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## **Choose Your Own Path: A Defendant's Constitutional Right to Legal Representation**

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## Choose Your Own Path: A Defendant's Constitutional Right to Legal Representation

Cover Page Footnote

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## CHOOSE YOUR OWN PATH: A DEFENDANT'S CONSTITUTIONAL RIGHT TO LEGAL REPRESENTATION

### COURT OF APPEALS OF NEW YORK

People v. Crampe<sup>1</sup>  
(decided October 13, 2011)

#### I. INTRODUCTION

Recently, the New York Court of Appeals reviewed two cases, *People v. Crampe*<sup>2</sup> and *People v. Wingate*,<sup>3</sup> which were consolidated for a determination on whether defendants properly waived their right to legal counsel.

In *Crampe*, the defendant was convicted of “criminal possession of a controlled substance” in the seventh-degree after conducting his own defense.<sup>4</sup> He appealed the conviction to the appellate court and the decision was affirmed.<sup>5</sup> The appellate court held that the trial court had adequately cautioned the defendant about the inherent risks of self-representation and the significance of being represented by legal counsel.<sup>6</sup> The court further found that, based on the defendant’s arrest and conviction records, it was clear that he was familiar with the workings of the adversarial system.<sup>7</sup>

Subsequently, the defendant appealed his conviction to the Court of Appeals.<sup>8</sup> The court ruled that the trial court had failed to conduct the searching inquiry necessary to ensure that the defendant was cognizant of the dangers of self-representation, prior to allowing

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<sup>1</sup> 957 N.E.2d 255 (N.Y. 2011).

<sup>2</sup> 907 N.Y.S.2d 102 (App. Term 2010).

<sup>3</sup> 892 N.Y.S.2d 867 (App. Div. 2d Dep’t 2010).

<sup>4</sup> *Crampe*, 957 N.E.2d at 257, 258.

<sup>5</sup> *Id.* at 258.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 256-57.

him to proceed pro se.<sup>9</sup> As a result, the court ordered a new trial.<sup>10</sup>

In *Wingate*, the defendant was convicted of “fourth-degree criminal possession of stolen property and seventh-degree criminal possession of a controlled substance.”<sup>11</sup> He appealed the conviction to the appellate division, where the conviction for “possession of stolen property” was reversed and the charge dismissed from the indictment; however, the rest of the decision was affirmed.<sup>12</sup> The court determined that the defendant had properly waived his right to counsel even though the suppression court that had allowed him to waive the right had not conducted the proper inquiry prior to allowing him to do so.<sup>13</sup> Upon review by the Court of Appeals, the appellate court’s ruling was modified and the case remitted to the lower court for a “new suppression hearing.”<sup>14</sup> The Court of Appeals directed that if the defendant prevailed at the new hearing, a new trial was to be granted, but if the prosecution prevailed, the judgment was to be amended as such.<sup>15</sup>

Though the requisite steps to be taken by a court prior to allowing a defendant to waive the right to counsel and proceed pro se are well established in the New York courts, this Note will analyze whether the decision in *Crampe* and those of its predecessors are consistent with their federal counterparts.

## II. THE OPINION: *PEOPLE V. CRAMPE*

### A. Crampe

Defendant Crampe was arrested and brought up on charges of “seventh-degree criminal possession of a controlled substance” for his alleged possession of a vial of phencyclidine (“PCE”).<sup>16</sup> At a preliminary hearing, the defendant advised the town justice that he had not retained an attorney for representation.<sup>17</sup> When asked if he

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<sup>9</sup> *Crampe*, 957 N.E.2d at 263.

<sup>10</sup> *Id.* at 265.

<sup>11</sup> *Id.* at 258, 262.

<sup>12</sup> *Id.* at 262.

<sup>13</sup> *Id.*

<sup>14</sup> *Crampe*, 957 N.E.2d at 265.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 257.

<sup>17</sup> *Id.*

wished to proceed pro se, he responded “I guess[ ] so, your Honor.”<sup>18</sup> Thereafter, the judge provided him with a pretrial order advising him of his right to counsel and reviewed it with him.<sup>19</sup> The judge informed him that failure to accept the recommendation to the Legal Aid Society would constitute both a waiver of his right to representation by an attorney and an election to continue pro se.<sup>20</sup> The judge further advised him to be prepared for trial on the next scheduled date and that failure to “appear” with counsel would constitute an “acknowledgment of the advice and warnings” of the court with regard to the right to counsel.<sup>21</sup> The defendant signed the order, and as he left, the judge advised him to get an attorney.<sup>22</sup> At trial, he proceeded pro se with counsel standing by for assistance.<sup>23</sup> The jury found him guilty and he was sentenced to six months in jail.<sup>24</sup>

On appeal, the judgment was affirmed, with the court deciding that the town court had adequately warned the defendant of the importance of representation by legal counsel and the disadvantages associated with self-representation.<sup>25</sup> The court stated that the defendant’s previous arrests and convictions were evidence that he was familiar with the way the criminal justice system operated.<sup>26</sup> On the subsequent appeal, the Court of Appeals disagreed with the appellate court.<sup>27</sup> It found that the trial court’s inquiry was insufficient to satisfy the searching inquiry necessary prior to allowing the defendant to represent himself.<sup>28</sup>

### B. Wingate

Defendant Wingate was arrested and charged with “fourth-degree criminal possession of stolen property and seventh-degree criminal possession of a controlled substance,” after police discov-

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<sup>18</sup> *Id.*

<sup>19</sup> *Crampe*, 957 N.E.2d at 257.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 257-58.

<sup>23</sup> *Id.* at 258.

<sup>24</sup> *Crampe*, 957 N.E.2d at 258.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 258.

<sup>27</sup> *Id.* at 263.

<sup>28</sup> *Id.*

ered him in a stolen van with a crack pipe in his pocket.<sup>29</sup> The defendant was initially assigned an attorney, but his attorney was later relieved after the defendant threatened to make a report “to the grievance committee.”<sup>30</sup> The court assigned a new attorney, but the defendant asked to proceed pro se with newly appointed counsel providing assistance, if required.<sup>31</sup> The judge advised the defendant to first consult with his attorney, but he neglected to do so.<sup>32</sup> At the next appearance, the attorney asked to be relieved because the defendant no longer desired her representation and their communication was ineffective.<sup>33</sup>

The defendant told the judge that the attorney had tried to convince him to change his defense strategy.<sup>34</sup> When the judge asked if he wished to represent himself at the suppression hearing, he answered in the affirmative, but requested an attorney’s assistance as he had done before.<sup>35</sup> The judge explained to him that he was not entitled to “hybrid representation” and again asked him if he wished to proceed pro se.<sup>36</sup> The defendant again responded in the affirmative.<sup>37</sup> The judge then went through a series of questions to ensure that the defendant understood his request, and granted him permission to represent himself.<sup>38</sup>

At the suppression hearing that same day, the officer in charge made a recommendation that the defendant’s motion be denied and the evidence of the crack pipe be admitted, as well as statements he made to police.<sup>39</sup> When the case went back to the trial court, the judge adopted the recommendations of the hearing officer and the defendant’s motion was denied.<sup>40</sup> Five months later at trial, another judge went over the defendant’s lack of legal representation again.<sup>41</sup> He spoke to the defendant about a deal he had refused for a

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<sup>29</sup> *Crampe*, 957 N.E.2d at 258.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Crampe*, 957 N.E.2d at 258.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Crampe*, 957 N.E.2d at 258-59.

