The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro Se with a Defendant's Right to Assistance of Counsel

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COMMENTS

THE FORMAL INQUIRY APPROACH: BALANCING A DEFENDANT'S RIGHT TO PROCEED PRO SE WITH A DEFENDANT'S RIGHT TO ASSISTANCE OF COUNSEL

I. INTRODUCTION

In *McDowell v. United States*, Justice White, joined by Justice Brennan, dissented from the denial of a writ of certiorari to review whether judges must conduct formal inquiries with defendants before permitting them to exercise their right of self-representation. The dissent identified a conflict among the federal appellate courts in their efforts to arrive at a proper balance between the constitutional right of self-representation and the need to ensure a knowing and intelligent waiver of counsel before defendants are permitted to proceed pro se.²

This Comment will review the Supreme Court's early decisions with respect to a defendant's constitutional right to have the assistance of counsel. As will be seen, the standard that emerged from these early cases was highly protective of a defendant's right to counsel even in the face of a purported waiver.

The impact of *Faretta v. California*³ will then be discussed. In *Faretta*, the Supreme Court, for the first time, recognized that defendants have a constitutional right to represent themselves. The effect of the *Faretta* decision has been to create a zero-sum game between two constitutional rights. The result often leaves lower court judges in the untenable position of having their decisions appealed no matter how they rule on a defendant's request to proceed pro se. If a judge permits a defendant to proceed pro se, the defendant may argue on appeal that the constitutional right to counsel

2. *Id.* (White, J., dissenting). Justice White distinguished between the "record as a whole" approach, in which no specific inquiries or special hearings must be conducted to ensure a knowing and intelligent waiver of counsel before a defendant is permitted to proceed pro se, and a second approach, in which a trial judge must conduct a special hearing to ensure a defendant understands the dangers and disadvantages of proceeding pro se. The opinion mentions four circuits that follow the "record as a whole" approach (First, Second, Seventh, and Ninth Circuits), and four circuits that require a special hearing before permitting a defendant to proceed pro se (Third, Fifth, Eleventh, and D.C. Circuits). *Id.* at 980-81.
was compromised because the defendant did not make a knowing and intelligent waiver of counsel. Conversely, if a judge denies a defendant’s request to proceed pro se, the judge’s decision may be attacked for failing to recognize the defendant’s constitutional right of self-representation.

There has been a split in authority among the appellate courts since *Faretta* on the question of how to recognize a defendant’s constitutional right to proceed pro se without violating his constitutional right to counsel. The two approaches to this problem that have emerged will be examined. Finally, an argument favoring the requirement of a formal inquiry in which defendants are explicitly warned of the dangers and disadvantages of proceeding pro se will be advanced.

II. EARLY CASE LAW

The constitutional right to counsel was first recognized in *Powell v. Alabama*. In *Powell*, seven black youths were charged with raping two white girls. An indictment was returned, and the defendants were arraigned six days after the alleged crime took place. At their arraignment, the defendants pleaded not guilty. Six days later, a mere twelve days from the date of the alleged crime, the trials began. Each of the three trials was completed within a single day.

The trial judge appointed all the members of the Alabama Bar as counsel for the defendants’ arraignment. He anticipated that the members of the Bar would continue to help the defendants if no counsel appeared. On the morning of the first trial, however, only one Alabama attorney agreed to assist in the youths’ trials, and this was after the judge appointed a visiting attorney from Tennessee to represent the youths. Thus, as the *Powell* Court noted, the defendants were put in peril of their lives within a few moments after an identifiable attorney was charged with any degree of responsibility for representing them.

4. 287 U.S. 45 (1932).
5. *Id.* at 49.
6. *Id.*
7. *Id.*
8. *Id.* at 53. There was a severance upon the request of the state, and the defendants were tried in three separate groups.
9. *Id.*
10. *Id.* at 50.
11. *Id.* at 49.
12. *Id.*
13. *Id.* at 55-56.
14. *Id.* at 58.
Out of this set of facts emerged the Supreme Court's declaration that criminal defendants have a constitutional right to the assistance of counsel. The Court's decision centered on the right to be heard in a criminal trial. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

Five years later, in *Johnson v. Zerbst*, the Court reaffirmed its decision in *Powell* and reminded trial courts of their duty to protect the right to counsel in the face of a purported waiver. In *Zerbst*, two enlisted men in the United States Marine Corps were charged with possessing and distributing counterfeit money. Although counsel represented them at their preliminary hearings, the defendants were unable to employ counsel for their trial. The defendants informed the trial judge that they did not have an attorney, but were ready for trial. The defendants made no specific request to the trial judge to appoint counsel, although there was evidence to suggest that such a request had been made to the District Attorney, who replied that no right to counsel existed unless a defendant was charged with

15. *Id*. at 68. The Court cited Holden v. Hardy, 169 U.S. 366, 389 (1898), when it stated that "the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Powell*, 287 U.S. at 68.

