

SETTLING ON A STANDARD: REVIEWING THE RIGHT TO SELF-REPRESENTATION

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Courts appoint counsel for indigent criminal defendants who cannot afford legal representation to uphold their Sixth Amendment rights. In its seminal waiver case, *Faretta v. California*, the U.S. Supreme Court elevated the corollary right—the right to self-representation—to constitutional status. In dicta, the Court created a standard by which defendants must waive their right to counsel “knowingly and intelligently” to proceed *pro se*. The Court subsequently sculpted the right to self-representation as it came to standby counsel and mental competency, but it never prescribed a precise waiver colloquy for district court judges to administer, causing the *Faretta* colloquy to look different in nearly all cases.

This Note examines the circuit split regarding which standard of review the U.S. Courts of Appeals should apply to appeals of the validity of *Faretta* waivers: *de novo* or plain error. This Note then advocates for circuit courts to uniformly apply a *de novo* standard of review to *Faretta* waivers, a mixed question of fact and law. *De novo*, an exacting standard of review, is warranted because (1) the right to self-representation is constitutional in nature, (2) a defendant’s legal knowledge plays no role in determining whether their waiver was “knowing and intelligent,” and (3) defendants are not expected to know the perils of self-representation. This Note argues that applying plain error review puts criminal defendants in an unfairly treacherous position, as they must rely on counsel whom they no longer desire to represent them to preserve the issue of valid waiver for appeal.

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INTRODUCTION

“You know, [my counsel] was appointed what, six days before my trial. He had seen me approximately, maybe, one hour. . . . He counseled me for one hour and it wasn’t even a full hour. He made no opening statements. He failed to question any of my witnesses.”¹ As a result, Randall Silkwood

1. *United States v. Silkwood*, 893 F.2d 245, 249 n.3 (10th Cir. 1989). “The average amount of time spent by a public defender at arraignment is often less than six minutes per case.” THOMAS GIOVANNI, COMMUNITY-ORIENTED DEFENSE: START NOW 2 (2012), <https://www.brennancenter.org/our-work/research-reports/community-oriented-defense-start-now> [<https://perma.cc/4BTD-KE3B>]. In some jurisdictions, public defenders may have more than 300 cases at a time. *Id.*

declined the court's offer to appoint representation and decided to represent himself.²

Five days before Silkwood's trial for unlawful possession of a firearm by a convicted felon, the court granted his attorney's request to withdraw and appointed new counsel to represent him at trial.³ At trial, Silkwood was convicted.⁴ Immediately after trial, Silkwood informed the court he wanted to proceed pro se.⁵ The court granted Silkwood the right to proceed pro se "by minute order without inquiry or advisement."⁶ Meanwhile, the government moved for sentence enhancement.⁷

At the hearing on the government's motion, the trial court asked Silkwood if he would like an attorney to be appointed for him.⁸ Silkwood declined because he believed his trial counsel had been incompetent.⁹ The trial court told Silkwood his sentence could be enhanced up to fifteen years with a substantial fine and "informed him generally of the dangers of self-representation."¹⁰ Silkwood again rejected the offer for counsel and was sentenced to twenty-five years' imprisonment without parole.¹¹

On appeal, the U.S. Court of Appeals for the Tenth Circuit reviewed Silkwood's waiver of counsel de novo and concluded that Silkwood did not voluntarily or knowingly waive his right to counsel.¹² The trial court incorrectly applied the voluntary requirement because it failed to ensure that Silkwood did not have to choose between incompetent or unprepared counsel and proceeding pro se.¹³ The trial court failed the knowing requirement because they incorrectly informed Silkwood of the potential length of his sentence enhancement.¹⁴

2. *Silkwood*, 893 F.2d at 247. In addition to competence concerns, defendants have also cited concerns that their appointed counsel is paid by the government, just as the attorneys prosecuting them. See *United States v. Norris*, 698 F. App'x 849, 850–51 (8th Cir. 2017) (per curiam).

3. *Silkwood*, 893 F.2d at 247. The court-appointed attorney cited his previous representation of one of the government's witnesses as his reason for needing to withdraw. *Id.*

4. *Id.* at 246.

5. *Id.* at 247.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 248. Because the "right to be represented by counsel is by far the most pervasive" of the rights an accused person has, relinquishing that right requires a voluntary, knowing, and intelligent waiver as determined by the trial court. *Faretta v. California*, 422 U.S. 806, 835 (1975); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). The right to representation is considered the most pervasive because "it affects [the defendant's] ability to assert any other rights [they] may have." *Id.*

13. *Silkwood*, 893 F.2d at 249. A defendant's choice to proceed pro se "cannot be voluntary in the constitutional sense" when the choice is between incompetent or unprepared counsel and appearing pro se. *Sanchez v. Mondragon*, 858 F.2d 1462, 1465 (10th Cir. 1988).

14. *Silkwood*, 893 F.2d at 249.

The Sixth Amendment expressly guarantees criminal defendants the right to legal representation.¹⁵ The right to self-representation in a criminal trial is not within the text of the U.S. Constitution,¹⁶ but since *Faretta v. California*,¹⁷ all courts recognize that the Sixth Amendment guarantees that right.¹⁸ Thus, upholding one constitutional right necessitates the relinquishment of another.¹⁹ This tasks the American legal system with the challenge of balancing two important goals: (1) ensuring every criminal defendant receives a fair trial by providing legal counsel to those who cannot afford it and (2) upholding values of self-reliance and individuality by permitting defendants to represent themselves.²⁰

Despite the warning in the old adage that “he who represents himself has a fool for a client,”²¹ criminal defendants request to represent themselves in around fifty trials per year.²² If a judge grants the criminal defendant’s request to proceed pro se, on appeal, the defendant may claim they did not “knowingly and intelligently” waive their right to counsel.²³ If a judge rejects the defendant’s request to waive counsel, on appeal, the defendant may claim they were denied their Sixth Amendment right to self-representation.²⁴ Therefore, district court rulings on a defendant’s request to proceed pro se are often appealed no matter the outcome.²⁵ The question remains: what level of deference should the circuit courts apply in their scrutinization?

This Note examines the jurisdictional split concerning what standard of review federal appellate courts should apply to criminal defendants appealing the validity of their waiver of counsel.²⁶ Part I focuses on the development

15. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

16. See Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 794 (2000).

17. 422 U.S. 806 (1975).

18. See *id.* at 834.

19. See Brian H. Wright, *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, 794 (1993). “The effect of the *Faretta* decision has been to create a zero-sum game between two constitutional rights.” *Id.* at 785.

20. See *id.* at 791.

21. Colleen D. Duffy & Melany Gray, *He Who Represents Himself Has a Fool for a Client: The Right to Counsel and the Right to Self-Representation in New York*, 85 ALB. L. REV. 891, 891 n.1 (2021/2022) (explaining that while “the actual origin of this adage remains uncertain, the saying has been attributed to Benjamin Franklin, Abraham Lincoln and others”).

22. See Williams, *supra* note 16, at 792.

23. See Wright, *supra* note 19, at 785–86.

24. See *id.* at 786.

25. *Id.* at 785.

26. The scope of this Note is limited to federal appellate review of federal criminal trials. This Note does not discuss nor propose an applicable standard of review for federal habeas appeals concerning valid waivers of counsel. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, (AEDPA) limited a federal court’s power to grant habeas relief to a state prisoner to instances where the state court’s decision was “contrary to” or “an unreasonable application” of federal law. 28 U.S.C. § 2254(d). “This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Cullen v. Pinholster*,

of the right to self-representation as constitutionally guaranteed in *Faretta* and post-*Faretta* cases. Part I also explains the procedural mechanisms of appeal and the standards of review applied by the appellate courts. Part II considers, in turn, the circuit courts' arguments in favor of adhering to a de novo standard of review, arguments in favor of a plain error standard, and the disposition of the circuit courts that have taken no clear stance on the applicable standard. Part III then advocates for uniform application of a de novo standard of review to waiver of counsel claims, as they present a decided constitutional issue, and it is nonsensical to require defendants to preserve the issue for appeal by calling their own waiver into question. Lastly, Part III argues against application of the plain error standard, as it is untenable to require defendants seeking to represent themselves to rely on their counsel to preserve objections when counsel is already seeking to withdraw from representation.

I. THE ROLE OF WAIVER IN A CRIMINAL DEFENDANT'S RIGHT TO COUNSEL

To understand the implications of reviewing the right to self-representation, this part provides a background on the development of the right, the appellate procedures, and the relevant standards of review. Part I.A outlines the history and development of the right to counsel. Part I.B examines the history and development of the right to self-representation and its application today. Finally, Part I.C offers a comprehensive analysis of the process governing how appeals reach the circuit courts.

A. *The Right to Counsel in Criminal Trials*

"If you cannot afford an attorney, one will be provided for you," courtesy of the Sixth Amendment.²⁷ The U.S. Supreme Court first recognized the right to counsel in 1932, holding that in capital cases, the Fourteenth Amendment's Due Process Clause²⁸ requires the states to provide counsel when a lawyer's assistance is necessary for a fair hearing.²⁹ The Court later

563 U.S. 170, 181 (2011). As such, it would be illogical to conflate the review standard regarding valid waiver for federal crimes and federal habeas appeals. To note, the Court's decisions on the contours of the right to self-representation as decided in habeas cases are applied with equal force in federal criminal trials. See *infra* notes 89, 120 and accompanying text.

27. Haley Snarr, *The Right to Counsel: When Does an Attorney Appear in the Courtroom?*, NCSL (Oct. 30, 2023), <https://www.ncsl.org/civil-and-criminal-justice/the-right-to-counsel-when-does-an-attorney-appear-in-the-courtroom> [<https://perma.cc/WL2S-T64A>]; U.S. CONST. amend. VI.

28. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

29. See *Powell v. Alabama*, 287 U.S. 45, 74 (1932). In *Powell*, nine Black men, whom the Court described as "young, ignorant, [and] illiterate," were falsely accused of raping two White women. *Id.* at 49, 58–59. Alabama law required appointment of counsel in capital cases; however, the defendants were not "asked whether they had, or were able to employ counsel," and the "members of the bar" appointed did little more than appear to represent the

expanded the right to counsel, holding that the Sixth Amendment requires federal courts to appoint counsel for all indigent defendants charged with felonies, even in noncapital cases.³⁰

However, the expansion of the right to counsel halted in 1942 in *Betts v. Brady*,³¹ when the Court held that the Fourteenth Amendment's Due Process Clause did not incorporate the Sixth Amendment.³² Under *Betts*, the Constitution only requires state courts to appoint counsel when specific circumstances of a case warrant legal representation to ensure a fair trial.³³

At the time of *Betts*, thirty-five states provided indigent defendants with counsel upon request in both capital and noncapital cases.³⁴ Meanwhile, four states followed the Court's majority jurisprudence of appointing counsel for indigent defendants exclusively in capital cases.³⁵

The different standards for appointing counsel in state and federal courts converged in 1963, when the Court decided *Gideon v. Wainwright*.³⁶ Because Clarence Earl Gideon was destitute and charged with breaking and entering, he asked the Florida state court to appoint counsel for him.³⁷ The court refused, citing Florida state law, which permitted appointment of counsel only when the defendant was charged with a capital offense.³⁸ Gideon responded, "The United States Supreme Court says I am entitled to be represented by Counsel."³⁹

defendants on the morning of trial. *Id.* at 52, 57, 60. At the day-long trials, occurring six days after arraignment, all nine defendants were convicted and sentenced to death. *See id.* at 50, 53. The *Powell* Court reversed the judgments against the defendants but limited its holding "to require appointment of counsel only when a defendant charged with a capital crime cannot defend himself." Bruce A. McGovern, *Invalid Waivers of Counsel as Harmless Errors: Judicial Economy or a Return to Betts v. Brady*, 56 FORDHAM L. REV. 431, 433 n.18 (1987); *see also Powell*, 287 U.S. at 72 ("[W]here the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.").

30. *See Johnson v. Zerbst*, 304 U.S. 458, 466 (1938) (holding that a defendant convicted for "possessing and uttering counterfeit," a noncapital offense, has a right to counsel).