<sup>40</sup> *Id.* at 259.

<sup>41</sup> *Id.*

minimum sentence of one and one-half to three years and about the fact that he was now facing fifteen years to life if convicted and sentenced as a persistent felon.<sup>42</sup> Further, the judge stressed that based upon his years of experience, his recommendation was that the defendant not proceed pro se.<sup>43</sup> In response, the defendant informed the judge that he had studied law for ten to twelve years on the street and in libraries, and had received legal research certificates.<sup>44</sup>

The defendant's motion for a speedy trial was denied, and again, when his case was called for trial, the same judge asked him if he had considered representation by an attorney.<sup>45</sup> He responded that he still wished to proceed pro se.<sup>46</sup> Prior to allowing him to proceed, the judge appointed standby counsel to assist him and went through a series of questions with regard to the defendant's academic record, work history and his knowledge about "the criminal justice system."<sup>47</sup> The judge also inquired as to whether the defendant had been "coerced or threatened" or influenced in any way to proceed pro se.<sup>48</sup> He went over the fact that most pro se defendants are unsuccessful and that he would be held to the same expectations as an attorney.<sup>49</sup> The case then went to trial and the defendant was convicted and sentenced to a term of two to four years.<sup>50</sup>

The defendant appealed his conviction and the Appellate Division, Second Department affirmed the trial court's decision with respect to the defendant's waiver of counsel.<sup>51</sup> The court, after a review of the complete record, concluded that even though the suppression court had not conducted a proper waiver colloquy, the record demonstrated that the defendant had properly waived his right to legal representation and had voluntarily chosen self-representation.<sup>52</sup>

However, on a subsequent appeal, the Court of Appeals re-

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Crampe*, 957 N.E.2d at 259.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 259-60.

<sup>47</sup> *Id.* at 260.

<sup>48</sup> *Id.*

<sup>49</sup> *Crampe*, 957 N.E.2d at 261.

<sup>50</sup> *Id.* at 262.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

jected the appellate court's ruling.<sup>53</sup> It found that the colloquy by the suppression court was insufficient because it had merely informed the defendant of the risk of being convicted of a felony, but had not adequately warned him of the pitfalls and difficulties inherent with self-representation.<sup>54</sup> The court also observed that, though the colloquy conducted by the trial court was sufficient because it was extensive and notified the defendant of the challenges inherent in proceeding pro se, the warnings to defendant were "incapable of retrospectively" correcting the error made by the suppression court.<sup>55</sup>

### III. THE FEDERAL APPROACH

Under the federal approach, the issue of waiver of the right to counsel is marginally different from the New York state approach. Under federal law, a defendant's constitutional right to counsel is protected by the Sixth Amendment.<sup>56</sup> This right developed and was enumerated in the Sixth Amendment as a means of countering the prosecution's advantage of familiarity with courtroom procedures and the criminal adjudication process.<sup>57</sup> As a result, it has been clearly established that this all-important right must extend through all the critical stages of a trial.<sup>58</sup> Due to the importance of this safeguard, waiver of the right must be intentionally relinquished or abandoned and acquiescence is not usually presumed as waiver.<sup>59</sup>

The federal approach requires that waiver be made knowingly, intelligently, and with an awareness of the possible negative consequences of such a decision.<sup>60</sup> A defendant need not have the same level of knowledge and experience as an attorney to waive this right.<sup>61</sup> An intelligent waiver is considered one where the defendant

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<sup>53</sup> *Id.* at 257.

<sup>54</sup> *Crampe*, 957 N.E.2d at 263.

<sup>55</sup> *Id.* at 263-64.

<sup>56</sup> *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004).

<sup>57</sup> See ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 4 (1992) (stating that the right to counsel evolved because the prosecutor had "great power" because he was familiar with criminal procedure, juries, and officers of the court).

<sup>58</sup> *Tovar*, 541 U.S. at 80-81.

<sup>59</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>60</sup> *Tovar*, 541 U.S. at 81. See also *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (stating that a defendant may "competently and intelligently" waive his right to counsel).

<sup>61</sup> *Tovar*, 541 U.S. at 89.

makes the choice knowing “what he is doing and his choice is made with eyes wide open.”<sup>62</sup> In order to ascertain whether a defendant is making the decision knowingly and intelligently, a federal court is required to conduct a colloquy with the defendant.<sup>63</sup> The standard employed for the colloquy is less stringent for the earlier stages of the criminal process and more rigorous for proceeding to trial.<sup>64</sup> If a defendant decides to collaterally attack a conviction, he bears the burden of proving that he did not effectively waive his right to counsel.<sup>65</sup>

### A. Supreme Court Cases

One of the earliest cases in which the Supreme Court dealt with a defendant’s right to counsel was *Powell v. Alabama*.<sup>66</sup> In *Powell*, three black youths were convicted and sentenced to death for the rape of two white girls.<sup>67</sup> The issue before the Court was whether the defendants’ constitutional right to a fair trial was violated by the denial of legal representation.<sup>68</sup>

The defendants’ trials, which began six days after the indictments, were all completed in one day and without representation by legal counsel.<sup>69</sup> An out-of-state attorney appeared at the trials and informed the court that he had not been retained, but was appearing out of courtesy to assist whomever the court assigned.<sup>70</sup> He informed the court that he had not had sufficient time to prepare for trial and was not familiar with Alabama procedure.<sup>71</sup> Another attorney from the local bar had also stepped forward and volunteered to assist;<sup>72</sup> however, the court never formally appointed counsel to represent the defendants.<sup>73</sup>

On the question of legal representation, the Supreme Court

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<sup>62</sup> *Id.* at 88 (quoting *Adams*, 317 U.S. at 279).

<sup>63</sup> *Id.* at 89.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 92.

<sup>66</sup> 287 U.S. 45 (1932).

<sup>67</sup> *Id.* at 49, 50. On appeal, defendants also claimed that they were not afforded a “fair, impartial and deliberate trial” and that the trial was presided over by a jury not consisting of members of their race. *Id.* at 50.

<sup>68</sup> *Id.* at 52.

<sup>69</sup> *Id.* at 50, 53.

<sup>70</sup> *Powell*, 287 U.S. at 53.

<sup>71</sup> *Id.* at 55.

<sup>72</sup> *Id.* at 56.