16. *Id*. at 68-69. Continuing its reasoning for finding a constitutional right to counsel, the Court stated:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

*Id*. at 69.

17. 304 U.S. 458 (1938).

18. *Id*. at 465. According to the Court:

This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

*Id*.

19. *Id*. at 459-60.

20. *Id*. at 460.

21. *Id*.
a capital crime. The defendants represented themselves during the trial and were convicted as charged.

The waiver in Zerbst was implied and did not involve a specific request by the defendants to waive their right to counsel. The Court was concerned that a trial judge would rely on a defendant's implied waiver of counsel as a basis for permitting the trial to go forward without the assistance of counsel. A defendant's constitutional right to be represented by counsel "invokes... the protection of a trial court," stated the Court, and an implied waiver of counsel is not in keeping with this protective duty. Accordingly, the Court refused to find a valid waiver of counsel on the record before it and reversed and remanded the Fifth Circuit's decision in order to determine whether the defendants competently and intelligently waived their right to counsel.

In Adams v. United States ex rel. McCann, the Court was squarely presented with the question of whether a defendant could waive his right to counsel. The case actually involved the waiver of a jury trial, but because

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22. Id. at 460-61.
23. Id. at 460. The ineptness of their defense without the assistance of counsel is demonstrated by the testimony of one of the defendants at a subsequent hearing discussing his effort to contradict testimony presented by the prosecutor:

I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof.

Id. at 461.
24. See id. at 460.
25. See id. at 465.
26. Id.
27. Id. at 469. In addition to the protecting duty of the courts, the Zerbst opinion mentioned two additional considerations that mitigated against the finding of a valid waiver in this case. One was that courts should indulge every reasonable presumption against the waiver of fundamental constitutional rights. Id. at 464. The other was that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.

The second consideration has been used as authority for finding a valid waiver of counsel in the absence of an inquiry or a hearing by the trial judge in which a defendant is made aware of the dangers and disadvantages of proceeding pro se. See, e.g., United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986). While the language may be used to support the notion that factors other than an inquiry or a hearing will support a valid waiver of counsel, the holding of the case should not be overlooked. In Zerbst, the background, experience, and conduct of the accused, as displayed in the record, was not enough to support a valid waiver of counsel. Zerbst, 304 U.S. at 469.
29. Id. at 272.
the defendant waived his right to a jury while proceeding pro se, the validity of the defendant's waiver of counsel was also directly implicated.30

The defendant in *Adams* was indicted on six counts of mail fraud.31 He insisted on conducting his own defense and was permitted to do so after informing the trial judge "that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be."32

The Court, while strongly suggesting that without the assistance of counsel a defendant could not present his best defense, nevertheless, held that a defendant "may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open."33 Thus, the defendant's waiver of a jury trial without the assistance of counsel was upheld.34

*Adams* is significant for two reasons. First, underlying the decision was the belief that the constitutional right to counsel was "jealously guarded" by the Court's previous holdings in cases such as *Zerbst*.35 Therefore, while some of the language in *Adams*, when read in isolation, appears to show a ready willingness by the Court to accept waivers of constitutional rights such as the right to a jury trial and the right to counsel,36 such a conclusion misplaces the importance that the Court had placed on what it perceived were existing constitutional safeguards that would prevent waivers in most instances.37

The second concern, as expressed by Justice Douglas in his dissent, is that without a reliable, objective standard for ensuring a defendant's intelligent and competent waiver of a jury trial without the assistance of counsel, appellate courts would be forced to speculate, based on information contained in the record, whether a defendant had a full understanding of the consequences of such a decision.38 Speculation over whether defendants

30. See *id.* at 275.
31. *Id.* at 270.
32. *Id.* The basis for the defendant's remarks, at least on the issue of familiarity with the case, stemmed from the fact that he had previously brought suit against the New York Stock Exchange and represented himself during both the trial and on appeal to the court of appeals and the Supreme Court. *Id.* at 270 n.1.
33. *Id.* at 279.
34. *Id.* at 280-81.
35. *Id.* at 280.
36. For example, the Court stated, "[T]o deny [defendants] in the exercise of [their] free choice the right to dispense with some [constitutional] safeguards . . . is to imprison [defendants] in [their] privileges and call it the Constitution." *Id.*
37. See *id.*
38. *Id.* at 283-84 (Douglas, J., dissenting). "Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is ‘too fundamental and absolute to allow courts to indulge
truly understand the consequences of waiving their right to counsel, particularly in the absence of a formal inquiry by the trial judge, continues to be a source of concern in more recent decisions.\(^{39}\)