31. 316 U.S. 455 (1942), *overruled by*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

32. *Id.* at 461-62.

33. *Id.* *Betts* could not afford counsel for his robbery trial, and Maryland refused to appoint counsel because the state only required counsel to be appointed in rape and murder cases. *Id.* at 457.

34. *See id.* app. I.A at 477-79 (collecting statutes); *see also id.* app. I.B at 479-80 (collecting judicial decisions); *id.* app. I.C at 480 (collecting constitutional provisions); *id.* app. II at 480 (collecting state requirements). *But see* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17 n.74 (1962) (finding that Justice Hugo Black's appendix miscategorized five jurisdictions, such that thirty states provided counsel in all felony cases at the time of the *Johnson v. Zerbst* decision in 1938).

35. *See Betts*, 316 U.S. app. III at 480 (collecting judicial dicta); *see also id.* app. IV at 480 (collecting cases).

36. 372 U.S. 335 (1963).

37. *See id.* at 337.

38. *See id.*

39. *Id.*

A jury found Gideon guilty, and the court sentenced him to five years in prison.⁴⁰ Gideon petitioned for a writ of habeas corpus, prompting the Supreme Court to grant review and reconsider *Brady v. Betts*.⁴¹ The Court unanimously held that the Sixth Amendment applied to the states through the Fourteenth Amendment, explicitly overruling *Betts*.⁴² So anyone accused of a crime, in state or federal court, is guaranteed the right to counsel.⁴³

B. Waiver of the Right to Counsel

This section illuminates the evolution of the right to self-representation, starting with the Court's initial dialogue. It then highlights the Court's landmark decision in *Faretta*, followed by a discussion of how the right has been refined in the years since. The section culminates with an analysis of how district courts currently conduct *Faretta* hearings.

1. Pre-*Faretta* Cases

Before the Supreme Court decided *Faretta*, state law provided relatively strong protection for the right to self-representation in state court trials.⁴⁴ Thirty-four state constitutions,⁴⁵ two states' case laws,⁴⁶ and one state's statute explicitly protect that right.⁴⁷

Meanwhile, the Court stopped short of recognizing a constitutional right to self-representation in *Adams v. United States ex rel. McCann*.⁴⁸ Instead, it held that "the Constitution does not force a lawyer upon a defendant" and waiver is constitutional so long as the defendant acts "with eyes open."⁴⁹

In subsequent consideration of the right to waive counsel, the Court laid the groundwork for its dicta in *Faretta* about circumstances required prior to

40. *See id.*

41. *See id.* at 337–38.

42. *See id.* at 345.

43. *See id.* at 339–40, 344.

44. *See Williams, supra* note 16, at 797. Federal courts have ensured the right of self-representation since the Judiciary Act of 1789. Ch. 20, 1 Stat. 73; 1 Stat. at 92. The right is currently codified in 28 U.S.C. § 1654.

45. *See* ALA. CONST. art. I, § 6; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 13; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 13; KY. CONST. Bill of Rights § 11; ME. CONST. art. I, § 6; MASS. CONST. pt. 1, art. XII; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. 15; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. 1, art. 10; WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

46. *See People v. Haddad*, 11 N.W.2d 240, 241 (Mich. 1943); *Zasada v. State*, 89 A.2d 45, 47 (N.J. Super. Ct. App. Div. 1952).

47. *See* N.C. GEN. STAT. § 1-11 (1998).

48. 317 U.S. 269 (1942).

49. *Id.* at 279; *see also United States v. Dougherty*, 473 F.2d 1113, 1121–22 (D.C. Cir. 1972) (noting that subsequent courts have split on the issue of whether the pro se right was accorded constitutional status in *Adams*).

valid waiver of counsel. The Court noted that “every reasonable presumption against waiver”⁵⁰ should be indulged and courts should not “presume acquiescence in the loss of fundamental rights.”⁵¹ Consequently, the Court imposed a duty on district judges: determine whether the accused made “an intelligent and competent waiver”⁵² based on the specific facts, background, and conduct of the case.⁵³ Further, the trial court’s query of the accused must go beyond a “mere routine inquiry.”⁵⁴ For a waiver to be valid, the defendant must understand the charges, the range of possible punishments, possible defenses, and mitigating factors and must have a broad understanding of the matter as a whole.⁵⁵

2. *Faretta*

Faretta v. California guaranteed criminal defendants the constitutional right to represent themselves at trial in state *and* federal judicial proceedings.⁵⁶

Los Angeles County Superior Court prosecutors charged Anthony Faretta with grand theft, and the court appointed a public defender to represent him at arraignment.⁵⁷ Well in advance of trial, Faretta requested to represent himself.⁵⁸ The trial judge questioned Faretta about his education and legal history and uncovered Faretta’s previous self-representation in a criminal prosecution.⁵⁹ Faretta further revealed he did not want the public defender to represent him because he believed the public defender’s office was bogged down with a “heavy case load.”⁶⁰ Satisfied, the judge preliminarily permitted Faretta to represent himself.⁶¹

50. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

51. *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292, 307 (1937).

52. *Johnson*, 304 U.S. at 465; *see also* *Carter v. Illinois*, 329 U.S. 173, 174 (1946) (holding that the Fourteenth Amendment’s Due Process Clause does not prohibit the accused from making their own defense nor acknowledging their guilt when they are “fully advised of all its implications and [are] capable of understanding”).

53. *Johnson*, 304 U.S. at 464.

54. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (“[T]he asking of several standard questions followed by the signing of a standard written waiver of counsel . . . may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.”).

55. *See id.* at 720–21. The Court in *Von Moltke v. Gillies*, 332 U.S. 708 (1948), highlighted factors—Von Moltke’s espionage charge, her German heritage, the U.S. war with Germany, suspicious attitudes toward Germans, and the potential for the death penalty—that made it “all the more essential that, before accepting a waiver of her constitutional right to counsel, the court be satisfied that [Von Moltke] fully comprehended her perilous position.” *Id.* at 720–21.

56. *Faretta v. California*, 422 U.S. 806, 834 (1975).

57. *Id.* at 807.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 808.

Several weeks later, the judge held a sua sponte hearing to inquire into Faretta's ability to represent himself.⁶² The judge specifically questioned Faretta about his knowledge of the hearsay rule and California state law governing the challenge of potential jurors.⁶³ Based on Faretta's answers and observation of his demeanor, the judge ruled that Faretta neither made "an intelligent and knowing waiver of his right to the assistance of counsel," nor did he have the "constitutional right to conduct his own defense."⁶⁴ Consequently, the public defender represented Faretta, who was ultimately found guilty at trial and sentenced to prison.⁶⁵ After the California Court of Appeals affirmed his conviction and the Supreme Court of California denied review (both without opinions), the U.S. Supreme Court granted certiorari.⁶⁶

The Court vacated the California courts' rulings and held that a criminal defendant has the constitutional right to conduct their own defense.⁶⁷ Justice Potter Stewart, for the majority, reasoned that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."⁶⁸ The Court held that the Sixth Amendment "necessarily implies the right of self-representation";⁶⁹ the Court also concluded that all the rights guaranteed and implied by the Sixth Amendment are part of "due process of law" and thus applicable to state judicial proceedings through the Fourteenth Amendment.⁷⁰ Accordingly, the Sixth Amendment rights to counsel, to waive counsel, and to self-representation lie squarely with the defendant in federal and state court criminal proceedings, "for it is [the defendant] who suffers the consequences if the defense fails."⁷¹

In dicta, the Court affirmed the standard by which an accused may relinquish the right to counsel: "knowingly and intelligently."⁷² A defendant need not possess the skill and experience of a lawyer to "competently and intelligently" choose self-representation; still, the defendant "should be made aware of the dangers and disadvantages of self-representation,"⁷³ so the record establishes "his choice [was] made with eyes open."⁷⁴

On review of the record, the Court found Faretta was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will."⁷⁵ Further, "[t]he very issue upon which the trial court based its

62. *Id.*

63. *Id.*

64. *Id.* at 809–10.

65. *Id.* at 811.

66. *See id.* at 811–12.

67. *See id.* at 834.

68. *Id.* at 817.

69. *Id.* at 832.

70. *Id.* at 818; *see also* *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that the Fourteenth Amendment incorporates the rights of the Sixth Amendment to the states).

71. *Faretta*, 422 U.S. at 820. If defendants elect to represent themselves, they cannot contend on appeal that they have received ineffective assistance of counsel. *See id.* at 834 n.46.

72. *Id.* at 835; *see also* *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938).

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

74. *See id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

75. *Id.*

decision to disallow Faretta's waiver was now the issue the Court excluded from consideration; the legal knowledge and ability of the defendant is absolutely not a factor in waiving the protections the Sixth Amendment affords."⁷⁶ Therefore, forcing Faretta "to accept against his will a state-appointed public defender . . . deprived him of his constitutional right to conduct his own defense."⁷⁷

3. Post-Faretta Cases

"The right to self-representation, however, is not absolute."⁷⁸ Part I.B.3.a examines the role of standby counsel, and Part I.B.3.b probes the level of competence necessary for a defendant to waive their right to legal representation.

a. Standby Counsel

In *Faretta*, the Court noted that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."⁷⁹ Defendants do not have a constitutional right to the assistance of standby counsel;⁸⁰ rather, the district court has discretion to appoint standby counsel.⁸¹

76. See Frederic Paul Gallun, Note, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559, 563 (1997). "[T]echnical, legal knowledge, as such, was not relevant to an assessment of [Faretta's] knowing exercise of the right to defend himself." *Faretta*, 422 U.S. at 836.

77. *Faretta*, 422 U.S. at 836.

78. *United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006). Courts may deny a defendant's request to represent himself when the request is untimely, the defendant "engages in serious and obstructionist misconduct," or the defendant is unable to produce a "valid waiver" of right to counsel. *Id.*; see also *supra* Parts I.B.3.a–b.

79. 422 U.S. at 834 n.46; see also Brittaney N. Eshbach, *The Interplay of Pro Se Defendants, Standby Counsel, and Ineffective Assistance of Standby Counsel Claims: An Examination of Current Law and a Suggestion for Reform in Pennsylvania*, 121 PENN ST. L. REV. 875, 881 (2017) (explaining that appointing standby counsel "may be necessary to ensure that the defendant respects the court and complies with the requirements of both procedural and substantive law").

80. See *United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998) ("The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*."); see also Gallun, *supra* note 76, at 563 ("The ability to proceed with standby counsel, unlike the right to counsel, is not a right; it is a privilege which is left to the discretion of the trial judge."). The Court further rejected a Sixth Amendment guaranteed right to hybrid representation—defined as simultaneous self-representation and representation by counsel. See *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *United States v. Couch*, 758 F. App'x 654, 655 (10th Cir. 2018).

81. See *United States v. Padilla*, 819 F.2d 952, 959–60 (10th Cir. 1987) (noting that the appointment of standby counsel "does not, by itself, relieve the district court of its responsibility to ensure that defendant's waiver of counsel is knowingly and intelligently made").

In *McKaskle v. Wiggins*,⁸² the Court made explicit that appointment of standby counsel does not violate a defendant's Sixth Amendment rights and defined the scope of standby counsel's role in relation to the defendant's *Faretta* right.⁸³ Carl Wiggins exercised his right to self-representation in his robbery trial.⁸⁴ Over Wiggins's objection, the court insisted counsel remain available for consultation.⁸⁵ At trial, Wiggins allowed his counsel to conduct voir dire,⁸⁶ interrupted his own cross-examinations of witnesses to confer with counsel, and requested the trial stop during his counsel's absence from the courtroom.⁸⁷ Following his conviction, Wiggins moved for a new trial on grounds that his standby counsel "unfairly interfered with his presentation of his defense."⁸⁸

On petition for federal habeas corpus relief,⁸⁹ the U.S. Court of Appeals for the Fifth Circuit agreed with Wiggins—his right to present his own defense, as guaranteed by *Faretta*, was violated "by the unsolicited participation of overzealous standby counsel" who should be "seen, but not heard."⁹⁰ The Supreme Court granted certiorari and reversed the judgment of the Fifth Circuit.⁹¹

The Court held that to determine if "a defendant's *Faretta* rights have been respected . . . the primary focus must be on whether the defendant had a fair chance to present his case in his own way."⁹² To preserve *Faretta* rights, the pro se defendant must be entitled to "preserve actual control over the case he chooses to present to the jury," and standby counsel's participation without the defendant's consent cannot destroy "the jury's perception that the defendant is representing himself."⁹³ However, "a defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense."⁹⁴

82. 465 U.S. 168 (1984).