<sup>73</sup> *Id.*

recognized that the Sixth Amendment established that all criminal defendants had a right to be represented by legal counsel.<sup>74</sup> The Court went on to conclude that the state court's failure to allow the defendants sufficient time and an opportunity to secure counsel was a violation of their due process rights.<sup>75</sup> The Court further emphasized that when a defendant is unable to retain counsel for his defense and he is incapable of conducting his own defense, the court is required to appoint counsel on his behalf.<sup>76</sup>

Six years later, in *Johnson v. Zerbst*,<sup>77</sup> the Supreme Court reaffirmed the Sixth Amendment's protection of a defendant's right to counsel and established the criteria by which federal courts were to evaluate a defendant's waiver.<sup>78</sup> In *Zerbst*, the defendant, unrepresented by counsel, was convicted of a felony for uttering, passing, and possessing counterfeit currency.<sup>79</sup> The Court in its decision stressed the importance of protecting a defendant's Sixth Amendment right, stating that "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not" be done.<sup>80</sup> The case was remanded to the district court for review and instructions were given that if the defendant met his burden of showing that he did not "competently and intelligently" waive his right to counsel, his petition for habeas corpus was to be granted.<sup>81</sup>

The Court in *Zerbst* observed that the protections enshrined in the Sixth Amendment exist because the average citizen does not possess the legal skill necessary to defend against a claim by the trained and experienced prosecution that could deprive him of his life or lib-

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<sup>74</sup> *Id.* at 66.

<sup>75</sup> *Powell*, 287 U.S. at 71.

<sup>76</sup> *Id.* See GARCIA, *supra* note 57, at 5 (finding that the court in *Powell* broadened the scope of Sixth Amendment protection to include the appointment of counsel).

<sup>77</sup> 304 U.S. 458 (1938).

<sup>78</sup> See GARCIA, *supra* note 57, at 6 (stating that *Zerbst* widened the parameters of *Powell* by setting forth standards for effective waiver of counsel).

<sup>79</sup> *Zerbst*, 304 U.S. at 459-60. The defendant was arrested along with another perpetrator, Bridwell. *Id.* at 459. Both men were enlisted in the United States Marine Corps and were on leave at the time. *Id.* at 460. Both men lived in other states and had no friends, relatives, or acquaintances in the trial state. *Id.* Both had limited education and no money. *Id.* Both were represented by counsel in preliminary hearings but informed the court at their arraignment that they did not have legal counsel. *Zerbst*, 304 U.S. at 460. However, they responded in the affirmative when asked if they were prepared for trial. *Id.*

<sup>80</sup> *Id.* at 462.

<sup>81</sup> *Id.* at 469.

erty.<sup>82</sup> The court emphasized that self-representation may put the defendant at a disadvantage because he may not know “the rules of evidence,” and thus, may be improperly charged and convicted with improper or inadmissible evidence.<sup>83</sup>

In *Faretta v. California*,<sup>84</sup> the court further clarified and solidified the federal approach to the issue of waiver. Even though the court’s main focus was a defendant’s right to conduct his own defense, the decision had important and far-reaching implications for the question of waiver, as proper waiver of the right to counsel is a prerequisite to self-representation.

The Court in *Faretta* announced that the Sixth Amendment’s right to counsel also encompassed an inextricable right to conduct one’s own defense.<sup>85</sup> Operating under this construct, the Court found that the trial court had violated the defendant’s constitutional right by denying him the opportunity to represent himself after he “had clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel.”<sup>86</sup> The Court held that the waiver was valid because the defendant was “literate,” “competent,” and knew that he was voluntarily waiving his right to counsel and choosing self-representation.<sup>87</sup> The Court pointed out that the defendant’s understanding of the rules of the judicial system was irrelevant to his waiver.<sup>88</sup> However, the dissent in *Faretta* questioned whether every defendant, “even the most uneducated and inexperienced,” should be able to insist upon self-representation when charged with a crime.<sup>89</sup> This question strikes at the delicate balance between a defendant’s interest in deciding his own destiny and the government’s countervailing interest in affording every citizen a fair trial.

On one hand, it could be asserted that in actuality, a defendant with less education will probably be affected more adversely by the criminal justice system than a defendant with more education, and thus, contrary to the dissent’s view, would require more protection.

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<sup>82</sup> *Id.* at 462-63.

<sup>83</sup> *Zerbst*, 304 U.S. at 463.

<sup>84</sup> 422 U.S. 806 (1975).

<sup>85</sup> *Id.* at 821.

<sup>86</sup> *Id.* at 835, 836.

<sup>87</sup> *Id.* at 835.

<sup>88</sup> *Id.* at 836.

<sup>89</sup> *Faretta*, 422 U.S. at 836 (Burger, J., dissenting).

This is because he is more likely to engage in activity that will cause interaction with the criminal justice system. A defendant has a strong interpersonal interest in determining his fate no matter his level of education because the criminal adjudication process could ultimately rob him of his liberty and have a profound impact on his life.

On the other hand, the government's countervailing interest in affording every defendant a fair trial is just as worthy of consideration as a defendant's interests. The government has a valid interest in the public's continued trust, respect, and confidence in the judicial system.<sup>90</sup> Citizens need to believe that courts will protect their interest even when they may be in a compromised and vulnerable position. This is the very reason why the Sixth Amendment was instituted—to ensure that all citizens had the basic right and that the right would not arbitrarily be dispensed. Delving into a defendant's background and level of education is a very delicate issue and could likely result in arbitrary judgments especially in circumstances where there is no immediate quantifiable level of education.

Later, in *Patterson v. Illinois*,<sup>91</sup> the Court distinguished between the constitutional minimum of a waiver at the pretrial stage of the criminal process and waiver during trial. There, the Court was called upon to decide whether the post-indictment interrogation of a defendant without the presence of an attorney violated his constitutional right.<sup>92</sup> The Court established that *Miranda* warnings satisfy the constitutional minimum of informing a defendant of his right to counsel during post-indictment questioning, and thus, provide a sufficient basis for satisfying the knowing and intelligent components of a constitutional waiver at the pretrial stage.<sup>93</sup>

In *Patterson*, the defendant, a member of a street gang, was convicted of the murder of a rival gang member who was found dead after being involved in an altercation with defendant's gang.<sup>94</sup> The defendant voluntarily answered questions at the time of his arrest and reviewed and signed a *Miranda* waiver.<sup>95</sup> He later moved to suppress

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<sup>90</sup> See GARCIA, *supra* note 57, at 16 (stating that the Supreme Court has acknowledged the importance of the assistance of counsel to the adversarial process).

<sup>91</sup> 487 U.S. 285 (1988).

<sup>92</sup> *Id.* at 287.

<sup>93</sup> *Id.* at 300.

<sup>94</sup> *Id.* at 287, 289.