One final early decision that has shaped subsequent court opinions on the question of whether defendants have made a valid waiver of counsel is *Von Moltke v. Gillies.*\(^{40}\) In *Von Moltke*, the defendant was charged with violating the Espionage Act of 1917.\(^{41}\) The defendant was imprisoned for nearly one and a half months before she finally agreed to plead guilty to the charges brought against her.\(^{42}\) While the defendant was imprisoned she was unable to retain counsel and, thus, counsel was not present when she appeared before a judge to enter her guilty plea.\(^{43}\)

When the trial judge noticed that the defendant was not represented by counsel, he initially refused to accept the guilty plea.\(^{44}\) However, after approximately five minutes of routine questioning, the trial judge permitted the defendant to sign a written waiver of counsel and accepted the plea.\(^{45}\)

In response to the haphazard manner in which this waiver was accepted, Justice Black set forth a standard that requires a trial judge to engage in a "penetrating and comprehensive examination" of defendants who attempt to waive their right to counsel.\(^{46}\) Justice Black’s reasoning\(^ {47}\) is perhaps more important than the standard itself, which gained the support of

\(^{39}\) See infra note 127.

\(^{40}\) 332 U.S. 708 (1948) (plurality opinion).

\(^{41}\) Id. at 709.

\(^{42}\) Id. at 712-15.

\(^{43}\) Id. at 716-18.

\(^{44}\) Id. at 717.

\(^{45}\) Id.

\(^{46}\) Id. at 724. In Justice Black’s words:

To discharge the duty [of protecting the right to counsel] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge’s responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused’s professed waiver of counsel is understandably and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Id. at 723-24.

\(^{47}\) According to Justice Black:

This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave
only a plurality of the Court and, thus, is not a constitutional standard. While the Von Moltke standard has not evolved into a constitutional standard, it is nevertheless often cited by appellate courts when reviewing whether a defendant made a knowing and intelligent waiver of counsel before exercising the right to proceed pro se.

III. FARETTA V. CALIFORNIA

A defendant's privilege to proceed pro se was accorded the status of a constitutional right in Faretta v. California. The effect has been to place lower courts in a difficult position by requiring them to balance a defendant's constitutional right to the assistance of counsel with a defendant's constitutional right of self-representation. Prior to this decision, although a majority of states recognized the right to proceed pro se, it was plausible to argue that granting a defendant's request to proceed pro se was premised not on a constitutional right but on a statutorily created privilege.

This distinction is important because, if self-representation is considered a privilege and not a constitutional right, courts have discretion to decide

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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.

Id. at 724.


50. 422 U.S. 806 (1975).

51. See Strozier v. Newsome, 871 F.2d 995 (11th Cir. 1989). The Eleventh Circuit stated:

Since the Supreme Court announced its decision in Faretta there has been tension between the right to counsel and the right to self-representation. The tension exists because the rights are reciprocal: to assert one necessitates waiver of the other. The problem is most difficult for the trial judge because if he allows a defendant his right to proceed pro se, he runs the risk that he may have denied the defendant his right to counsel. Similarly, if counsel is appointed to ensure that the right to counsel is not violated, the right to proceed pro se may be violated.

Id. at 997 (citation omitted).

52. Faretta, 422 U.S. at 813 & n.10.

53. Justice Burger identified two sources of authority for his belief that prior to the Court's decision in Faretta the right of a defendant to proceed pro se was not a constitutional right. First, the Court's decision in Price v. Johnston, 334 U.S. 266 (1948), had distinguished between the "constitutional prerogative" to be present at trial and the "recognized privilege" of self-representation. Faretta, 422 U.S. at 842 (Burger, C.J., dissenting). Second, Section 35 of the Judiciary Act of 1789 had explicitly provided a statutory right to self-representation in federal criminal trials, while the text of the Sixth Amendment, which was proposed the day after the Judiciary Act was signed, provided only for the right to counsel. Id. at 844 (Burger, C.J., dissenting).
whether a particular defendant's request to proceed pro se will be granted.\textsuperscript{54} Thus, if a trial judge was not convinced that a defendant was capable of conducting his own defense, the judge would not be obliged to grant the defendant's request to proceed pro se.\textsuperscript{55} However, by holding that defendants have a constitutional right to self-representation, the \textit{Faretta} Court took this discretion away from trial judges and gave defendants an absolute right to represent themselves, irrespective of any concern for the fairness of the trial.\textsuperscript{56}