83. See generally *id.*

84. *Id.* at 170.

85. *Id.* at 171–72.

86. Voir dire is a "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir dire*, BLACK'S LAW DICTIONARY (12th ed. 2024).

87. *McKaskle*, 465 U.S. at 172.

88. *Id.* at 173.

89. *Id.* *McKaskle* deals with a federal habeas appeal from a state court proceeding. However, federal courts have applied its holding with full force to cases pertaining to federal crimes. See, e.g., *United States v. Roof*, 10 F.4th 314, 364 (4th Cir. 2021); *supra* Parts II.B.2–3.

90. *Wiggins v. Estelle*, 681 F.2d 266, 271–72 (5th Cir. 1982), *rev'd*, 465 U.S. 168 (1984).

91. *McKaskle*, 465 U.S. at 173.

92. *Id.* at 177; see also *United States v. Fields*, 483 F.3d 313, 361 (5th Cir. 2007) (likening standby counsel to "legal reference material"); Barry J. Pollack, *From the President: Self-Representation and the Role of Standby Counsel*, CHAMPION, Jan./Feb. 2017, at 5, 5 (likening standby counsel to "one rung higher on the evolutionary ladder than a potted plant" who can "consult with the defendant during breaks, sit at counsel's table whispering in the defendant's ear, and facilitate the receipt by the defendant of court filings . . . [but] could neither speak for the defendant, nor address the court directly").

93. *McKaskle*, 465 U.S. at 178.

94. *Id.* at 182 ("Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable.").

Lastly, *Faretta* rights are “not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete.”⁹⁵

In this instance, the Court found Wiggins’s standby counsel did not infringe his *Faretta* rights because Wiggins was accorded the opportunity to control the organization of his defense, make motions, argue points of law, participate in voir dire, question witnesses, and address the court and the jury at appropriate times in the trial.⁹⁶ Furthermore, Wiggins’s standby counsel’s unsolicited comments before the jury were inconsequential and infrequent such that they did not impair the jury’s perception that Wiggins was representing himself.⁹⁷ Standby counsel is a discretionary tool in the court’s pocket and one constraint on the right of self-representation.

b. Competence

The *Faretta* Court concluded that Faretta was “literate, competent, and understanding”⁹⁸ and thus did not consider the standard of competency necessary for a defendant to represent himself.⁹⁹ In general, for a defendant to be found competent to stand trial, the court must determine “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁰⁰ The Court considered the applicability of this competency standard as to self-representation in *Godinez v. Moran*¹⁰¹ and *Indiana v. Edwards*.¹⁰²

In *Godinez*, the state charged Richard Moran with three counts of first-degree murder, and he pled not guilty.¹⁰³ The court then ordered psychiatric evaluation of Moran, which concluded that he was competent to stand trial.¹⁰⁴ At his next hearing, Moran sought to plead guilty and waive counsel because he did not want his attorneys to present mitigating evidence at his sentencing.¹⁰⁵ The trial court first found Moran competent to stand trial and, after conducting an appropriate colloquy, found that Moran

95. *Id.* at 183; *see also* *United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir. 1998) (finding that the defendant’s right to self-representation was not violated when standby counsel made objections on behalf of the defendant).

96. *McKaskle*, 465 U.S. at 174.

97. *Id.* at 187.

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

99. *See Indiana v. Edwards*, 554 U.S. 164, 171 (2008).

100. *Dusky v. United States*, 362 U.S. 402, 402 (1960). Subsequently, the Court held that convicting incompetent defendants or failing to adhere to procedures designed to assess a defendant’s competence when doubt is raised violates the Constitution. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975).

101. 509 U.S. 389 (1993).

102. 554 U.S. 164 (2008).

103. *See Godinez*, 509 U.S. at 391–92.

104. *Id.* at 391.

105. *Id.* at 392.

knowingly and intelligently waived his right to counsel.¹⁰⁶ Moran's guilty plea was accepted, and he was sentenced to death.¹⁰⁷

On appeal, Moran contended that his due process rights were violated because he was not competent to represent himself.¹⁰⁸ The U.S. Court of Appeals for the Ninth Circuit agreed, holding that the competency needed to represent oneself is higher than the competency required to stand trial.¹⁰⁹ However, the Supreme Court disagreed.¹¹⁰ The Court reasoned that the decision to plead guilty "is no more complicated than the sum total of decisions that a defendant may have to make during the course of a trial."¹¹¹ Federal appellate courts have since interpreted *Godinez* as extending to defendants who wish to represent themselves at trial, too, not only those entering a plea.¹¹²

The Court addressed the intersection of competency and self-representation again in *Indiana v. Edwards*,¹¹³ where it considered whether the right of self-representation is violated when courts require a defendant satisfy a higher competency standard to represent themselves than to stand trial.¹¹⁴ Ahmad Edwards was charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft for drawing a gun and firing it at a store security officer when he was discovered attempting to steal a pair of shoes.¹¹⁵ After three competency hearings, and nearly six years after being charged, Edwards was found competent to stand trial.¹¹⁶ Before his trial began, Edwards requested to represent himself.¹¹⁷ The trial court denied this request, noting that Edwards still suffered from schizophrenia and concluding that he was "competent to stand trial" but not "competent to defend himself."¹¹⁸

After being convicted, Edwards appealed, arguing that once he was found competent to stand trial, he had a constitutional right to represent himself.¹¹⁹ Indiana's intermediate appellate court and supreme court agreed with

106. *Id.*

107. *Id.* at 392–93.

108. *Id.* at 393.

109. *Moran v. Godinez*, 972 F.2d 263, 266 (9th Cir. 1992), *rev'd sub nom.*, 509 U.S. 389 (1993).

110. *Godinez*, 509 U.S. at 398.

111. *Id.*

112. See Ashley G. Hawkinson, *The Right to Self-Representation Revisited: A Return to the Star Chamber's Disrespect for Defendant Autonomy?*, 48 WASHBURN L.J. 465, 489–90 (2009); Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez, and Edwards*, 7 OHIO ST. J. CRIM. L. 391, 395 (2009) ("After *Godinez*, most lower courts held that a defendant who is competent to stand trial and who knowingly and voluntarily waives the right to counsel has a right to self-representation."); Todd A. Berger, *The Aftermath of Indiana v. Edwards: Re-Evaluating the Standard of Competency Needed for Pro Se Representation*, 68 BAYLOR L. REV. 680, 706–07 (2016).

113. 554 U.S. 164 (2008).

114. *Id.* at 167.

115. *Id.*

116. *Id.* at 168.

117. See *id.*

118. See *id.* at 169.

119. See *id.*

Edwards, holding that *Godinez* and *Faretta* required that Edwards be allowed to represent himself.¹²⁰ But the U.S. Supreme Court disagreed.¹²¹ The Court concluded that the Constitution allows judges to first ask whether defendants are competent to stand trial; should the defendants want to represent themselves, the judge is then permitted to ask whether the defendants are competent to conduct their own defense.¹²² If the defendants are found not competent to conduct their own defense, courts may require the defendant to proceed to trial with representation, over their objections.¹²³

“Although [*Godinez* and *Edwards*] are not strictly contradictory, they are in deep tension with one another.”¹²⁴ As presently applied, *Edwards* is a discretionary criterion,¹²⁵ and the “minimum standard for competency that is required for a defendant to waive counsel and conduct trial court proceedings is still determined by *Godinez*—the defendant need only be competent to stand trial.”¹²⁶ Competence, like standby counsel, is a constraint to the absoluteness of the right of self-representation.

4. *Faretta* in Practice Today

There is no “prescribed . . . formula or script to be read to a defendant who states that he elects to proceed without counsel.”¹²⁷ Taken together, Court decisions indicate that a knowing and intelligent waiver depends on “a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.”¹²⁸ The ultimate test is whether the defendant

120. See *id.* at 169. Although *Edwards* expressly dealt with a state court proceeding, because “both state and federal courts are bound to uphold the right to a fair trial and the right to self-representation, it follows that *Edwards* applies to federal courts equally.” *United States v. Bernard*, 708 F.3d 583, 589 n.8 (4th Cir. 2013); see also *United States v. Berry*, 565 F.3d 385, 391–92 (7th Cir. 2009); *United States v. Ferguson*, 560 F.3d 1060, 1067 n.3 (9th Cir. 2009).

121. See *Edwards*, 554 U.S. at 179.

122. See *id.* at 178.

123. See *id.*

124. Richard J. Bonnie, *Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence*, 20 OHIO ST. J. CRIM. L. 231, 232 (2023). For a discussion of how to resolve this tension, see Berger, *supra* note 112, at 719–27; Joanmarie Ilaria Davoli, *You Have the Right to an Attorney; If You Cannot Afford One, Then the Government Will Underpay an Overworked Attorney Who Must Also Be an Expert in Psychiatry and Immigration Law*, 2012 MICH. ST. L. REV. 1149, 1184–87.

125. See Ashley N. Beck, *Indiana v. Edwards: The Prospect of a Heightened Competency Standard for Pro Se Defendants*, 84 U. COLO. L. REV. 433, 458–59 (2013) (“Although *Edwards* does not require state trial courts to employ a particular test or adopt a heightened standard to determine a defendant’s competence to represent himself, it does make clear that trial courts retain the discretion to do so.”).

126. Berger, *supra* note 112, at 685.

127. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

128. *Id.*; see also Jeffrey P. Willhite, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro Se in Iowa*, 78 IOWA L. REV. 205, 211 (1992) (noting how lower courts failed to follow the procedure established in *Von Moltke* for evaluating waivers of counsel because it was a plurality opinion, not regarded as binding precedent). Also, a totality of the circumstances approach to the *Faretta* inquiry provides judges flexibility and precludes the defendant’s disingenuous memorization of the answers to rote waiver questions. See Michael

understands the risks of self-representation and freely chooses to face those risks.¹²⁹

Nonetheless, several circuit courts have set forth questions and/or factors as a framework for judges to assure that a defendant's waiver is knowing and voluntary. For example, the U.S. Court of Appeals for the Third Circuit abides by a list of factors established in *United States v. Peppers*¹³⁰—a series of model questions¹³¹ derived from the Federal Judicial Center's Benchbook for United States District Court Judges¹³² (the "Benchbook"), which provide a "useful framework" in deciding whether a defendant knowingly and voluntarily waived their right to counsel.¹³³ Other circuit courts note that the Benchbook provides a useful framework of questions from which to conduct a *Faretta* colloquy; among those that find it useful, some circuits encourage judges¹³⁴ to use the Benchbook questions, while others mandate their use.¹³⁵

Conversely, the U.S. Court of Appeals for the Eleventh Circuit balances a set of factors established in *Fitzpatrick v. Wainwright*¹³⁶ when deciding whether to uphold the defendant's waiver of counsel.¹³⁷ Meanwhile, the U.S. Court of Appeals for the Ninth Circuit does not rely on factors but requires the district court ensure that defendants understand the nature of the charges against them, the possible penalties, and the dangers and disadvantages of self-representation.¹³⁸ Ultimately, the district court must ensure that the waiver is knowing and intelligent, although the defendant is likely to appeal regardless of the thoroughness of the *Faretta* colloquy.¹³⁹

J. Kelly, *Making Faretta v. California Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN'S J. LEGAL COMMENT, 245, 265 (2005).

129. *United States v. Stanley*, 739 F.3d 633, 645 (11th Cir. 2014).

130. 302 F.3d 120 (3d Cir. 2002).

131. *Id.* at 136–37 (listing fourteen questions asking about the defendant's understanding of possible sentencing and familiarity with evidence rules, explaining the court's inability to assist, and advising the defendant they would be better off with a lawyer).

132. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 6–7 (6th ed. 2013).

133. *Peppers*, 302 F.3d at 136.

134. *See, e.g.*, *United States v. Underwood*, 88 F.4th 705, 710 (7th Cir. 2023); *United States v. Hansen*, 929 F.3d 1238, 1258–59 (10th Cir. 2019); *United States v. Jones*, 421 F.3d 359, 363 (5th Cir. 2005).

135. *See United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004) ("[F]aced with an accused who wishes to represent himself, the court must ask the defendant a series of questions drawn from, or substantially similar to, the model inquiry set forth in the [Benchbook]."); *see also United States v. Johnson*, 24 F.4th 590, 601 (6th Cir. 2022) (holding that the district court did not sufficiently advise the defendant during the *Faretta* colloquy because the series of questions from the Benchbook were omitted, the court did not confirm that the defendant knew his maximum potential sentences, and the defendant expressed amenability to representation).

136. 800 F.2d 1057 (11th Cir. 1986).

137. *See infra* note 301.

138. *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987).

139. *See Wright, supra* note 19, at 785–86.

C. The Procedure of Faretta Rulings

This section briefly explores three procedural mechanisms of the federal appeals process. Part I.C.1 illustrates the mechanisms of preserving issues for appeal at the trial court level. Part I.C.2 discusses the rights and process for bringing an appeal. Finally, Part I.C.3 analyzes the standards of review employed by appellate courts.

1. Preserving Issues for Appeal

In general, “issues raised for the first time on appeal are typically deemed forfeited or waived.”¹⁴⁰ There is no “bright line” rule for determining whether an issue has properly been raised for appeal.¹⁴¹ Appellate courts typically require the issue be “raised sufficiently for the trial court to rule on it,”¹⁴² often phrasing it as “squarely and timely.”¹⁴³ Raising an issue “squarely” requires parties to advance it “prominently, specifically, and with reasonable thoroughness,”¹⁴⁴ such that opposing counsel and the district court are on notice of the issue being raised.¹⁴⁵ Raising an issue “timely” in the district court “depends largely on the procedural circumstances that gave rise to the opportunity or obligation to raise an issue or an argument.”¹⁴⁶ If parties do not raise legal issues “squarely and timely” in the district court, courts will review the issue under a plain error¹⁴⁷ standard rather than a de

140. See Robert F. Parsley, *Litigating Waiver of Issues for Appeal and on Appeal in Federal Courts*, in STRATEGIES FOR APPELLATE LITIGATION: LEADING LAWYERS ON THE UNIQUE DIFFERENCES BETWEEN APPELLATE AND TRIAL PRACTICE 7 (Thomson Reuters Westlaw ed., 2013). The waiver rule finds support in Rule 46 of the Federal Rules of Civil Procedure, which embodies the principle that parties must make their objections and reasons for objections known to the district court because it otherwise deprives the district court of an opportunity to correct its own errors. FED. R. CIV. P. 46; Parsley, *supra*, at 7. This reasoning transfers to the criminal context because the advisory committee notes for Rule 51 of the Federal Rules of Criminal Procedure indicate that the two rules are “practically identical” and relate to a matter of “trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion.” FED. R. CRIM. P. 51.

141. Walsh v. Dep’t of Hum. Res., 471 F.3d 1033, 1037 (9th Cir. 2006).

142. *Id.*

143. Iverson v. City of Boston, 452 F.3d 94, 102 (1st Cir. 2006).

144. See generally Parsley, *supra* note 140.

145. See Portis v. First Nat’l Bank of New Albany, 34 F.3d 325, 331 (5th Cir. 1994) (“The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised.”); Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988) (requiring arguments be spelled out “squarely” such that parties cannot “defeat the system by seeding the record with mysterious references to unpled claims, hoping to set the stage for an ambush should the ensuing ruling fail to suit”).

146. See generally Parsley, *supra* note 140. For example, it would be procedurally untimely to mount an argument for the first time in opposition to a summary judgment motion when the issue was not properly identified in the complaint. See generally *id.*

147. See *supra* Part I.C.3.b.

novo¹⁴⁸ standard.¹⁴⁹ However, it is never too late to raise an issue on appeal that was decided by the district court.¹⁵⁰

The raise or waive rule is ultimately discretionary;¹⁵¹ as the Court has said, “The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals to be exercised on the facts of individual cases. We announce no general rule.”¹⁵² Although appellate courts possess discretion to entertain a waived issue, they will generally not do so unless the factual record has been sufficiently developed as to that issue.¹⁵³ Appellate courts may choose to address waived issues when doing so is in the public interest or is necessary to avoid manifest injustice so long as the proponent offers a good reason why the new issue was not raised below.¹⁵⁴

2. Criminal Defendant Appeals

Criminal defendants do not have a federal constitutional right to an appeal; however, they do have a statutory right.¹⁵⁵ The statutory right provides that the “court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts.”¹⁵⁶ For criminal cases, an appealable final decision constitutes the conviction and the imposition of a sentence for that conviction;¹⁵⁷ this is consistent with the practice in civil cases in which a final judgment occurs when the court has nothing left to do but execute the judgment.¹⁵⁸

148. *See supra* Part I.C.3.a.

149. “If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue.” *Puckett v. United States*, 556 U.S. 129, 134 (2009); *see* *United States v. Aderinoye*, 33 F.4th 751, 754 (5th Cir. 2022) (“[W]e apply the more deferential plain error review to the claims [the defendant] raises for the first time on appeal.”); *United States v. Bostick*, 791 F.3d 127, 142 (D.C. Cir. 2015) (reviewing for plain error because the defendant did not raise the argument in the district court).

150. *Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008) (“[I]f an argument is raised belatedly in the district court but that court, without reservation, elects to decide it on the merits, the argument is deemed preserved for later appellate review.”).

151. 28 U.S.C. § 2106 (“The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgement, decree, or order of a court lawfully brought before it for review.”).

152. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

153. *See generally* Parsley, *supra* note 140.

154. *See* *LNC Invs., Inc. v. Nat’l Westminster Bank*, 308 F.3d 169, 176 n.8 (2d Cir. 2002).

155. *See* *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal.”).

156. 28 U.S.C. § 1291.

157. *See, e.g., Berman v. United States*, 302 U.S. 211, 212 (1937) (“Final judgment in a criminal case means sentence. The sentence is the judgment.”); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989) (“The general rule is that finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence.”).

158. *See* 7 WAYNE R. LEFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 27.2(a) (4th ed. 2024).

Since the establishment of the statutory right, appellate review has become an important element of the criminal justice process¹⁵⁹ and functions to correct errors, promote uniformity in future cases, hold trial courts accountable, and shape law to reflect public policy.¹⁶⁰ The Court has also recognized constitutional protections to the statutory right to appeal.¹⁶¹ Nevertheless, the statutory right does not guarantee review of every trial court ruling.¹⁶² Appellate review is typically limited to claims that are (1) final judgments or exceptions to the final judgment rule,¹⁶³ (2) not moot,¹⁶⁴ (3) not expressly waived,¹⁶⁵ and (4) not forfeited by failure to comply with procedural requirements.¹⁶⁶ Meritorious claims may not even receive relief on appeal if the reviewing court finds the error to be harmless.¹⁶⁷

3. Appellate Standards of Review

District court decisions—conclusions of law, findings of fact, and discretionary matters—are not binding, nor do they have binding precedential effect over other courts or cases. Rather, the decisions are appealable to the circuit courts. Standards of review are the lens through which the appellate court scrutinizes the district court’s decision and determines if the court erred.¹⁶⁸ More often than not, the selected standard determines the result on appeal.¹⁶⁹ Part I.C.3.a examines the *de novo* standard, and Part I.C.3.b discusses the plain error standard.¹⁷⁰

159. See LEFAVE ET AL., *supra* note 158, § 27.1(a).

160. See Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 5 (2008); see also LEFAVE ET AL., *supra* note 158, § 27.1(a) (explaining that appellate courts “develop and pronounce much of the law that governs the criminal process”).

161. See *Anders v. California*, 386 U.S. 738, 744 (1967) (disallowing appointed counsel to withdraw based on a mere assertion that the appeal would be frivolous); *Douglas v. California*, 372 U.S. 353, 356 (1963) (requiring counsel to be appointed for defendant’s first appeal); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (ensuring that indigent defendants have equal access to the appeals process).

162. See LEFAVE ET AL., *supra* note 158, § 27.2(a).

163. See *supra* note 157 and accompanying text.

164. See LEFAVE ET AL., *supra* note 158, § 27.1(b).

165. See *id.*

166. See *supra* Part I.C.1.

167. See LEFAVE ET AL., *supra* note 158, § 27.1(b). “Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to a ‘harmless error’ analysis.” *United States v. Arlt*, 41 F.3d 516, 524 (9th Cir. 1994).

168. See SARAH ERICKSON ANDRÉ, *FEDERAL APPEALS JURISDICTION AND PRACTICE* § 5:1 (2025 ed. 2025); see also *Standard of Review*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“The criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court.”).

169. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995).

170. Federal appellate courts also employ abuse of discretion and harmless error review to appeals, both of which are not within the scope of this Note. See *infra* note 185 and

a. De Novo

Circuit courts review conclusions of law under the plenary de novo standard.¹⁷¹ De novo requires the appellate court to arrive at its own independent conclusion “as if [the issue] had not been heard before and no decision was previously rendered.”¹⁷² Appellate courts have two structural advantages over trial courts in deciding questions of law.¹⁷³ First, appellate judges can more freely focus on legal questions because they are unburdened with the “time-consuming, process of hearing evidence.”¹⁷⁴ Second, the collaborative, deliberate appellate process, involving three appellate judges on the panel for each case, reduces the risk of judicial error on questions of law.¹⁷⁵

b. Plain Error

Appellate courts review questions of fact under the deferential plain error standard.¹⁷⁶ There is plain error when, “although there is evidence to support [a finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹⁷⁷

Federal Rule of Civil Procedure 52(a) mandates that appellate courts “not disturb” the trial court’s factual findings unless there is plain error, which serves two policy objectives.¹⁷⁸ First, the risk of judicial error is lessened when the primary responsibility for resolving factual issues lies in the hands of the court in the “superior position to evaluate and weigh the evidence—the trial court.”¹⁷⁹ Trial judges have a distinct advantage in judging the accuracy of witness testimony and making credibility determinations because they preside over live testimony, whereas appellate judges receive a cold record.¹⁸⁰ Second, the reviewing court is alleviated of the burden of “full-scale independent review and evaluation of the evidence,” thus

accompanying text; *supra* note 167 and accompanying text. Parties are required to state the applicable standard in their briefs to the circuit courts. See FED. R. APP. P. 28(a)(9)(B), (b)(5).

171. See *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984).

172. *Ness v. Comm’r of Internal Revenue Serv.*, 954 F.2d 1495, 1497 (9th Cir. 1992).

173. See *McConney*, 728 F.2d at 1201.

174. *Id.*

175. See *id.*; see also FRANK M. COFFIN, *THE WAYS OF A JUDGE* 58 (1980) (“Every important appellate court decision is made by a group of equals. This fact reflects the shrewd judgment of the architects of our state and federal judicial systems that an appellate judge is no wiser than a trial judge. His only claim to superior judgment lies in numbers; three, five, seven or nine heads are usually better than one.”).

176. FED. R. CRIM. P. 52(b).

177. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *United States v. Camejo*, 333 F.3d 669, 672 (6th Cir. 2003) (“Plain error is defined as an egregious error, one that directly leads to a miscarriage of justice or error that is obvious, affects substantial rights, and seriously impairs the fairness or integrity of the juridical proceedings.”).

178. *McConney*, 728 F.2d at 1201.