<sup>95</sup> *Id.* at 287, 288. Pre-indictment, the defendant gave a statement about the initial fight between the gangs and denied any involvement in the victim's death. *Patterson*, 487 U.S. at 287. However, after indictment, the defendant gave statements describing his role in the

his statements to the police claiming they had been obtained in an unconstitutional manner.<sup>96</sup> The Court found that the *Miranda* warnings provided to the defendant were sufficient for a proper waiver as he had been informed of his right to have an attorney present during questioning and that if he could not afford one, the court would appoint one.<sup>97</sup> In its decision, the Court differentiated between waiver during post-indictment questioning and waiver during trial.<sup>98</sup> The Court emphasized that the less stringent standard during post-indictment questioning exists because the risks a defendant faces are more obvious than at trial and there is also a less substantial risk of exposure to the “dangers and disadvantages of self-representation” during post-indictment questioning.<sup>99</sup>

Recently, in *Iowa v. Tovar*,<sup>100</sup> the Supreme Court affirmed the relevance of the requirements for the constitutional waiver of the right to legal counsel. There, the defendant was arrested for “operating a motor vehicle” while intoxicated (“OWI”).<sup>101</sup> He subsequently signed a form waiving his right to counsel while being questioned by the police.<sup>102</sup>

At an initial hearing, the defendant waived his application for a court-appointed attorney.<sup>103</sup> At his arraignment, he informed the judge that he wished to represent himself and subsequently pled guilty to the charge.<sup>104</sup> Prior to granting the request, the court conducted a colloquy and informed the defendant that he was entitled to legal representation and a speedy public trial by a jury.<sup>105</sup> The court advised the defendant that if he waived his right to counsel and represented himself he would lose the right to remain silent at trial, the right to the presumption of innocence, and the right to subpoena witnesses.<sup>106</sup> He was also informed of the maximum and minimum pen-

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murder. *Id.* at 288.

<sup>96</sup> *Id.* at 289.

<sup>97</sup> *Id.* at 293.

<sup>98</sup> *Id.* at 299.

<sup>99</sup> *Patterson*, 487 U.S. at 299-300.

<sup>100</sup> 541 U.S. 77 (2004).

<sup>101</sup> *Id.* at 81-82. The defendant was a college student at the time of his arrest. *Id.* at 81. His blood alcohol level was 0.194 at the time of his arrest. *Id.* at 82.

<sup>102</sup> *Id.*

<sup>103</sup> *Tovar*, 541 U.S. at 82.

<sup>104</sup> *Id.* at 82.

<sup>105</sup> *Id.* at 83.

<sup>106</sup> *Id.*

alty his charge carried.<sup>107</sup> The defendant affirmed to the court that he understood the risks he was undertaking and that he still wished to proceed pro se.<sup>108</sup>

Thereafter, the defendant was charged with a second OWI, but was represented by counsel at that trial.<sup>109</sup> When the defendant was charged with a third OWI in addition to driving with a suspended license (which ranked as a class D felony), he filed a motion of law points to prevent his first OWI conviction from being used to enhance the current charge.<sup>110</sup> He claimed that his waiver of counsel was invalid because it had not met constitutional requirements.<sup>111</sup> The trial court denied his motion and he was subsequently convicted.<sup>112</sup>

In turn, the Supreme Court remanded the case for further proceedings because it found that the state's formal admonitions to the defendant were not clearly sufficient to inform the defendant of the dangers and disadvantages of waiver.<sup>113</sup> The Court reaffirmed the precedent that the information to be communicated to a defendant prior to an intelligent waiver varies according to the "facts and circumstances" of the case.<sup>114</sup> It clarified that a "scripted" formal inquiry was not required for constitutional waiver even though states are free to mandate such inquiries.<sup>115</sup> The Court further stated that the requirements of a knowing and intelligent waiver are satisfied where the court apprises the defendant of the "nature of the charges" he faces, the right to speak to an attorney regarding his plea, and the minimum and maximum jail-time he faces if a guilty plea is entered.<sup>116</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Tovar*, 541 U.S. at 83, 84.

<sup>109</sup> *Id.* at 85.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 86. The defendant was sentenced to 180 days in jail, three years probation and leveled a fine of \$2,500 plus costs and surcharges for the third OWI offense. *Tovar*, 541 U.S. at 86. He received thirty days in jail to run concurrently with the OWI sentence and a \$500 fine for driving with a suspended license. *Id.*

<sup>113</sup> *Id.* at 93.

<sup>114</sup> *Id.* at 92.

<sup>115</sup> *Id.* at 92, 94.

<sup>116</sup> *Tovar*, 541 U.S. at 81.

## B. Circuit Split

While the *Faretta* decision established the standard that a court must satisfy prior to allowing a defendant to proceed pro se, it did not set out a specific test or set of rules to be met to satisfy this standard.<sup>117</sup> Since *Faretta*, the federal circuit courts have been split with regard to the procedure to be used to establish that a defendant's waiver of counsel is knowing, intelligent, and voluntary.<sup>118</sup> Most circuits seem to favor a less formal approach, while others seem to prefer a more formal one.<sup>119</sup> The Second Circuit endorses a less formal

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<sup>117</sup> See, e.g., *Swiger v. Brown*, 86 Fed. App'x. 877, 881 (6th Cir. 2004) (acknowledging that federal appeals courts have concluded that "*Faretta* does not clearly establish that formal warnings by the trial court are required to establish a knowing, voluntary and intelligent waiver of the right to counsel").

<sup>118</sup> Cf. *United States v. McDowell*, 814 F.2d 245, 249 (6th Cir. 1987) (acknowledging that since *Faretta*, many courts have "addressed the question of the type of record necessary" to establish waiver but there is a split in the circuit courts); accord, Brian H. Wright, Comment, *The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro Se with a Defendant's Right to Assistance of Counsel*, 76 MARQ. L. REV. 785 (1993) (stating that there has been a split in the federal circuit courts of appeal with regard to constitutional waiver of the right to counsel).

<sup>119</sup> See *United States v. Benson* 686 F.3d 498, 503 (8th Cir. 2012) (holding that the defendant's waiver was proper after observing that both the prosecution and the court had notified and repeatedly warned the defendant of the disadvantages and difficulties he would face if he chose to conduct his own defense, and also recognizing that the defendant had been specifically advised that he would be required to follow the "Federal Rules of Evidence and the Federal Rules of Criminal Procedure"); *Jones v. Walker*, 540 F.3d 1277, 1293 (11th Cir. 2008) (finding that the validity of waiver of counsel does not depend upon the adequacy of a trial court's warnings but is based on whether the defendant understood the choices presented and the danger of proceeding pro se and thus the warnings can be promulgated on a colloquy with the court or counsel or through the defendant's own experience); *Mallard v. Cain*, 515 F.3d 379, 382 (5th Cir. 2008) (establishing that the Fifth Circuit follows the guidelines set out in *Tovar* that no formal or scripted colloquy is necessary for constitutional waiver; all that is required is informing the defendant of the right to counsel, the nature of the charges, and the range of sentencing); *Maynard v. Boone*, 468 F.3d 665, 665 (10th Cir. 2006) (stating that the validity of a waiver depends on the totality of the circumstances which is inclusive of the defendant's background, experience, and conduct); *United States v. Frechette*, 456 F.3d 1, 12 (1st Cir. 2006) (stating that waiver is constitutional when the court informs the defendant of the right to counsel, the nature of the charges against him, and the possible punishment); *Thomas v. United States*, 357 F.3d 357, 364 (3d Cir. 2004) (stating that the Third Circuit has suggested a set of questions to provide a framework for determining whether a defendant understands the risk of proceeding pro se, but not mandating their use); *Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) (stating that the Ninth Circuit has suggested, but not mandated, a specific procedure to be followed to determine waiver of the right to counsel, and ordering its courts to inform a defendant in open court of the dangers of proceeding pro se and the nature of the charges and the possible penalties); *United States v. Singleton*, 107 F.2d 1091, 1097-98 (4th Cir. 1997) (stating that the Fourth Circuit is in agreement with a majority of circuits and does not require a precise procedure to be followed to determine waiver of the right to counsel and endorses "open court exploration of the de-