In \textit{Faretta}, the defendant, charged with grand theft, asked to defend himself because he was concerned about the ability of the public defender's office to adequately represent him.\textsuperscript{57} The trial judge first stated that he believed that the defendant was "making a mistake."\textsuperscript{58} Despite his reservations, the judge issued a preliminary ruling allowing the defendant to waive his right to counsel.\textsuperscript{59} However, in a subsequent hearing, the trial judge reversed his previous ruling because he was not convinced that the defendant made an intelligent and knowing waiver of counsel.\textsuperscript{60} Moreover, the trial judge ruled that the defendant did not have a constitutional right to conduct his own defense.\textsuperscript{61} This latter ruling formed the basis for the Court's holding that the Sixth Amendment "necessarily implies the right of self-representation."\textsuperscript{62}

Since \textit{Faretta}, lower courts have wrestled with the issue of how to ensure that defendants make a knowing and intelligent waiver of counsel before exercising their absolute right to proceed pro se. The inconsistency in the lower courts over what standard to apply is due to the lack of guidance in \textit{Faretta}.\textsuperscript{63} Furthermore, the bases upon which the \textit{Faretta} Court found a knowing and intelligent waiver of counsel are inconclusive on the

\textsuperscript{55} See \textit{id.} at 846-49 (Blackmun, J., dissenting).
\textsuperscript{56} See \textit{id.} at 845-46 (Burger, C.J., dissenting).
\textsuperscript{57} \textit{Id.} at 807.
\textsuperscript{58} \textit{Id.} at 807-08.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 808-10.
\textsuperscript{61} \textit{Id.} at 810 & n.4.
\textsuperscript{62} \textit{Id.} at 832.
\textsuperscript{63} The \textit{Faretta} Court's only reference to a standard has itself proven to be contradictory. The \textit{Faretta} Court stated that "in order competently and intelligently to choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" \textit{Id.} at 835 (quoting \textit{Adams v. United States ex rel. McCann}, 317 U.S. 269, 279 (1942)). A close examination of this standard reveals two elements: (1) a defendant should be made aware of the dangers and disadvantages of proceeding pro se (2) so that the record will establish that the defendant comprehends the ramifications of waiver of counsel. The inconsistency in the lower courts stems from the question of whether a defendant must still be made aware of the dangers
question of what actions a trial judge must take when a defendant requests to proceed pro se.\textsuperscript{64}

A final consideration, noted in Justice Blackmun's dissent in \textit{Faretta}, is the method by which lower courts properly balance a defendant's constitutional right to counsel with a defendant's constitutional right to proceed pro se.\textsuperscript{65} On the one hand is Justice Stewart's explanation of the personal interest of a defendant in proceeding pro se:

[Because a defendant] will bear the personal consequences of a conviction . . . it is the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'\textsuperscript{66}

On the other hand, Chief Justice Burger explains the governmental interest in preserving the right to counsel:

[T]he quality of [a defendant's] representation at trial is [not] a matter with which only the accused is legitimately concerned. . . . [T]he integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. . . . True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel . . . .\textsuperscript{67}

and disadvantages of proceeding pro se if the record indicates that, irrespective of any such warning, the defendant understands the consequences of waiving the right to counsel.

\textsuperscript{64} The \textit{Faretta} Court indicated that the record affirmatively showed that the defendant understood the consequences of waiving his right to counsel. \textit{Id.} at 835. However, part of that record included the warning given to the defendant by the trial judge. \textit{Id.} at 808. Two possible interpretations are therefore possible. One is that the warning given by the trial judge was ancillary to the defendant's understanding of the consequences of waiving counsel as shown by the record and thus was not required. The other interpretation is that the warning was an integral part of the record because it showed that the defendant had been explicitly made aware of the dangers and disadvantages of proceeding pro se and, thus in the absence of such a warning, the record standing alone would have been insufficient. A further question arises if the latter interpretation is followed. That question concerns how extensive the colloquy between the trial judge and a defendant must be before an appellate court will consider the warning given by the trial judge to be sufficient.

\textsuperscript{65} \textit{Id.} at 852 (Blackmun, J., dissenting). "Since the right to [the] assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured?" \textit{Id.} (Blackmun, J., dissenting).

\textsuperscript{66} \textit{Id.} at 834 (citing Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

\textsuperscript{67} \textit{Id.} at 839-40 (Burger, C.J., dissenting) (citations omitted).
IV. SPLIT IN AUTHORITY AFTER FARETTA v. CALIFORNIA

The impact of Faretta on subsequent appellate decisions has produced two approaches for determining whether a defendant knowingly and intelligently waived his right to counsel before exercising his right of self representation. The first, the "record as a whole" approach, does not require the trial judge to conduct a hearing or an inquiry to ensure the validity of a waiver. Rather, if it can be discerned from the record developed in a case that a defendant was aware of the consequences of waiving his right to counsel, the trial judge's decision to allow the defendant to proceed pro se will not be reversed. Seven circuits follow this approach.