179. *Id.*

180. *Id.*

conserving valuable appellate resources for issues that the appellate court is best suited to decide, namely, issues of law.¹⁸¹

II. COURTS CONFRONT WAIVER APPEALS WITH DISPARATE STANDARDS OF REVIEW

Picture this: during pretrial proceedings, a defendant requests to represent themselves. In response, the district court judge conducts a *Faretta* hearing to assess whether the defendant is knowingly and intelligently waiving their right to counsel.¹⁸² After the hearing, the district court finds the waiver valid, and the defendant moves forward to trial, representing themselves.¹⁸³ The defendant presents their case to the best of their ability but is ultimately convicted.¹⁸⁴ On appeal, the defendant argues that their waiver of counsel was unknowing and not voluntary; thus, the district court violated the defendant's constitutional right to counsel by allowing them to represent themselves. When reviewing the validity of the waiver, the circuit courts do not uniformly apply the same standard of review to the issue. Part II.A examines the justifications for applying a de novo standard of review. Part II.B explains the line of reasoning for applying a plain error standard. Lastly, Part II.C analyzes the circuit courts' contention that they need not decide on a standard of review for *Faretta* appeals.

A. Circuits Applying a De Novo Standard of Review

Twelve circuits have applied a de novo standard of review in certain waiver of counsel cases. The U.S. Courts of Appeals for the First Circuit,¹⁸⁵

181. *Id.*; *supra* note 175 and accompanying text.

182. For an initial discussion of *Faretta* hearings, see *supra* Part I.B.4.

183. *Id.*

184. An empirical study looking at outcomes of pro se felony defendants in federal court from 1998 to 2003 found that, of the fifty-seven pro se defendants in the federal court database who went to trial, only four were acquitted. See Erica J. Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 452 (2007).

185. See *United States v. Belin*, 868 F.3d 43, 54 (1st Cir. 2017). The First Circuit also applies abuse of discretion review to appeals regarding the validity of a defendant's waiver of counsel. See *United States v. Manjarrez*, 306 F.3d 1175, 1179 (1st Cir. 2002). First Circuit courts reviewing for abuse of discretion cite *United States v. Proctor*, 166 F.3d 396 (1st Cir. 1999), as a basis for using abuse of discretion; in *Proctor*, however, the court emphasized the high stakes of a *Faretta* colloquy and held that because the Sixth Amendment was implicated, the *Faretta* issue could be considered for the first time on appeal, warranting plenary review. *Id.* at 401. Plenary review is almost always associated with de novo review. See *supra* Part I.C.3.a. Therefore, discussion of the abuse of discretion standard of review is omitted.

Second Circuit,¹⁸⁶ Third Circuit,¹⁸⁷ Fifth Circuit,¹⁸⁸ Seventh Circuit,¹⁸⁹ Eighth Circuit,¹⁹⁰ Ninth Circuit,¹⁹¹ Tenth Circuit,¹⁹² and District of Columbia Circuit¹⁹³ exclusively apply the de novo standard, whereas the other circuits have oscillated between de novo and plain error review.¹⁹⁴ The circuits rely on two main reasons when applying de novo review: (1) generally, constitutional issues receive de novo review, and waivers of counsel implicate the Sixth Amendment; and (2) pro se defendants cannot be expected to point out the court's errors and preserve the issue of waiver for appeal.

1. The Seventh Circuit:

United States v. Balsiger

A grand jury in the Eastern District of Wisconsin indicted Thomas Balsiger, the chief executive officer (CEO) of International Outsourcing Services (IOS), for wire fraud, conspiracy to commit wire fraud, and conspiracy to obstruct justice.¹⁹⁵ The indictment alleged that the defendants, including Balsiger, devised and participated in a scheme to defraud manufacturers who issued coupons for consumer products, large retailers, and others by knowingly submitting fraudulent coupons to manufacturers for reimbursement.¹⁹⁶ Years into the litigation, Balsiger's counsel died.¹⁹⁷

186. See *United States v. Hausa*, 922 F.3d 129, 134 (2d Cir. 2019) (per curiam); *United States v. Green*, 623 F. App'x 571, 573 (2d Cir. 2015); *United States v. Spencer*, 995 F.2d 10, 11 (2d Cir. 1993) (per curiam).

187. See *United States v. Taylor*, 21 F.4th 94, 99 (3d Cir. 2021); *United States v. Stubbs*, 281 F.3d 109, 113 (3d Cir. 2002); *United States v. Peppers*, 302 F.3d 120, 127 (3d Cir. 2002).

188. See *United States v. Sterling*, 99 F.4th 783, 789 (5th Cir. 2024); *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008); *United States v. Virgil*, 444 F.3d 447, 452 (5th Cir. 2006).

189. See *infra* Part II.B.2.

190. See *United States v. Mosley*, 607 F.3d 555, 558 (8th Cir. 2010); *United States v. Mahasin*, 442 F.3d 687, 691 (8th Cir. 2006). In one instance, the Eighth Circuit noted the government's argument for application of a plain error standard when the defendant did not raise an objection to proceeding pro se at the district court level but declined to resolve the question because the judgment would be upheld under the stricter, de novo standard. See *United States v. Norris*, 698 F. App'x 849, 852 n.2 (8th Cir. 2017) (per curiam). Subsequent cases in the Eighth Circuit have reviewed the validity of a waiver de novo without mentioning whether the objection was raised for the first time on appeal. See *United States v. Maloney*, 102 F.4th 904, 914 (8th Cir. 2024); *United States v. Atkins*, 52 F.4th 745, 750 (8th Cir. 2022).

191. See *infra* Part II.B.1.

192. See *United States v. Hamett*, 961 F.3d 1249, 1255 (10th Cir. 2020); *United States v. Hansen*, 929 F.3d 1238, 1248 (10th Cir. 2019); *United States v. Williamson*, 859 F.3d 843, 862 (10th Cir. 2017).

193. See *United States v. Gewin*, 471 F.3d 197, 199 (D.C. Cir. 2006); *United States v. Cunningham*, 145 F.3d 1385, 1392 (D.C. Cir. 1998).

194. See *infra* note 241.

195. See Indictment, *United States v. Int'l Outsourcing Servs., LLC*, No. 07-CR-057 (E.D. Wis. Mar. 6, 2007).

196. *Id.* at 1–12; see also John Diedrich, *Coupon Company Boss Sentenced in \$250 Million Fraud Scheme*, MILWAUKEE J. SENTINEL (Mar. 8, 2017), <https://www.elpasotimes.com/story/money/business/2017/03/08/el-paso-coupon-company-boss-sentenced-prison-250-million-fraud-scheme/98903018/> [https://perma.cc/W5AS-9GSA].

197. *United States v. Balsiger*, 910 F.3d 942, 947 (7th Cir. 2018).

Subsequently, the district court “conducted multiple hearings over several months to address Balsiger’s representation, ultimately concluding that he waived his right to counsel by repeatedly refusing to retain an attorney despite having the means to do so.”¹⁹⁸ Balsiger represented himself at the bench trial, after which the court convicted him of conspiracy to commit wire fraud and conspiracy to obstruct justice.¹⁹⁹ The judge sentenced Balsiger to 120 months’ imprisonment, ordered him to pay \$65 million of restitution, and entered a \$21.2 million forfeiture judgment.²⁰⁰

Balsiger appealed and argued that the district court violated his Sixth Amendment right by denying him an eighteen-month continuance after his attorney’s death to accommodate his desired attorney, thus forcing him to proceed pro se.²⁰¹ In their briefs, the parties disagreed on the applicable standard of review.²⁰² The Seventh Circuit acknowledged that this divergence mirrored prior cases in the jurisdiction and affirmed Balsiger’s conviction under a de novo standard of review.²⁰³

First, the Seventh Circuit explained that constitutional issues generally receive de novo review.²⁰⁴ In 2018, the Supreme Court affirmed this, explaining that appellate courts reviewing constitutional issues conduct “de novo review even when answering a mixed question primarily involves plunging into a factual record.”²⁰⁵ Whether Balsiger “knowingly and voluntarily” waived his Sixth Amendment right to counsel was a mixed question of law and fact.²⁰⁶

The court acknowledged that whether a defendant engaged in conduct amounting to waiver of counsel requires an assessment of the defendant’s “candor, credibility, and resolve to pursue a certain course of action—assessments that benefit from the district judge having a front-row seat.”²⁰⁷ However, de novo review, unlike plain error review, accounts for the district

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (explaining that the defendant, Balsiger, invited de novo review); Brief of Plaintiff-Appellee at 25, *Balsiger*, 910 F.3d 942 (No. 17-1708) (demonstrating that the government invited an abuse of discretion standard of review).

203. *Balsiger*, 910 F.3d at 951–52. *But see* *United States v. Vizcarra-Millan*, 15 F.4th 473, 486 (7th Cir. 2021) (holding that review of *Faretta* waivers is deferential because a district judge is on the “razor’s edge” to ensure that the colloquy is neither too cursory nor too persuasive). Plain error is often considered the deferential standard of review. *See supra* Part I.C.3.b.

204. *See Balsiger*, 910 F.3d at 951; *United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997) (reviewing a constitutional challenge to a deportation order de novo); *United States v. Hamilton*, 128 F.3d 996, 999 (6th Cir. 1997) (reviewing a constitutional challenge to an admission of evidence de novo).

205. *U.S. Bank Nat’l Ass’n ex rel. CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018). Circuits that endorse de novo review often simply point out that the question is of a constitutional dimension. *See United States v. Mesquiti*, 854 F.3d 267, 271 (5th Cir. 2017); *United States v. Conklin*, 835 F.3d 800, 801–02 (8th Cir. 2016); *United States v. Hughes*, 191 F.3d 1317, 1323 (10th Cir. 1999).

206. *Balsiger*, 910 F.3d at 952.

207. *Id.*

court's front row seat *and* allows the appellate court to take "a fresh look at the district court's ultimate conclusion that a defendant waived his right to counsel."²⁰⁸

In its fresh look, the Seventh Circuit found that Balsiger did not face a constitutionally offensive choice when the court ordered him to retain counsel within a month or represent himself.²⁰⁹ Contrary to Balsiger's arguments on appeal, the court found eight months a sufficient amount of time for an attorney to prepare for trial.²¹⁰ Next, in conceding that the district court did not conduct a formal hearing, the court explained that the record showed Balsiger sufficiently understood the risks of proceeding *pro se* because he relied on standby counsel, which reflects an "appreciation for the difficulties of self-representation."²¹¹ Balsiger's background as a CEO with a master of business administration degree and prior litigation experience also pointed to a knowing waiver.²¹² Lastly, the court found that Balsiger's decision to proceed without counsel was a calculated, deliberate decision so that he could appeal on Sixth Amendment grounds to the Seventh Circuit.²¹³ The Seventh Circuit held that a defendant who waives their right to counsel "for strategic reasons tends to do so knowingly."²¹⁴

The Seventh Circuit also acknowledged that the *de novo* approach taken to this mixed question of law and fact "aligns closely with the course we chart in other areas of criminal procedure implicating a defendant's constitutional rights."²¹⁵

2. The Ninth Circuit: *United States v. Erskine*

A grand jury in the Central District of California returned an indictment against Erik Erskine on two counts of threatening to assault or murder Federal Bureau of Investigation (FBI) agents.²¹⁶ The first count pertained to a voicemail message he left at the Santa Maria FBI office, and the second count pertained to a typewritten note left under the door of the same office.²¹⁷

208. *Id.*

209. *Id.* at 953; *see also supra* note 13 and accompanying text.

210. *Balsiger*, 910 F.3d at 953. Eight months is the amount of time between the date by which Balsiger was ordered to retain counsel and the scheduled trial date. *Id.*

211. *Id.* (quoting *United States v. Todd*, 424 F.3d 525, 533 (7th Cir. 2005)).

212. *Id.* Balsiger referred to himself as a "litigious individual." *Id.*

213. *Id.* ("[T]he last thing that I want to do is spend good money for a good attorney, have him submit a motion, and then have that motion denied and some-how, in my mind [indiscernible] the appeals that I feel I have. . . . I've got to play—businessmen play the odds." (second alteration in original)).

214. *Id.* (quoting *Todd*, 424 F.3d at 533).

215. *Id.* at 952; *see, e.g., Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that probable cause determinations for warrantless searches should be reviewed *de novo* and underlying "findings of historical fact only for clear error"); *United States v. Shabaz*, 579 F.3d 815, 819–20 (7th Cir. 2009) (reviewing the ultimate conclusion of whether a *Miranda* waiver was knowing and voluntary *de novo* and the district court's findings of fact and credibility determinations for plain error).