inquiry that seeks to establish a defendant's waiver based on a view of the entire record.<sup>120</sup> In contrast, the Sixth Circuit has taken a stricter approach requiring that the court perform a detailed inquiry.<sup>121</sup>

In *Torres v. United States*,<sup>122</sup> the Second Circuit dealt with the issue of whether a defendant properly waived her right to legal counsel when she refused to participate in her trial and sentencing hearing.<sup>123</sup> In *Torres*, the defendant, a self-proclaimed Puerto Rican freedom fighter, was implicated in the bombing of a building in New York City, which killed one man and injured several others.<sup>124</sup>

During the trial, the defendant refused the court's appointment of counsel, requested to represent herself, and refused to conduct a defense or participate in the trial.<sup>125</sup> Throughout the trial, the court informed the defendant of her right to counsel and the consequences associated with waiver.<sup>126</sup> The defendant insisted on representing herself and not participating in the proceedings.<sup>127</sup> She was convicted and subsequently refused to participate in her sentencing hearing.<sup>128</sup> She was eventually sentenced to life in prison.<sup>129</sup> The defendant did not appeal the conviction or sentence until fifteen years later, when she claimed that her Sixth Amendment right to counsel had been violated.<sup>130</sup>

The Second Circuit, in reviewing the defendant's claim, con-

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defendant's background and capabilities and understanding of the dangers and disadvantages of self-representation"); *United States v. Sandles*, 23 F.3d 1121, 1126 (7th Cir. 1994) (stating that the Seventh Circuit endorses a "thorough and formal inquiry" though it stops "short of ruling that a scanty inquiry, by itself, automatically establishes constitutional error" and instead looks at the whole record to determine whether a defendant properly waived the right to counsel).

<sup>120</sup> See *infra* notes 122-58.

<sup>121</sup> See *infra* notes 159-84.

<sup>122</sup> 140 F.3d 392 (2d Cir. 1998).

<sup>123</sup> *Id.* at 395.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 396. The court advised the defendant that her interests would be better served if she was represented by an attorney during jury selection, testimony, admission of evidence, and the prosecution's opening and closing arguments. *Torres*, 140 F.3d at 396. The defendant acknowledged her right to counsel on April 16, 1980 and again on May 5, 1980. *Id.* at 401.

<sup>127</sup> *Id.* at 396.

<sup>128</sup> *Id.* at 395.

<sup>129</sup> *Id.*

<sup>130</sup> *Torres*, 140 F.3d at 395. The defendant also claimed that her Fifth and Eight Amendment rights were violated. *Id.*

sidered whether she had: (i) understood that she had a choice in accepting assigned counsel or self-representation; (ii) comprehended the advantages and disadvantages of legal representation; and (iii) had the capacity to intelligently waive her right.<sup>131</sup> The court held that the record contained sufficient proof that the defendant had made a knowing and intelligent waiver.<sup>132</sup> The court further stated that it was satisfied that the district court had established that the defendant “understood her rights, knew her options, was aware of the risks and voluntarily waived her right to counsel.”<sup>133</sup> The court expressed that “there is no dispute that district courts must” assure that a defendant is aware of the dangers and pitfalls associated with proceeding pro se.<sup>134</sup> It further acknowledged that a defendant’s refusal to participate at trial might make it more difficult to determine whether the right to counsel was properly waived, but pointed out that the proper *Faretta* inquiry should be whether the defendant had the capacity and knowledge to rationally choose waiver.<sup>135</sup>

The Second Circuit again dealt with the issue of waiver in *Dallio v. Spitzer*.<sup>136</sup> There, the court acknowledged that the federal approach had not clearly established the precedent that a court must “explicitly warn a defendant of the dangers and disadvantages of proceeding pro se.”<sup>137</sup> In *Dallio*, the defendant was convicted in New York state court of second-degree murder, first-degree robbery and second-degree criminal weapon possession after he shot and killed a young woman during an armed robbery.<sup>138</sup> The defendant filed a petition for a writ of habeas corpus, which was subsequently denied by the district court.<sup>139</sup>

The district court found that the state trial court had not properly informed the defendant of the “dangers and disadvantages” of proceeding pro se as required by *Faretta*; however, the court concluded that the error was not reversible because the defendant had the

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<sup>131</sup> *Id.* at 401.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Torres*, 140 F.3d at 402.

<sup>135</sup> *Id.* at 401, 402.

<sup>136</sup> 343 F.3d 553 (2d Cir. 2003).

<sup>137</sup> *Id.* at 561.

<sup>138</sup> *Id.* at 555. The victim received three gunshot wounds in the process of the robbery, one to the chest and three to the head. *Id.*

<sup>139</sup> *Id.*

assistance of standby counsel.<sup>140</sup> The defendant subsequently appealed to the Court of Appeals, arguing that a violation of his Sixth Amendment right to legal representation had occurred when he was allowed to proceed pro se at a suppression hearing, without being warned about the dangers and pitfalls of self-representation.<sup>141</sup>

At a post indictment hearing, the defendant moved to suppress incriminating statements made to detectives in an interview after he waived his *Miranda* rights by claiming that he had not properly waived his right to counsel.<sup>142</sup> During the hearing, the defendant's attorney informed the court that his client wished to proceed pro se and that he had thoroughly discussed the decision with him and had concluded that he was competent to make such a decision.<sup>143</sup> The court then permitted the defendant to proceed pro se with his attorney as standby counsel after asking him if he was ready to proceed and he responded in the affirmative.<sup>144</sup>

While the Second Circuit affirmed the conviction, it did so without reaching the question of harmless error.<sup>145</sup> The court acknowledged that while explicit warnings about the "dangers and disadvantages" of proceeding pro se were "advisable," they were not a minimum requirement for constitutional waiver.<sup>146</sup> The court emphasized that it interpreted the part of the *Faretta* decision concerning warnings as "dictum," and therefore, not clearly established law.<sup>147</sup>

Even within the Second Circuit there is disagreement between the judges as to what level of inquiry satisfies the warning requirement. In a concurring opinion by Judge Katzmman, he acknowledged that even though he agreed with the majority's decision he arrived there by means of a different analysis.<sup>148</sup> He rejected the majority's finding that clear federal law had not established the requirement that a court must inform a defendant of the "dangers and disadvantages" of proceeding pro se.<sup>149</sup> Judge Katzmman reasoned that the warning requirement for a knowing waiver in *Faretta* was not dictum because

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<sup>140</sup> *Dallio*, 343 F.3d at 555.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 555, 556.