Johnson v. Zerbst supports the record as a whole approach. In Zerbst, the Court identified how a trial judge should determine whether a defendant made a valid waiver of counsel: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." In other words, no formal inquiry in which a defendant is warned of the dangers and disadvantages of proceeding pro se is needed if the record sufficiently establishes that the defendant was aware of the consequences of his decision.

The second approach places an affirmative duty on the trial judge to conduct an inquiry with a defendant in which the dangers and disadvantages of proceeding pro se are discussed. In the absence of such an inquiry, a decision by the trial judge to permit a defendant to proceed pro se will be remanded to the district court. Five circuits follow this approach.

68. See supra text accompanying note 2; see also infra notes 71, 76.
70. Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).
71. See United States v. Maldonado-Rivera, 922 F.2d 934, 977 (2d Cir. 1990), cert. denied, 111 S. Ct. 2811 (1991); United States v. Bell, 901 F.2d 574, 577 (7th Cir. 1990); United States v. Campbell, 874 F.2d 838, 845 (1st Cir. 1989); Strozier v. Newsome, 871 F.2d 995, 997 (11th Cir. 1989); Gallop, 838 F.2d at 110; Wiggins v. Procunier, 753 F.2d 1318, 1320 (5th Cir. 1985); United States v. Pilla, 550 F.2d 1085, 1093 (8th Cir.), cert. denied, 432 U.S. 907 (1977).
72. 304 U.S. 458 (1938).
73. Id. at 464; see also supra text accompanying note 27.
74. United States v. Padilla, 819 F.2d 952, 959 (10th Cir. 1987).
The formal inquiry approach finds support in Von Moltke v. Gillies.\textsuperscript{77} As previously discussed, Justice Black believed that the only way a judge could determine whether a defendant knowingly and intelligently waived the right to counsel was by conducting a “penetrating and comprehensive examination” of the defendant.\textsuperscript{78}

It is important to recognize at this juncture that the formal inquiry approach does not necessarily require a more rigorous standard to evaluate whether a defendant makes a knowing and intelligent waiver of counsel. At first glance, this might appear to be the case, since circuits that follow the formal inquiry approach require judges to explicitly warn defendants of the dangers and disadvantages of proceeding pro se.\textsuperscript{79} However, in the D.C. Circuit, which follows the formal inquiry approach, judges are merely required to engage defendants in a “short discussion” of the dangers and disadvantages of proceeding pro se.\textsuperscript{80} By contrast, the Seventh and Eleventh Circuits, two circuits that follow the record as a whole approach, have instructed judges to conduct a formal inquiry whenever a defendant requests to proceed pro se to ensure that defendants are “fully informed” of the consequences of waiving their right to counsel.\textsuperscript{81}

The formal inquiry approach provides a framework in which defendants will always be told of the dangers and disadvantages of proceeding pro se because some form of inquiry between the trial judge and a defendant is required.\textsuperscript{82} However, the crux of a valid waiver of counsel is not what is said to a defendant, but whether a defendant understands what he is giving up by waiving his right to counsel.

\textsuperscript{77} 332 U.S. 708 (1948).
\textsuperscript{78} Id. at 724; see also supra note 46 and accompanying text.
\textsuperscript{79} See supra notes 74-76.
\textsuperscript{80} See United States v. Brown, 823 F.2d 591, 599 (D.C. Cir. 1987).
\textsuperscript{81} See, e.g., United States v. Bell, 901 F.2d 574 (7th Cir. 1990). In Bell, the appellate court reaffirmed its “strong preference” that trial courts, as a matter of course, conduct a formal inquiry in which the defendant is fully informed of the risks of proceeding pro se and is explicitly advised against self-representation. Id. at 576-77. The court even went so far as to point trial judges to 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES § 1.02-2 (3d ed. 1986) as an appropriate source for guidelines to follow during an inquiry with a defendant who makes a request to proceed pro se. Id. at 577. The position taken by the Seventh Circuit has, if anything, become more pronounced. See United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991) (“[T]he trial court must 'conduct a formal inquiry' in which it asks the necessary questions and imparts the necessary information.”) (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

In Strozier v. Newsome, 871 F.2d 995, 997-98 (11th Cir. 1989), the appellate court similarly stated that a trial court must hold a hearing “to make sure that the accused understands the risks of proceeding pro se,” although in “rare cases” such a hearing may not be required. The guidelines to be followed by trial judges in the Eleventh Circuit also represent an extremely high standard for evaluating whether a request to proceed pro se should be granted. Id. at 997 & n.4.

