *Faretta* lays out requirements for a waiver in addition to competence – notably a finding that the waiver was made "knowingly and intelligently" – distinctions will be made on a case-by-case basis to take into account other factors that the *Dusky* standard does not consider.[257]

255 Faretta v. California, 422, U.S. 806, 835 (1975) (explaining defendant must be aware of rights he is relinquishing before he is allowed to represent himself at trial).

256 *See* Pearson, *supra* note 244, at 711 (discussing complicated nature of competency with regard to *pro se* litigants); *see also* Williams, *supra* note 46, at 800 (analyzing manner by which accused may invoke and relinquish his or her right to self-representation). *See generally* Gallun, *supra* note 14 at 574–78 (assessing recent developments with respect to right to waive counsel under *Faretta*).

257 *See generally* Boch, *supra* note 88, at 883 (analyzing distinction between competency to waive one's constitutional rights and 'competency to stand trial); Grant H. Morris, Ansar M. Haroun & David Naimark, *Health Law in the Criminal Justice System Symposium, Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 238 (2004) (discussing complexity involved in setting competency standard in criminal court cases); Pickles, *supra* note 56, at 632 (assessing likelihood of finding ultimate competency standard).