<sup>143</sup> *Id.* at 556.

<sup>144</sup> *Id.* at 557.

<sup>145</sup> *Dallio*, 343 F.3d at 555.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 561, 562.

<sup>148</sup> *Id.* at 565 (Katzmann, J., concurring).

<sup>149</sup> *Id.*

it was essential to Faretta's knowing relinquishment of his right to counsel.<sup>150</sup> He further advanced the idea that, because a defendant must properly waive his right to counsel prior to being allowed to proceed pro se, the Supreme Court must have decided that Faretta's knowing inquiry was sufficient, otherwise, it would not have made the determination that his Sixth Amendment right of self-representation had been violated.<sup>151</sup>

The Second Circuit, in *United States v. Duty*,<sup>152</sup> upon reviewing the entire record, held that the defendant had properly waived his right to counsel even though the court had not specifically examined the defendant and advised him of the dangers and pitfalls of proceeding pro se.<sup>153</sup> The facts in *Duty* involved a defendant who was convicted of "illegal sale of amphetamine hydrochloride."<sup>154</sup> During the trial, the defendant's privately hired counsel requested to be relieved after the defendant asked to conduct his own defense.<sup>155</sup> Prior to granting the defendant's waiver and ordering counsel to remain on standby, the judge ascertained that the defendant was twenty-seven and was only three credits shy of being awarded a "B.S. degree in Chemistry at Kent State University."<sup>156</sup>

The Second Circuit concluded that the defendant had "made it clear" that he wished to conduct his own defense despite the presence of a competent attorney.<sup>157</sup> The court further stated that a court must respect a defendant's right to waive counsel and proceed pro se if he is aware of his rights and the ramifications of waiving those rights.<sup>158</sup>

The Sixth Circuit in *United States v. McDowell*,<sup>159</sup> in an effort to avoid a deluge of appeals based on a defendant's claim of invalid waiver, adopted a formal inquiry to be used by the district court when deciding whether to allow a defendant to proceed pro se.<sup>160</sup> The court established a set of questions (a model inquiry) adopted from the 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES §§ 1.02-2 (3d ed.

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<sup>150</sup> *Dallio*, 343 F.3d at 566 (Katzmann, J., concurring).

<sup>151</sup> *Id.*

<sup>152</sup> 447 F.2d 449 (2d Cir. 1971).

<sup>153</sup> *Id.* at 451.

<sup>154</sup> *Id.* at 450.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Duty*, 447 F.2d at 450.

<sup>158</sup> *Id.*

<sup>159</sup> 814 F.2d 245 (6th Cir. 1987).

<sup>160</sup> *Id.* at 249-50.

1986), to be asked by Sixth Circuit district judges prior to allowing a defendant to waive the right to counsel and proceed pro se.<sup>161</sup> In *McDowell*, the defendant was arrested for his involvement in a counterfeiting scheme.<sup>162</sup> The defendant's attorney, at the final pretrial hearing, informed the court that his client wished to invoke his right to self-representation.<sup>163</sup> The defendant went on to represent himself at trial and was subsequently convicted.<sup>164</sup> The defendant later appealed the decision to the appeals court claiming that his waiver was not made knowingly and intelligently.<sup>165</sup>

Upon reviewing the trial record, the court concluded that there was sufficient evidence to show that the defendant "understood the dangers and disadvantages of self-representation."<sup>166</sup> Though the court in *McDowell* instituted the formal procedure to be used in determining whether the searching inquiry requirement was satisfied, it decided the defendant's appeal based on a review of the entire record.<sup>167</sup> The court explained that it was clear that the defendant was familiar with the criminal justice system, aware of his right to counsel, was not forced to continue with counsel he considered incompetent, and not forced to immediately proceed pro se.<sup>168</sup> The court further explained that the new requirements were only to be used for future cases.<sup>169</sup>

In a strong concurring opinion, Judge Engel acknowledged the dual problems posed by the right to counsel and the right to self-representation. There, he discussed his interpretation of the defendant's behavior as an attempt to "manipulate" the system.<sup>170</sup> He explained that although he was reluctant to endorse a rigid formula for deciding whether a defendant had validly waived his right to counsel, the repeated abuse of the Sixth Amendment right by defendants re-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 246. The defendant's wife was also arrested at the same time on the same charges. *Id.* Both the defendant and his wife fled the country after being released on bond. *McDowell*, 814 F.2d at 246. They were subsequently arrested in Canada and returned to the United States where they were immediately indicted. *Id.* at 246-47.

<sup>163</sup> *Id.* at 247.

<sup>164</sup> *Id.* at 246, 247.

<sup>165</sup> *Id.* at 248.

<sup>166</sup> *McDowell*, 814 F.2d at 249.

<sup>167</sup> *Id.* at 249-50.

<sup>168</sup> *Id.* at 249.

<sup>169</sup> *Id.* at 250.

<sup>170</sup> *Id.* at 252 (Engel, J., concurring).

quired attention.<sup>171</sup> He conceded that the questions laid out in the 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES are an effective response to the problem and an effective way of avoiding procedural error which is “the least useful and productive” grounds for an appeal.<sup>172</sup>

The Sixth Circuit, in *Fowler v. Collins*,<sup>173</sup> adhered to the more stringent interpretation of the *Faretta* standard, where a formal colloquy was used to decide whether the defendant had properly waived his right to an attorney. The court mentioned factors—such as the severity of the charges and the possible punishment—that a court should delve into before making the decision.<sup>174</sup> The court also stated that “a judge must thoroughly investigate the circumstances under which waiver is made.”<sup>175</sup>

In *Fowler*, the defendant was convicted and sentenced to twenty-four years in prison for theft by deception and passing bad checks, after representing himself at trial.<sup>176</sup> The court concluded that the defendant had not properly waived his right to counsel because the trial court had not satisfied its duty of apprising the defendant of the dangers and disadvantages of self-representing.<sup>177</sup> The court explained that the trial court had only conducted a “cursory investigation” as to whether the defendant had met the high standard set out in *Faretta*, before allowing him to proceed pro se.<sup>178</sup> The court further pointed out that the judge at the defendant’s arraignment had only once inquired whether the defendant wished to proceed pro se and waive the explanation of other relevant processes.<sup>179</sup> The court expressed that an affirmation by the defendant that he is aware of his right to counsel and his intention to proceed pro se does not end the courts obligation to ensure that the waiver is being made knowingly, intelligently, and voluntarily.<sup>180</sup>

Recently, in *United States v. McBride*,<sup>181</sup> the Sixth Circuit af-

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<sup>171</sup> *McDowell*, 814 F.2d at 252 (Engel, J., concurring).