\textsuperscript{82} See supra notes 74-76 and accompanying text.
Both the record as a whole approach and the formal inquiry approach have emerged as means by which to ascertain whether defendants were aware of the consequences of waiving their right to counsel when they exercised their right of self-representation. A defendant's background, experience, and conduct are clearly relevant in determining whether the defendant was aware of the consequences of a waiver. Similarly, a formal inquiry conducted by a trial judge in which a defendant is warned of the dangers and disadvantages of proceeding pro se establishes that the defendant was made aware of the consequences of proceeding without counsel. The critical question is whether a hearing or an inquiry should be required whenever a defendant requests to proceed pro se or whether such a formal inquiry should be left to the discretion of the trial judge on a case-by-case basis.

The Supreme Court had an opportunity to answer this question in Patterson v. Illinois. However, Patterson further confused the issue and left the appellate courts without additional guidance.

In Patterson, a member of the Vice Lords street gang was indicted for the murder of a rival gang member. The accused, after learning of the indictment against himself and two other members of the Vice Lords, gave a lengthy statement to police officers, describing in detail the involvement of himself and other gang members in the murder. The accused gave a similar statement a second time to the Assistant State's Attorney. The defendant was advised of his right to have the assistance of counsel, and he initialied each of the warnings contained in a Miranda waiver form before giving his statements to authorities.

The question before the Supreme Court was whether the accused made a knowing and intelligent waiver of counsel at the time of his postindictment confessions. The Court answered in the affirmative and applied a "sliding scale" method of analysis.

84. Id. at 287-88.
85. Id. at 288. The statement was given at least in part because the accused believed that the principal actor had not been indicted. Id. Prior to this statement, the accused was given a Miranda waiver form that was read aloud to him and subsequently initialied by him. Id. One of the warnings contained in the Miranda waiver form was that the defendant had the right to consult with an attorney. Id. at 288 & n.1.
86. Id. at 288.
87. Id. at 288-89.
88. Id.; see also supra text accompanying note 85.
89. Id. at 289.
90. Id. at 298. At one end of the scale, no warning need be given at a postindictment photographic display identification. Id. At the other end of the scale, the "most rigorous" means must be employed to ensure that a defendant is aware of the dangers and disadvantages of proceeding
Although the Court appears to recognize a requirement for some form of inquiry between the trial judge and a defendant before permitting the defendant to proceed pro se at trial, this interpretation has not emerged. For the most part, the limited impact of Patterson on subsequent lower court decisions is explained by the fact that the Court cited Faretta as authority for what procedures courts must adhere to before permitting defendants to exercise their right of self-representation. However, Faretta does not provide any clear indication of whether a formal inquiry is required when defendants seek to waive their right to counsel. Under one interpretation of Faretta, a formal inquiry is not required, but merely forms a part of the record from which an appellate court can evaluate whether a defendant was aware of the dangers and disadvantages of proceeding pro se. Under a second interpretation of Faretta, a formal inquiry is required since the waiver of counsel that took place in Faretta came only after the judge warned the defendant against proceeding pro se.

Thus, those circuits that follow the record as a whole approach are unaffected by the Patterson decision since they find support under one of the possible interpretations of the Faretta waiver standard. Likewise, those circuits that follow the formal inquiry approach are also unaffected by the Patterson decision since they too find support in Faretta.

For these reasons, any reliance on Patterson as authority to support the requirement of a formal inquiry is misplaced. Patterson does not address the proper application of the Faretta waiver of counsel standard. Patterson states only that it should be applied.

V. AN ARGUMENT FAVORING THE ADOPTION OF THE FORMAL INQUIRY APPROACH

The formal inquiry approach has the advantage of ensuring that defendants are explicitly told the consequences of waiving their right to counsel pro se at trial. Because the waiver of counsel in this case was near the lower end of the scale (postindictment stage), the use of the Miranda warnings as a means of making the accused aware of the dangers and disadvantages of self-representation was sufficient.

91. Id. at 298 ("[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial.").

92. Id.

93. See supra notes 63-64 and accompanying text.

94. See supra note 64 and accompanying text.

95. See supra note 64 and accompanying text.


97. See id.
before they are permitted to exercise their right to proceed pro se. While there is no guarantee that a defendant's decision will be any more knowing and intelligent simply because he is explicitly made aware of the benefits of counsel and the disadvantage of proceeding pro se, the formal inquiry approach nevertheless contributes to what the true objective should be when a defendant seeks to waive his right to counsel: Did the trial court take all reasonable steps to ensure that a defendant understood what he was giving up when he decided to proceed pro se?

In some cases, the requirement of a formal inquiry will amount to nothing more than a formality, especially when a defendant has experience with the court system and already understands what he is giving up by waiving his right to counsel. In such instances, one could argue that requiring a formal inquiry amounts to a waste of judicial resources.