216. *United States v. Erskine*, 355 F.3d 1161, 1163 (9th Cir. 2004).

217. *Id.* at 1162–63.

The court appointed a public defender to represent Erskine, and the case went to trial.²¹⁸ A jury found Erskine not guilty on the first count and was unable to reach a verdict on the second count, so the district court declared a mistrial.²¹⁹

In advance of the second trial, Erskine requested permission to represent himself and for a new attorney to be appointed as standby counsel.²²⁰ Subsequently, the district court engaged Erskine in an extensive colloquy, at which the government was not present, about the dangers and disadvantages of self-representation.²²¹ The court specifically asked whether Erskine was aware of possible sentences, and Erskine responded affirmatively, declaring his statutory maximum to be one year.²²² The court erroneously assented.²²³ Thereafter, the court found Erskine “knowingly and intelligently” waived his right to counsel.²²⁴

On the first day of the second trial, where Erskine was representing himself with the public defender from his first trial as standby counsel, the government sought to orally correct its original trial memorandum that misstated the maximum penalty as one year of imprisonment—the correct maximum penalty was actually five years’ imprisonment.²²⁵ Although this “quintupled the stakes of self-representation,” the court did not acknowledge its earlier mistake, ask Erskine whether he understood the government’s misrepresentation, advise him of the correct maximum penalty, or ask him whether he wanted to withdraw his *Faretta* waiver considering the new and different information about the possible sentence.²²⁶ The case proceeded to trial, where a jury found Erskine guilty on the second count but was unable to reach a verdict on the first count.²²⁷

At sentencing, Erskine again revealed that he was unaware of the maximum penalty he was facing prior to or during the trial.²²⁸ Still, the court sentenced Erskine to twenty-seven months imprisonment—a term “more than the twice the length that it had allowed him to believe was the maximum at the time of the *Faretta* waiver.”²²⁹

Erskine appealed the validity of his *Faretta* waiver.²³⁰ On appeal, the government urged the Ninth Circuit to apply plain error review to Erskine’s

218. *Id.* at 1163.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1165.

223. *Id.* at 1164–65. Erskine told the court his possible sentence was “[o]ne, sir. Maximum amount is one year,” and the court responded, “All right.” *Id.* at 1165.

224. *Id.* at 1165.

225. *Id.* The government stated, “The correct maximum penalty in this case, pursuant to section 115(b)(4) is a maximum of five years of imprisonment, and I just wanted to make sure everybody was on the same page, especially since Mr. Erskine is representing himself in this case.” *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 1166.

230. *Id.*

appeal because he let the *Faretta* error pass without objection.²³¹ The Ninth Circuit reversed the conviction and rejected the government's position.²³²

The Ninth Circuit explained that its requirements for reviewing the validity of *Faretta* waivers "are predicated on the fact that we do not expect pro se defendants to know the perils of self-representation, and consequently, we cannot expect defendants to recognize that they have not been correctly and fully advised,²³³ let alone to point out the court's errors."²³⁴ Accordingly, the Ninth Circuit reviewed whether Erskine understood the nature of the charges against him,²³⁵ the possible penalties, and the "dangers and disadvantages of self-representation" de novo, in line with their previous precedent.²³⁶

The Ninth Circuit found the district judge's colloquy with Erskine appropriately thorough and fully communicative on the dangers and disadvantages of self-representation.²³⁷ However, Erskine "did not understand the possible punishment he faced at the time he opted to forgo counsel"²³⁸ because of the district court's erroneous assent to his statement that the maximum penalty applicable was one year imprisonment.²³⁹ Therefore, Erskine did not "intelligently and voluntarily waive his Sixth Amendment right" and, as such, was entitled to a new trial."²⁴⁰

B. Circuits Applying a Plain Error Standard of Review

No circuit has exclusively applied a plain error standard of review to appeals of waiver of counsel. However, the U.S. Courts of Appeals for the

231. *Id.* at 1166.

232. *Id.* at 1166–67.

233. See Gallun, *supra* note 76, at 563.

234. See *Erskine*, 355 F.3d at 1166. An Eleventh Circuit panel, finding *Erskine*'s reasoning persuasive, added that plain error review would also be "nonsensical" because preserving the issue for appeal would require defendants "to recognize their own inability to represent themselves and object to their own record to proceed pro se." *United States v. Johnson*, 24 F.4th 590, 601 (11th Cir. 2022). A Fourth Circuit dissent echoed this reasoning, arguing that plain error review is inappropriate because it required the defendant to "(1) recognize his own mental infirmities, and (2) object to his own motion to proceed pro se." *United States v. Bernard*, 708 F.3d 583, 595 (4th Cir. 2013) (Diaz, J., dissenting).

235. This element was not at issue; thus, it was not addressed by the Ninth Circuit. *Erskine*, 355 F.3d at 1167–68.

236. *Id.* at 1167.

237. See *id.* at 1169. The Ninth Circuit found the district judge's colloquy fully communicative because it covered the seriousness of the charges; specific ascertainment of whether Erskine understood he would have to abide by the same rules as attorneys; broad review of rules regarding admission of evidence, jury selection, objections, and grounds for appeal and because he "repeatedly emphasized the importance of counsel." *Id.* at 1168.

238. The Ninth Circuit underscored the importance of timing in determining whether the defendant validly waived their right to counsel, explaining that the pertinent inquiry is whether Erskine understood his possible penalty "at the particular stage of proceedings at which he purportedly waived his right to counsel," not "what the record reveals about Erskine's understanding of the possible penalty throughout the different stages of the proceedings." *Id.* at 1169.

239. *Id.* at 1171.

240. *Id.*

Fourth Circuit,²⁴¹ Sixth Circuit,²⁴² and Eleventh Circuit,²⁴³ have utilized a plain error standard in certain instances. Circuits applying a plain error standard typically do so in instances where (1) the issue of valid waiver is raised for the first time on appeal and (2) appointed counsel represented the defendant at the time of the *Faretta* colloquy or in posttrial proceedings.

1. The Sixth Circuit:

United States v. Modena

Michael Modena was indicted for conspiracy to defraud the United States for helping a group of five brothers set up and administer sham trusts to hide their income and avoid paying federal income taxes.²⁴⁴ At his initial pretrial conference, Modena informed the magistrate judge that he wished to represent himself.²⁴⁵ The magistrate judge questioned Modena, and he responded that he understood the difficulties of representing himself and wished to do so anyway.²⁴⁶ Based on his answers and demeanor, the magistrate judge concluded that Modena knowingly and voluntarily waived his right to counsel.²⁴⁷

Five days later, Modena sent a letter to the district court requesting counsel be appointed for him, but he withdrew this request three days after.²⁴⁸ At the final pretrial conference, Modena affirmed his desire to represent himself, which the district court permitted without further inquiry.²⁴⁹ At trial, the government called thirty witnesses and presented more than 200 exhibits; Modena “sat silent . . . raise[d] no objections and present[ed] no defense on his own behalf.”²⁵⁰ The jury found Modena guilty.²⁵¹ Modena subsequently requested assistance from an attorney qualified in tax matters for the sentencing proceedings.²⁵² While waiting for a response, Modena declined to participate in a presentence interview without counsel, and the corresponding investigation report was prepared without Modena’s input.²⁵³ Subsequently, the district court informed Modena that “the Federal Public Defender had already been appointed to provide any assistance that he might

241. Compare *supra* Part II.B.2 (plain error), and *United States v. Rodgers*, 537 F. App’x 273, 274 (2014) (per curiam) (same), with *infra* note 285 and accompanying text (de novo), and *United States v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005) (same).

242. Compare *supra* Part II.B.1 (plain error), with *infra* note 285 and accompanying text (de novo), with *United States v. Carmichael*, 676 F. App’x 402, 408 (6th Cir. 2017) (“We need not decide which standard of review applies here, however, because [defendant’s] claim fails under both.”).

243. Compare *supra* Part II.B.3 (de novo), with *United States v. Talley*, 315 F. App’x 134, 136 (11th Cir. 2008) (per curiam) (plain error).

244. *United States v. Modena*, 302 F.3d 626, 629 (6th Cir. 2002).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 629–30.

need.”²⁵⁴ The court sentenced Modena to sixty months’ imprisonment and three years of supervised release.²⁵⁵

On appeal, Modena contended that the district court erred in concluding he knowingly and voluntarily waived his right to counsel.²⁵⁶ The Sixth Circuit reviewed for plain error because Modena raised the argument “for the first time on appeal” and other Sixth Circuit criminal cases applied plain error review when the criminal defendant failed to “object below.”²⁵⁷

The Sixth Circuit affirmed the validity of Modena’s waiver.²⁵⁸ The court reasoned that the magistrate judge “conducted the required colloquy” and the district judge did not need to conduct a second inquiry because Modena had an “interim change of heart regarding his decision to proceed pro se” as he “reiterated his desire to proceed pro se” at the final pretrial conference.²⁵⁹ Accordingly, Modena’s Sixth Amendment right was not compromised.

2. The Fourth Circuit:

United States v. Bernard

On April 22, 2009, a grand jury indicted Michael Defonte Bernard on charges of possession with intent to distribute, conspiracy to possess with the intent to distribute fifty kilograms or more of marijuana, and possession of a firearm in furtherance of a drug trafficking offense.²⁶⁰ The district court ordered an evaluation of Bernard because concerns were raised about his mental health.²⁶¹ Emotionally and physically abused as a child, Bernard suffered from severe depression and mental illness, including chronic schizophrenia and paranoia.²⁶² Bernard also attempted suicide at least three times, was involuntarily committed to mental health institutions at least four times, and on many of these occasions was found to be using cocaine and marijuana to cope.²⁶³

A government psychologist recommended Bernard be found incompetent to stand trial because of his schizophrenia, paranoid delusions, and disorganized thought process.²⁶⁴ At the district court’s competency hearing, it found Bernard incompetent and ordered he receive treatment.²⁶⁵ Five months later, a second government psychologist recommended Bernard be found competent to stand trial because the antipsychotic, antidepressant, and

254. *Id.* at 630.

255. *Id.*

256. *Id.*

257. *Id.*; see also *United States v. Jones*, 108 F.3d 668, 676 (6th Cir. 1997) (en banc) (“Plain error review applies even if the forfeited assignment of error is a constitutional error.”).

258. *Modena*, 302 F.3d at 631.

259. *Id.*

260. *United States v. Bernard*, 708 F.3d 583, 586 (4th Cir. 2013).

261. *Id.*

262. *Id.* at 585.

263. *Id.* at 585–86.

264. *Id.* at 586.

265. *Id.*

antianxiety medication he was taking enabled him to “sufficiently understand the judicial proceedings against him and to assist his counsel.”²⁶⁶

The district court held another competency hearing to address (1) the second psychologist’s report and (2) Bernard’s appointed counsel’s motion to withdraw based on Bernard’s request to proceed pro se.²⁶⁷ At the hearing, defense counsel did not oppose a finding that Bernard was competent to stand trial.²⁶⁸ Defense counsel further posited that since Bernard was competent to stand trial, he should also be found competent to waive counsel.²⁶⁹ In response, the judge engaged Bernard in a colloquy concerning his request to waive counsel.²⁷⁰ Satisfied, the district court granted defense counsel’s motion to withdraw and Bernard’s request to waive counsel, though Bernard consented to his court-appointed attorney remaining as standby counsel.²⁷¹ Afterward, the court privately conferred with the government’s counsel and defense counsel to discuss Bernard’s competency going forward.²⁷² Namely, they discussed that the issue of Bernard’s competency was “fluid”: the judge was comfortable with Bernard’s competency at the time, but the judge might not remain so.²⁷³ “In this posture, the case proceeded to trial.”²⁷⁴

At trial, Bernard made opening and closing statements, testified, and had his case reopened to conduct examination of a law enforcement officer whom he previously declined to cross-examine during the government’s case-in-chief.²⁷⁵ However, Bernard did not make objections during the government’s case-in-chief, question two of the government’s witnesses, nor call witnesses on his own behalf.²⁷⁶ The jury deliberated for twelve minutes before finding Bernard guilty on all charges.²⁷⁷

Months later, the court convened a sentencing hearing at which Bernard was fully represented by his former standby counsel.²⁷⁸ The district court continued the proceeding when it became clear that Bernard’s “mental condition was wholly compromised at that time.”²⁷⁹ At the reconvened sentencing hearing, Bernard was sentenced to 180 months’ imprisonment.²⁸⁰

Bernard appealed, arguing that the district court erred in allowing him to waive counsel because it wrongly conflated the legal standards for assessing his competency to stand trial and his competency to represent himself at

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 586–87.