<sup>172</sup> *Id.*

<sup>173</sup> 253 F.3d 244 (6th Cir. 2001).

<sup>174</sup> *Id.* at 249.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 246.

<sup>177</sup> *Id.* at 250.

<sup>178</sup> *Fowler*, 253 F.3d at 250.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> 362 F.3d 360 (6th Cir. 2004).

firmed the use of the formal inquiry by acknowledging that a district court does not have to strictly adhere to the inquiry.<sup>182</sup> The circuit court concluded that though the model inquiry consisted of a “strongly worded admonishment” and thirteen questions, and the district court only asked the defendant twelve of those questions, the district court substantially complied “with the essence” of the model inquiry, and thus, had satisfied the requisite inquiry for a knowing and intelligent waiver.<sup>183</sup> It explained that this was as a result of the district court having reviewed a substantial amount of information with the defendant.<sup>184</sup>

Another problem stemming from the issue of waiver under the federal system is whether the court in *Faretta* clearly established that warnings of the dangers and disadvantages of self-representation are required for a valid waiver. The circuits are split on the issue, with some interpreting *Faretta* as clearly establishing the need for such warnings and others arriving at the opposite conclusion; moreover, there seems to be inconsistencies even within circuits. For example, the Second Circuit earlier in *Torres* and *Duty*, did not require specific warnings for waiver, but did so later on in *Dallio*. In order to stop the large number of appeals based on challenges to the constitutionality of a defendant’s waiver, the Supreme Court will need to revisit this issue in the future and give a clear ruling on whether specific warnings must be given by the court in order to determine that a defendant’s waiver passes constitutional muster.

One solution to this problem is the approach followed by the Sixth Circuit, which requires its district courts to perform a formal inquiry prior to allowing a defendant to waiving the right to counsel. The formal inquiry approach could provide a specific procedure that would quickly identify whether the court performed its duty and substantially lessen the deluge of appeals due to claims of an invalid waiver. This approach could lessen the arbitrariness of a court deciding that a defendant knowingly relinquished the right to counsel.

With regard to the cases that do make it to the appeals process, the approach could reduce the additional time and resources spent on reviewing the cases to determine whether a defendant’s waiver was made knowingly. It would be a means of unequivocally affirming that a court performed its duty of ensuring that a defendant

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<sup>182</sup> *Id.* at 366.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

made a waiver knowingly. Even if additional issues remained after the appeals court determined that the court performed the requisite inquiry, this approach would greatly expedite the process of addressing those specific issues.

One weakness of this approach is that even if the formal inquiry approach were adopted, it would not resolve the question of how a court would determine whether a defendant's waiver was intelligently made. However, even if it were not clear whether the answers provided by the defendant clearly established that he was intelligently waiving his right, the formal inquiry would still serve to establish that he knowingly did so, again, lessening the burden on the courts.

#### IV. THE NEW YORK APPROACH

Under the New York State Constitution, every New York citizen who is accused of a crime has the right to “appear and defend in person and with counsel” in any court.<sup>185</sup> Like the federal courts, New York courts must conduct a searching inquiry prior to allowing a defendant to proceed pro se in order to ensure that the defendant is making an informed, voluntary, and intelligent renunciation of the right to counsel.<sup>186</sup> In order to ensure that the requirements of a proper waiver are met, a New York court must apprise a defendant of the pitfalls and risks associated with self-representation.<sup>187</sup> To achieve this goal, New York courts have permitted the use of a non-formalistic, flexible inquiry.<sup>188</sup> Under this approach, a court is not limited to a colloquy when deciding whether a defendant has properly waived his right to counsel, but has the broader capacity of examining the record as a whole.<sup>189</sup>

New York courts have consistently upheld waivers of counsel where the court has conducted a proper colloquy and concluded that the defendant had knowingly, voluntarily, and intelligently waived the right to counsel and chosen to proceed pro se.

In *People v. McIntyre*,<sup>190</sup> the New York Court of Appeals

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<sup>185</sup> N.Y. CONST. art. I, § 6.

<sup>186</sup> *Crampe*, 957 N.E.2d at 262.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 263.

<sup>189</sup> *Id.*

<sup>190</sup> 324 N.E.2d 322 (N.Y. 1974).

dealt with a defendant's right to waiver of counsel and his corresponding right to self-representation when the defendant was convicted of murder and robbery after being denied the opportunity to conduct his own defense with standby counsel.<sup>191</sup> The court then inquired into his background, uncovering that he had attended college for one year, and at the time he was charged, had been working as a furniture designer.<sup>192</sup> The court directed the defendant to be seated after he replied in the affirmative when asked if he thought his then attorney was competent to represent him.<sup>193</sup> However, the defendant continued to respond after being ordered to sit down and eventually jumped out of his chair and knocked it over.<sup>194</sup> The judge lectured him on proper courtroom conduct and after the defendant promised he would cooperate, formally denied his motion to proceed pro se.<sup>195</sup> The record from that court reflected that the defendant's motion was denied because of his outburst, his statement that his attorney was competent, and the court's general inquiry.<sup>196</sup>

The Court of Appeals, in its decision, recognized the importance of a defendant's right to self-representation and concluded that the lower court had erroneously denied the defendant's motion to proceed pro se.<sup>197</sup> The court ruled that a court cannot deny a defendant's motion to proceed pro se if it conducts its inquiry in an abusive manner.<sup>198</sup> Further, it decided that a provoked outburst would not serve to void a defendant's right to self-representation.<sup>199</sup>

In *People v. Slaughter*,<sup>200</sup> the defendant was convicted of felony murder when a passenger in a car was killed after a collision with his car, following an attempt at robbing a warehouse.<sup>201</sup> At a hearing, the defendant requested the removal of his attorney and assignment of new counsel.<sup>202</sup> The court denied his application, stating that it

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<sup>191</sup> *Id.* at 324, 325.

<sup>192</sup> *Id.* at 324.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 325.

<sup>195</sup> *McIntyre*, 324 N.E.2d at 325.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 328.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> 583 N.E.2d 919 (N.Y. 1991).

<sup>201</sup> *Id.* at 921.