This argument is unpersuasive for two reasons. First, a defendant's Sixth Amendment right to have the assistance of counsel is one of the most important rights that criminal defendants retain. Though Faretta gives criminal defendants a right to represent themselves, courts should continue to abide by the notion, first set forth in Zerbst, that they have a duty to protect a defendant's right to counsel, even when the defendant seeks to waive that right. Trial judges may no longer have discretion to decide whether a defendant should be permitted to proceed pro se, but they certainly should attempt to convey to defendants the reasons a waiver of counsel may be detrimental to their case. If a defendant persists in his request to proceed pro se even after the trial judge's warnings against such a decision, then the defendant's decision must be respected. However, by requiring judges to conduct a formal inquiry before defendants are permitted to exercise their right of self-representation, courts will have taken all reasonable steps to ensure that defendants have been made aware of and understand the consequences of their decision.

98. See supra notes 74-76 and accompanying text.
99. See discussion supra part IV.
100. See, e.g., United States v. Maldonado-Rivera, 922 F.2d 934, 977 (2d Cir. 1990), cert. denied, 111 S. Ct. 2811 (1991) (The defendant was an attorney who was admitted to practice before the Supreme Court of Puerto Rico and had represented numerous defendants in court.); United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989) (The defendant was a member of the Maine Bar and had tried numerous criminal cases in both state and federal court.).
101. See discussion supra part II.
102. Johnson v. Zerbst, 304 U.S. 458, 465 (1938); see also supra note 26 and accompanying text.
103. See discussion supra part III.
104. See discussion supra part III.
A second reason for rejecting the argument that a formal inquiry wastes judicial resources is that, in many cases, it may actually conserve judicial resources. When defendants have been explicitly warned against proceeding pro se, the merits of an appeal based on a defendant's failure to make a knowing and intelligent waiver of counsel diminish. Therefore, the number of appeals raising the issue of an invalid waiver of counsel should decline. When the issue of an invalid waiver is raised on appeal, the existence on the record of an explicit warning by the trial judge about the dangers and disadvantages of proceeding pro se should reduce the amount of time necessary to determine whether a defendant made a knowing and intelligent waiver of counsel. For these reasons, a small investment of judicial resources at the front end of a case should result in hefty returns when judicial resources are conserved during the appellate process.

It should be noted that appeals have not stopped in those circuits that presently follow the formal inquiry approach. However, the basis for those appeals is the adequacy of the hearing itself, not whether a hearing took place. For this reason, the Supreme Court could effectively stop all appeals on the issue of a knowing and intelligent waiver of counsel by adopting a standardized set of inquiries that judges are required to perform whenever defendants request to proceed pro se. The risk of such an approach is that defendants may be afforded less protection of their right to counsel than the protection afforded under the record as a whole approach unless the constitutional standard adopted mandates an extremely thorough and comprehensive discussion of the advantages of counsel and the disadvantages of proceeding pro se. The Bench Book for United States District Judges is a source currently relied upon in three circuits and provides guidelines from which the Supreme Court can ideally formulate a constitutional standard for finding a valid waiver of counsel that will satisfy, if not exceed, the "penetrating and comprehensive examination" of defendants advocated by Justice Black in Von Moltke.

The tradeoff to adopting a standardized set of inquiries as the constitutional standard is that a defendant's background, experience, and conduct

105. See supra note 76.
106. See supra note 76.
107. See supra notes 48, 80-81.
108. The Sixth, Seventh, and Eleventh Circuits have suggested that trial judges follow the guidelines set forth in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES, supra note 81, when conducting a hearing or an inquiry in response to a defendant's request to proceed pro se. See Strozier v. Newsome, 926 F.2d 1100, 1109 (11th Cir. 1991); United States v. Bell, 901 F.2d 574, 577 (7th Cir. 1990); United States v. McDowell, 814 F.2d 245, 250-51 (6th Cir. 1987).
109. See supra note 46 and accompanying text.
will no longer be taken into consideration when a defendant waives his right to counsel. However, the failure to consider these factors after a defendant has been explicitly warned against proceeding pro se is no different than relying on a defendant’s statements after the defendant has been advised of his Miranda rights.\textsuperscript{110}

Furthermore, after Faretta, judges no longer have discretion to deny what has become a defendant’s absolute right to proceed pro se.\textsuperscript{111} Thus, a defendant’s background, experience, and conduct may suggest a lack of understanding about the consequences of waiving counsel, but the defendant must, nevertheless, be permitted to proceed pro se.\textsuperscript{112} As a result, these factors should no longer play a role in determining whether defendants make a knowing and intelligent waiver of counsel. Instead, as long as defendants are made explicitly aware of the consequences of their decision to proceed pro se through a standardized set of inquiries set forth by the Supreme Court, their waiver of counsel should be deemed valid. Such an approach is the only way that the right of defendants to represent themselves can be respected without holding the door open to continued appeals on the issue of a knowing and intelligent waiver of counsel.