274. *Id.* at 587.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* The record does not indicate whether the district court appointed Bernard’s standby counsel to represent him over Bernard’s wishes or whether Bernard made the decision on his own. *Id.* at 587 n.4.

279. *Id.* at 587.

280. *Id.*

trial.²⁸¹ Bernard contended that the competency standard to represent oneself is higher following the Court's decision in *Indiana v. Edwards*.²⁸²

The Fourth Circuit reviewed the district court's decision to allow Bernard to waive counsel for plain error because the issue was raised for the first time on appeal.²⁸³ The Fourth Circuit further justified plain error review on the grounds that Bernard was not left "to his own devices during the *Faretta* proceedings" because "defense counsel initiated and actively participated in the discussion with the court regarding Bernard's request to represent himself and his own corresponding motion to withdraw."²⁸⁴ Even though defense counsel's motion to withdraw was pending, defense counsel participated with "full representational authority" until the court granted Bernard's request to represent himself, which happened late in the hearing.²⁸⁵ As such, defense counsel bore "substantial responsibility" for allowing the alleged error to pass without objection and plain error review was warranted.²⁸⁶

Applying plain error review, the Fourth Circuit affirmed the district court's finding of a knowing and intelligent waiver.²⁸⁷ First, the court rejected Bernard's argument that the elevated *Edwards* competence standard applied because it is a permissive standard, not a mandatory one.²⁸⁸ Next, the court rejected Bernard's argument that his statement—he would "have a field day with these boys [(the prosecutors)] in court"—was indicative of severe mental illness and, thus, his waiver was not knowing.²⁸⁹ The Fourth Circuit explained that many defendants proceed pro se "because they believe they are more capable than trained attorneys to conduct their own defense."²⁹⁰ So Bernard's statement—viewed in consideration with the district court's warnings against self-representation—did not offend the knowing standard for waiver of counsel.²⁹¹

281. *Id.*

282. *Id.*

283. *See id.* at 588. *But see* *United States v. Rodgers*, 537 F. App'x 273, 276 (4th Cir. 2014) (Diaz, J., concurring) ("I continue to doubt the wisdom of applying plain error review to the appeal of a pro se defendant alleging a defective *Faretta* waiver on the basis of mental incompetency, for 'it is paradoxical to expect a defendant to recognize his own "gray area" competency, and then object to his own motion to proceed pro se.'" (quoting *Bernard*, 708 F.3d at 596)).

284. *See Bernard*, 708 F.3d at 588 n.7.

285. *See id.*; *United States v. Taylor*, No. 21-4601, 2024 WL 1045228, at *4 (4th Cir. Mar. 11, 2024) ("[T]he standard of review is plain error when a represented defendant, whose counsel is advocating for their client's right to self representation, is allowed to proceed pro se."). *But see* *United States v. Ductan*, 800 F.3d 642, 648 (4th Cir. 2015) (per curiam) (finding de novo review appropriate when the court granted defense counsel's motion to withdraw early in the hearing and before a finding that the defendant waived counsel; thus, at the point the judge found waiver, the defendant was "left to his own devices"); *United States v. Johnson*, 24 F.4th 590, 601 (4th Cir. 2022) (finding de novo review appropriate when defense counsel was present at the *Faretta* hearing but not acting in a representational capacity because they sought the district court's permission to withdraw as counsel).

286. *See Bernard*, 708 F.3d at 588 n.7.

287. *See id.* at 590.

288. *See id.*

289. *See id.* at 591.

290. *See id.*

291. *See id.*

The Fourth Circuit also rejected Bernard's argument that the district court was unjustified in accepting his waiver because the court raised concerns about his competency after the *Faretta* colloquy.²⁹² The Fourth Circuit reasoned that because the district court judge was satisfied at the moment of the *Faretta* colloquy and remained alert to Bernard's behavior—including rescheduling the sentencing proceeding after observing Bernard's mental competency to be compromised—the record as a whole showed no error in the district court's acceptance of Bernard's waiver of counsel.²⁹³

3. The Eleventh Circuit:
United States v. Stanley

In *United States v. Stanley*,²⁹⁴ Rufus Harris and two codefendants were indicted for their role in a “pump and dump” scheme in which misrepresentations artificially boosted their company's stock price, allowing them to transfer substantial amounts of stock to their family members, who then sold it at inflated prices.²⁹⁵ Shortly after indictment, the court appointed Howard Jay Manchel to represent Harris and his codefendants, which Manchel did in all pretrial proceedings.²⁹⁶ At trial, after the jury was empaneled and the government gave its opening statement, Manchel informed the court that Harris requested to represent himself.²⁹⁷ The court then asked Harris if he wished to represent himself, to which Harris assented and requested Manchel be allowed to advise him in “technical matters and objections and stuff of that type.”²⁹⁸ The court obliged the request, allowing Harris to proceed pro se and appointing Manchel as standby counsel.²⁹⁹ Immediately thereafter, the judge engaged in a colloquy warning Harris about the dangers of self-representation and stating on the record that the court thought that Harris was making a “huge mistake.”³⁰⁰ Less than two hours later, the trial judge engaged Harris again, conducting an even deeper colloquy.³⁰¹ The trial resumed, with Harris representing himself during the

292. *See id.*

293. *See id.* at 591–92.

294. 739 F.3d 633 (11th Cir. 2014).

295. *Id.* at 638, 640.

296. *Id.* at 640.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

During the second set of questions, the court inquired if Harris was “in good physical health” (“Yes”); if he was “using any medication that might impair [his] judgment right now” (“No”); if he was “suffering from any physical or mental affliction or disease that might impair [his] judgment” (“No”); if he understood that he would “be required to comply with the rules of procedure and evidence during the trial even though [he was] not a lawyer” (“Yes”); if he was “making [the] decision because anyone's compelled [him] to or coerced [him] to” (“No”); if he was “aware, from talking to Mr. Manchel in preparation for this case, of whatever defenses there might be that you have” (“Yes”); and if he understood that the charges carried a

government's case-in-chief and a portion of his own case, during which he "invoked the rule of sequestration; made numerous evidentiary objections; examined witnesses; distinguished government case law while arguing in response to a motion *in limine*; and argued a Rule 29 motion."³⁰² As standby counsel, Manchel actively supported Harris by "assisting with preparation of witness subpoenas, addressing the court on Harris's behalf in responding to objections, and drafting proposed jury instructions."³⁰³

However, eight days into trial, Harris absconded, and the court refused to permit Manchel to step in due to Harris's waiver of counsel.³⁰⁴ Two days later, the jury found Harris guilty on all counts.³⁰⁵ Three days later, and after a nationwide manhunt, Harris was apprehended by federal marshals 2,000 miles away.³⁰⁶ When the sentencing hearing was convened, Manchel represented Harris, who was sentenced to 276 months' imprisonment, five years of supervised release, joint and several restitution of \$44,025,620, and a special assessment of \$80.³⁰⁷ Harris appealed, claiming that his waiver of the right to counsel was invalid and the district court erred in allowing him to conduct his own representation.³⁰⁸

In addressing the government's argument for plain error review, the Eleventh Circuit noted that it may be appropriate because Manchel represented Harris at the sentencing hearing; thus, he "easily could have challenged Harris's previous waiver before the district court."³⁰⁹ The court ultimately assessed Harris's appeal under a *de novo* standard, finding that his argument would fail when measured under either standard.³¹⁰

C. Unclear and Undecided Circuits

The Fourth, Sixth, and Eleventh Circuits—the unclear and undecided—continue to engage with the circuit split. The Fourth Circuit recognizes that applying plain error to *Faretta* appeals—when competency is at issue and counsel is involved—"is the subject of thoughtful debate and has led to a circuit split."³¹¹ The Fourth Circuit has questioned whether the court should expect a mentally ill person seeking to represent themselves to raise their own mental illness as a reason to reject their request to waive counsel; but it has reasoned that counsel "has a duty of candor to alert the court to concerns with [their] client's competency," such that plain error review is acceptable.³¹²

maximum possible prison sentence of 160 years" and "hundreds of thousands of dollars, if not over a million dollars" in possible fines ("Yes").

Id.

302. *Id.*

303. *Id.* at 641–42.

304. *Id.* at 642.

305. *Id.*

306. *Id.*

307. *Id.* at 643.

308. *Id.* at 644.

309. *Id.* at 645.

310. *Id.*

311. *United States v. Ziegler*, 1 F.4th 219, 228 (4th Cir. 2021).

312. *Id.* at 228 n.5.

The Sixth and Eleventh Circuits have often sidestepped the issue, reasoning that the appeal would fail under de novo and plain error review, so they apply the stricter standard.³¹³

When faced with an appeal where “the standard of review impact[ed] the outcome of the case,” the Sixth Circuit joined the majority of its sister circuits in applying de novo review, finding the Ninth Circuit’s reasoning in *United States v. Erskine*³¹⁴ persuasive.³¹⁵ However, subsequent panels of the Sixth Circuit continue to note the unresolved question.³¹⁶ Meanwhile, in 2022, an Eleventh Circuit panel split: the majority applied a de novo standard of review because of the prevailing view in their circuit and their sister circuits,³¹⁷ while the dissent argued that plain error review was more appropriate for the case.³¹⁸ Still, the majority acknowledged that the circuit’s precedent “leaves the question open” and refrained from establishing a binding precedent.³¹⁹

III. DE NOVO IS THE APPROPRIATE STANDARD OF REVIEW

Nearly fifty years ago, the Supreme Court recognized and constitutionally protected the right of a defendant to represent himself in *Faretta v. California*.³²⁰ Since then, litigants have invoked this right consistently,³²¹ placing district courts in the untenable position of having their decisions on waivers widely challenged on appeal—the result of a constitutional right that can be invoked in both directions.³²² Yet, the circuit courts have not adopted

313. See, e.g., *United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004); *Stanley*, 739 F.3d at 638, 640; see also *supra* Part II.B.3.

314. 355 F.3d 1161, 1163 (9th Cir. 2004).

315. *United States v. Johnson*, 24 F.4th 590, 600–01 (6th Cir. 2022); see also *supra* Part II.A.2.

316. See *United States v. Dixon*, No. 23-1400, 2024 WL 2974483, at *5 (6th Cir. June 13, 2024) (“Our court has not settled on a standard of review to apply when reviewing a trial court’s decision to allow a waiver of counsel.”).

317. *United States v. Hakim*, 30 F.4th 1310, 1318 (11th Cir. 2022) (vacating and remanding the case).

318. See *id.* at 1327 (Grant, J., dissenting). Judge Britt C. Grant reasoned that plain error review was appropriate because the defendant’s standby counsel attended the arraignment where the defendant chose to proceed pro se, kept up with the case in a standby role, and then took over representation before the jury was sworn in, thus providing ample opportunity to challenge the validity of the waiver. *Id.* at 1328. Judge Grant concluded by finding that the defendant’s conviction would stand under the plain error standard and wrote, “Misunderstandings about the exact length of the potential punishment, which are all but unavoidable given the complexity of our sentencing system, should not doom a defendant’s choice to represent himself so long as a complete review shows that he understood the nature and seriousness of the charges against him.” *Id.*

319. *Id.* at 1319 (majority opinion). Subsequent panels continue to note that the Eleventh Circuit has “not articulated the standard by which to review a district court’s revocation of a defendant’s right of self-representation.” *United States v. Butler*, 117 F.4th 1309, 1315 (11th Cir. 2024).