<sup>202</sup> *Id.*

would be unfair because it was the middle of the hearing.<sup>203</sup> On the last day of the hearing, defense counsel informed the court that the defendant had refused to speak to him.<sup>204</sup> The court then advised the defendant that if he did not wish to be represented by counsel he could proceed pro se with counsel's assistance.<sup>205</sup> The court further advised the defendant that he could ask legally permissible questions, but would get no assistance from the court with regard to questioning witnesses or on constitutional issues.<sup>206</sup>

On appeal, the Court of Appeals concluded that merely informing a defendant that he would not receive any court assistance was not sufficient to satisfy the searching inquiry requirement.<sup>207</sup> With regard to the voluntariness of the defendant's waiver, the court found that it was not the defendant, but the court's repeated denial of the defendant's request for appointment of new counsel that forced him to proceed pro se without the proper inquiry by the court.<sup>208</sup>

Another case that was integral in defining New York's approach to waiver of counsel is *People v. Arroyo*.<sup>209</sup> In *Arroyo*, the trial judge granted the defendant's request to proceed pro se with his attorney as standby counsel, after only inquiring whether he really wanted to represent himself.<sup>210</sup> The judge informed the defendant, "[Y]ou have a right to do it because I don't think there is anything wrong with you."<sup>211</sup> On review, the Court of Appeals ruled that the waiver of counsel had been ineffective because the court did not ask the defendant "any questions" to ascertain whether he was competent to waive his right to an attorney.<sup>212</sup> The court emphasized that the defendant was not adequately warned about the disadvantages of proceeding pro se and the importance of representation by counsel in criminal adjudications.<sup>213</sup>

In *People v. Providence*,<sup>214</sup> the Court of Appeals reaffirmed

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Slaughter*, 583 N.E.2d at 922.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 923.

<sup>208</sup> *Id.* at 924.

<sup>209</sup> 772 N.E.2d 1154 (N.Y. 2002).

<sup>210</sup> *Id.* at 1155.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1156.

<sup>213</sup> *Id.*

<sup>214</sup> 813 N.E.2d 632 (N.Y. 2004). *See also* *People v. Vivienzo*, 465 N.E.2d 1254, 1255

the precedent that a specific set of rigid questions was not required to properly conduct the searching inquiry necessary for a proper waiver.<sup>215</sup> The court adhered to a totality of the circumstances approach, concluding that after reviewing the record, it was clear that the defendant had effectively waived his right to counsel.<sup>216</sup> The court observed that the trial court had taken certain pertinent facts into account in deciding to allow the defendant to proceed pro se; namely, that the defendant had (i) “earned a GED,” (ii) had been a student at the “New York Restaurant School” at the time of his arrest, (iii) had been involved with the criminal justice system several times before, and (iv) was warned of the risks associated with self-representation.<sup>217</sup>

However, in *People v. Smith*,<sup>218</sup> the Court of Appeals clarified that “a waiver-textured colloquy” was not enough to satisfy the searching inquiry requirement.<sup>219</sup> In *Smith*, the defendant was convicted of “criminal sale of a controlled substance in the third degree.”<sup>220</sup> Throughout the trial he requested the appointment of new counsel and repeatedly informed the court that he was not prepared to represent himself.<sup>221</sup> The court denied the defendant’s requests and the case proceeded to trial.<sup>222</sup> During trial, his attorney was relieved after informing the judge that the defendant had threatened him.<sup>223</sup> Thereafter, the defendant continued with his own defense with his former counsel serving as a legal advisor.<sup>224</sup>

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(N.Y. 1984) (finding that the defendant properly waived his right to counsel because the lower court had determined that he had previously been involved with the criminal process, had discussed his decision with his attorney who advised him not to do so, had been warned that he did not have the proper training to defend himself and that most other defendants who had represented themselves had not succeeded in their defenses, and that if he chose to ignore the advice and proceed pro se, he would be held to the same standards as an attorney).

<sup>215</sup> *Providence*, 813 N.E.2d at 635.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 633, 634.

<sup>218</sup> 705 N.E.2d 1205 (N.Y. 1998).

<sup>219</sup> *Id.* at 1208. *See also* *People v. Kaltenbach*, 457 N.E.2d 791, 792 (N.Y. 1983) (finding that the defendant had not properly waived his right to counsel because the court, instead of conducting a colloquy, had merely made declarations to the defendant that he had a right to an attorney, that he was facing a “serious charge,” and that if he was found guilty he could face a year in prison).

<sup>220</sup> *Smith*, 705 N.E.2d at 1206.

<sup>221</sup> *Id.* at 1206.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1206, 1207.

<sup>224</sup> *Id.* at 1207.

On appeal, the Court of Appeals found that the waiver was improper.<sup>225</sup> The court ruled that a defendant does not waive the constitutional right to counsel because of a refusal of or refusal to work with his assigned attorney.<sup>226</sup> Furthermore, the court clarified that a searching inquiry was not satisfied by: (i) the court's urging that a defendant proceed with his assigned counsel; (ii) the court's observation that a defendant is probably better off being represented by counsel; nor by (iii) the court allowing defense counsel to standby and provide assistance, if necessary.<sup>227</sup>

While New York satisfies the constitutional minimum for a defendant's waiver of the right to counsel by requiring its courts to conduct a colloquy prior to a waiver, its less formalistic approach of achieving this minimum standard is in line with that of the Second Circuit. As previously discussed, a less formalistic approach can have negative implications with regard to ensuring a valid waiver. A stricter, more formal approach would more closely serve the purpose for which the right to counsel was developed—to counterbalance the prosecution's familiarity with the adjudication process by requiring that an attorney assist the defendant with the necessary knowledge to defend against a criminal charge. While it has been recognized that there should be an equally important right for a defendant to waive the right to counsel and proceed pro se, because the right to counsel is of such importance to our criminal justice system, there should be an additional safeguard of requiring that a specific procedure be followed in order to provide some heightened level of protection for a defendant's right. Thus, a defendant should not be allowed to waive the right to counsel unless a strict procedure is followed and there is no disputing that a waiver was made knowingly.

## V. CONCLUSION

A review of the cases discussed herein warrants the conclusion that the federal approach and the New York state approach to the question of a defendant's waiver of the right to counsel are similar in that they both recognize that a defendant's waiver must be made knowingly, intelligently, and voluntarily. The precedent set forth at both the state and federal levels requires that a court conduct a

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<sup>225</sup> 705 N.E.2d at 1208-09.

<sup>226</sup> *Id.* at 1208.

<sup>227</sup> *Id.*

searching inquiry prior to permitting a defendant to proceed pro se. Both approaches have established that only after the trial court has found that a defendant has knowingly, intelligently, and voluntarily waived his right to counsel, may a court find a defendant's waiver constitutional.

However, the approaches differ with regard to the type of inquiry that is necessary to validate a waiver. At the federal level, the circuit courts are split, with a majority of the circuits following an informal approach, while the Sixth Circuit follows a formal approach, requiring that a set of questions be formerly presented to a defendant prior to waiver. New York courts on the other hand follow an informal approach allowing inquiry to be based either on a series of non-formalistic questions or on a review of the record as a whole.

Despite the fact that different approaches are utilized when deciding whether or not to allow a defendant to waive the right to counsel, it is clear that both federal and New York courts recognize the importance of a defendant being represented by a trained counselor-at-law. The recognition of this basic right is a feature that sets America's judicial system apart from that of many other nations. The corollary to this right, which allows a defendant to waive counsel and proceed pro se, is yet another insightful aspect of America's judicial system. Though it is important to protect citizens from unfair prosecution by providing the default standard of representation by counsel, it is equally important in an impartial judicial system, if a defendant knowingly and intelligently waives this protection, he or she is allowed to proceed pro se and be the author of his or her own destiny. This is the model of a true democracy.

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