320. See generally *Faretta v. California*, 422 U.S. 806 (1975).

321. See Williams, *supra* note 16, at 792.

322. See Wright, *supra* note 19, at 785–86.

a uniform standard of review for these waivers.³²³ This part offers a straightforward answer to the question at the heart of this Note: what standard of review should appellate courts apply when reviewing the validity of a defendant's *Faretta* waiver? De novo.

The question of whether a criminal defendant has knowingly and intelligently waived their right to counsel is a mixed inquiry of law and fact. The factual inquiry concerns whether the defendant's "demeanor, conduct, and intonations"³²⁴ indicate they understand the risks of self-representation and "freely choose to face them."³²⁵ The legal inquiry, meanwhile, concerns whether the district court's findings of fact and assessment of the defendant's credibility support "as a legal matter the court's conclusion that a defendant waived his right to counsel."³²⁶ As such, appellate courts should defer to the district court's factual findings under the plain error standard while independently reviewing the legal question de novo. Part III.A explains how the constitutional nature of the right to waive counsel and the expectations, or lack thereof, regarding pro se defendants' legal knowledge favor a de novo standard of review. Part III.B then addresses the injustice of applying a plain error standard, as it requires that defendants rely on counsel whom they no longer desire to represent them to preserve their issue of valid waiver for appeal.

A. *De Novo Review as the Path Forward*

This section advances the arguments in favor of uniformly applying a de novo standard of review. Part III.A.1 contends that the constitutional implications of waiver support de novo review. Part III.A.2 maintains that waivers are a decided issue not subject to plain error review. Part III.A.3 reasons that criminal defendants asserting their right to proceed pro se cannot fairly be expected to object to their own waiver.

1. An Issue of Constitutional Dimension

The right of self-representation is rooted in the history and structure of the Sixth Amendment, serving as the corollary of the right to counsel.³²⁷ Thus, on appeal, the question of whether a defendant's waiver was "knowingly and voluntarily" made raises a significant constitutional issue.³²⁸ The right to counsel is essential to ensuring a fair trial for criminal defendants,³²⁹ and, by extension, the right to waive counsel is pervasive because it impacts the

323. *See supra* Part II.

324. *Gov't of V.I. v. Charles*, 72 F.3d 401, 404 (3d Cir. 1995).

325. *United States v. Stanley*, 739 F.3d 633, 645 (11th Cir. 2014).

326. *United States v. Balsiger*, 910 F.3d 942, 952 (7th Cir. 2018).

327. *Faretta v. California*, 422 U.S. 806, 832 (1975).

328. *See supra* note 205 and accompanying text.

329. *See supra* note 29 and accompanying text.

defendant's ability to exercise other fundamental rights.³³⁰ Given the importance of these rights, courts should not presume acquiescence³³¹ but should instead scrutinize the issue of waiver with the same rigor as other constitutional questions—under a *de novo* standard.³³²

The Court recently affirmed this jurisprudence, observing that the calculus changes when the issue is of a constitutional nature even when it requires the reviewing court to plunge into the factual record.³³³ Applying this charge, the Seventh Circuit distilled the factual record to determine that Balsiger was afforded eight months to retain new counsel, he relied on standby counsel, he had a strong business background, and he deliberately proceeded without counsel for the sake of appealing.³³⁴ The Seventh Circuit was then independently suited to determine that these facts indicated a knowing and intelligent waiver of counsel such that Balsiger's Sixth Amendment right was protected.³³⁵ Because self-representation implicates the Sixth Amendment and is of a sensitive nature, defendants who waive their right to counsel should be entitled to appellate review at the highest level of scrutiny permissible, similar to defendants who appeal other criminal procedure rulings, such as probable cause determinations³³⁶ and the knowingness and voluntariness of *Miranda* waivers.³³⁷ Moreover, there is no justification for reviewing *Faretta* waivers at a lower standard than other constitutional issues³³⁸ when it is settled that standards of review are often outcome determinative.³³⁹

2. An Issue Decided

The Fourth and Sixth Circuits contend that it is appropriate to apply plain error review because the issue of valid waiver was raised for the first time on appeal.³⁴⁰ This is ill-considered because "knowing and intelligent" waiver is always expressly decided by the district court and appellate courts can review any issue that has been decided by a district court, even if no objection was timely raised.³⁴¹

When a defendant requests to proceed *pro se*, the district court will ideally conduct a *Faretta* colloquy on the record to see if the defendant is waiving

330. See Schaefer, *supra* note 12, at 8.

331. *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937).

332. See *supra* note 225 and accompanying text.

333. See *U.S. Bank Nat'l Ass'n ex rel. CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018).

334. See *United States v. Balsiger*, 910 F.3d 942, 953–54 (7th Cir. 2018).

335. See *id.*

336. See *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

337. See *United States v. Shabaz*, 579 F.3d 815, 819–20 (7th Cir. 2009).

338. See *United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997) (reviewing a constitutional challenge to a deportation order *de novo*); *United States v. Hamilton*, 128 F.3d 996, 999 (6th Cir. 1997) (reviewing a constitutional challenge to admission of evidence *de novo*).

339. See Wald, *supra* note 169, at 1391.

340. See *supra* Parts II.B.1–2.

341. See *generally* Parsley, *supra* note 140.

the right with an awareness of the dangers of self-representation and of their own free will.³⁴² At the conclusion of the colloquy, the district court must determine whether the waiver is knowing and intelligent, such that the defendant may proceed pro se, or the waiver is not knowing and intelligent, such that the defendant will remain represented. Even if no formal colloquy occurs, as in *United States v. Balsiger*, the district court will reach a conclusion as to whether the defendant is waiving their right to counsel.³⁴³ As such, regardless of the procedure conducted, the district court will make a final determination on the issue of whether the defendant may proceed pro se. Therefore, the issue is never too late to raise.³⁴⁴ Accordingly, the appellate court should apply the same standard—de novo—as it would if the issue had been objected to and preserved for appeal.³⁴⁵

Appellate courts generally refrain from reviewing issues where the factual record is insufficient so as not to prejudice the parties from being able to introduce relevant evidence.³⁴⁶ However, this concern is often mitigated in *Faretta* appeals because district judges typically conduct detailed on-the-record colloquies or engage in frequent conferences that amount to knowing waiver.³⁴⁷ With a fully developed record, the appellate court is well positioned to independently assess the validity of the defendant's waiver of counsel, and the government is not prejudiced by lack of ability to develop the factual record on the matter.

3. An Issue of Unfair Expectations

If a circuit court finds that the issue of valid waiver is undecided by the district court, thus prohibiting its permission to review de novo, it possesses discretion to review issues that were not objected to in the district court.³⁴⁸ Waivers of counsel are an opportune time for circuit courts to assert their discretion and conduct de novo review because self-represented criminal defendants have two compelling reasons for not raising objections.

First, the *Faretta* Court itself clarified that a defendant's legal knowledge is not a factor in determining whether they may represent themselves and a main reason the Court remanded *Faretta*'s case.³⁴⁹ If defendants are not expected to appreciate the nuances of the *Faretta* inquiry nor the "knowing and intelligent" waiver standard, it is unrealistic to expect them to object to the adequacy or correctness of it. For example, the Ninth Circuit, rightfully, did not expect Erskine to object to the district court's erroneous assent to his misstatement of possible penalties.³⁵⁰ As a pro se defendant, Erskine was

342. See *supra* Part I.B.4.

343. *United States v. Balsiger*, 910 F.3d 942, 947 (7th Cir. 2018).

344. See generally Parsley, *supra* note 140.

345. See *supra* note 149 and accompanying text.

346. See *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

347. See *supra* Part II.B.4.

348. See 28 U.S.C. § 2106.

349. See *Faretta v. California*, 422 U.S. 806, 836 (1975); Gallun, *supra* note 76, at 563.

350. See *United States v. Erskine*, 355 F.3d 1161, 1171 (9th Cir. 2004).

not expected to know that threatening to murder or assault FBI agents carried a maximum penalty of five years' imprisonment, not one year.³⁵¹ The Ninth Circuit's de novo review, therefore, correctly pointed out the court's error and saved Erskine from falling into a peril of self-representation.³⁵² Had the Ninth Circuit applied plain error review, Erskine might have been stuck with a conviction that quintupled the stake of his self-representation.³⁵³

Second, even if defendants themselves have concerns about the thoroughness of the waiver process, objecting risks undermining their ability to represent themselves in the first place.³⁵⁴ If at the time of the waiver, the defendant contends they are unknowingly and unintelligently waiving their right to counsel, a judge is unlikely to disagree. If, after the district court's colloquy, Bernard indicated that he was unsure whether he was mentally fit to understand all the questions and warnings of proceeding pro se, in all likelihood the district court would have prohibited Bernard from representing himself.³⁵⁵ But, by saving this specific argument for appeal, Bernard was only entitled to plain error review—a far less exacting standard with which the Fourth Circuit plainly determined the judge was attentive enough to Bernard's competence.³⁵⁶ Moreover, if a district court is discretionarily imposing the *Edwards* competence standard on a defendant's right to self-representation,³⁵⁷ it will be even more difficult for the defendant to preserve the issue of waiver for appeal and still be allowed to represent themselves. As such, requiring defendants to object to their own waivers will cause constitutional rights to go unreviewed by a de novo standard or gradual erosion of the *Faretta* right—if defendants preserve their objection for appeal, they will likely not be allowed to proceed pro se. To preserve the constitutional right to self-representation, courts of appeals should therefore review all waivers of counsel de novo.

B. Plain Error Review as Unjustifiable

The Fourth, Sixth, and Eleventh Circuits contend that it is appropriate to apply plain error review when defendants are represented by counsel at their *Faretta* hearing or in posttrial proceedings after the defendant represented themselves at trial.³⁵⁸ This standard, however, is unworkable and unfairly penalizes defendants. When a defendant requests to proceed pro se,

351. See *id.*

352. See *id.*

353. See *supra* note 318 and accompanying text.

354. See *United States v. Johnson*, 24 F.4th 590, 601 (11th Cir. 2022) (finding plain error review “nonsensical” because preserving the issue for appeal would require defendants “to recognize their own inability to represent themselves and object to their own record to proceed pro se”).

355. See *supra* Part II.B.2.

356. See *supra* Part II.B.2.

357. See Beck, *supra* note 125, at 458–59.

358. See *supra* Parts II.B.2–3.

appointed counsel often simultaneously moves to withdraw from the case.³⁵⁹ As a result, at the time of the *Faretta* hearing, defense counsel's motion to withdraw is pending. Whether the motion is granted at the beginning or end of the *Faretta* hearing, the fact remains that the defendant wishes to represent himself. Given that the *Faretta* hearing is a time of ambiguity—the defendant is not yet pro se but is seeking to achieve that status—there is no guarantee that defense counsel will step in to preserve an issue on behalf of the defendant out of respect for the pro se status the defendant seeks. Nor is there a guarantee that standby counsel will step in to object to the defendant's self-representation for the same reason. So, it is unjust to hold defendants to a plain error standard, given that any responsibility for preserving errors—if any—rests solely with defense counsel.

Although defendants who proceed pro se forfeit the right to claim ineffective assistance of counsel,³⁶⁰ they are still reliant on their counsel to protect their interests until the court officially grants their right to self-representation. This creates an unfair disadvantage for defendants who are not expected to fully understand the perils of self-representation.

CONCLUSION

Litigants will continue to exercise their right to self-representation and circuit courts will continue to review the validity of *Faretta* waivers. The time is now to standardize application of a de novo standard of review to *Faretta* waivers. Self-representation is a sensitive issue of constitutional dimension such that appellate courts should apply a nondeferential standard out of respect for the pervasiveness of the right. Further, the issue of waiver is always decided by the district court, such that no objection is required for circuit courts to review de novo. Moreover, requiring defendants to object to their own waivers is a nonsensical solution—a defendant's legal knowledge is not a factor for valid waiver, and district courts are unlikely to allow defendants who question their own waiver to exercise the right to proceed pro se. Finally, plain error review is unjustifiable even for defendants represented at their *Faretta* hearings or in posttrial proceedings because it requires defendants to rely on counsel whom they no longer wish to provide them representation.

359. See *supra* note 285 and accompanying text.

360. See *supra* note 71 and accompanying text.