The formal inquiry approach also advances two additional, important governmental interests. First, without a requirement that trial judges conduct a formal inquiry before allowing defendants to proceed pro se, the responsibilities of prosecutors may begin to take on a judicial role. For example, in United States v. Moya-Gomez,\textsuperscript{113} the Seventh Circuit Court of Appeals found unsatisfactory a pretrial hearing in which the trial judge offered to appoint a lawyer to represent the defendant, but failed to explain the disadvantages of self-representation.\textsuperscript{114} However, the appellate court considered a formal inquiry conducted by two Assistant United States Attorneys, who were prosecuting the case, to weigh in favor of finding a valid waiver of counsel.\textsuperscript{115} The appellate court was quick to point out that, despite its consideration of the colloquy be-

\textsuperscript{111} See discussion supra part III.
\textsuperscript{112} See discussion supra part III.
\textsuperscript{113} 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989).
\textsuperscript{114} Id. at 733-34. The defendant was involved in an extensive cocaine network centered in Milwaukee, Wisconsin. Id. at 714. He was convicted on one count of conspiracy to possess cocaine with intent to distribute, six counts of possession of cocaine with intent to distribute, and one count of conducting a continuing criminal enterprise. Id. at 716. On appeal, the defendant asserted six reasons why he was entitled to a new trial; one was that he did not make a knowing and intelligent waiver of counsel before the district court permitted him to proceed pro se. Id.
\textsuperscript{115} Id. at 735. During this inquiry, the defendant was warned of the dangers and disadvantages of self-representation by two Assistant United States Attorneys. Id. at 734-35.
tween the prosecuting attorneys and the defendant, it was inappropriate for the district court to have delegated its duty to ensure a knowing and intelligent waiver of counsel to the prosecuting attorneys.\textsuperscript{116}

Similarly, in \textit{Fitzpatrick v. Wainwright},\textsuperscript{117} the prosecutor was directly involved in questioning the defendant on whether he was waiving his right to counsel.\textsuperscript{118} The avowed purpose behind the prosecutor's questions was to ensure that the trial judge's decision to allow the defendant to proceed pro se would not be overturned on appeal.\textsuperscript{119} On appeal, the defendant raised the issue of an invalid waiver of counsel.\textsuperscript{120} The Eleventh Circuit Court of Appeals upheld the validity of the defendant's waiver of counsel after examining the colloquy that took place between the defendant, the prosecuting attorney, and the trial judge.\textsuperscript{121} Unlike the Seventh Circuit Court of Appeals, which considered a colloquy between the prosecuting attorneys and the defendant to be inappropriate, the Eleventh Circuit Court of Appeals expressed absolutely no concern over the prosecutor's involvement during the pretrial hearing.\textsuperscript{122}

The use of prosecutors to convey information to, or elicit information from, defendants is hazardous because prosecutors serve as advocates for

\textsuperscript{116} Id. at 735. The Moya-Gomez court stated that "'[It is the solemn duty of a federal judge . . . to make a thorough inquiry.']" Id. (quoting Von Moltke v. Gillies, 332 U.S. 708, 722 (1948)). The court also cited language that places on the trial judge the responsibility for determining whether there has been an intelligent and competent waiver of counsel. Id. (citing Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

A second concern of the Moya-Gomez court was the impact that such inquiries would have on the adversarial process. In the court's words, "this duty should not be discharged by enlisting the defendant's adversary to conduct the waiver inquiry." Id. at 735. The court again cited Von Moltke, 332 U.S. at 725, when it concluded that "'[t]he Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be." Moya-Gomez, 860 F.2d at 735.

\textsuperscript{117} Id. at 1060-62. The defendant was "convicted in state court on four counts of selling unregistered securities, four counts of fraud in connection with the sale of unregistered securities, and four counts of grand theft." Id. at 1058-59. Prior to his trial, the defendant asked for and was granted a number of continuances so that he could raise money for a private attorney. Id. at 1059. Approximately six months later, the trial judge held a pretrial hearing in which the defendant affirmatively waived his right to counsel. Id. at 1060. It was during this hearing that the prosecutor became directly involved in questioning the defendant. Id. at 1060-62.

\textsuperscript{119} Near the end of the hearing, the prosecutor stated to the trial judge: "Only thing, I don't want to belabor this, but if it weren't for the history of this case I wouldn't be quite as worried as I am now, but I want [the defendant] to understand and to so state that once we start on this ship it's not going to dock . . . ." Id. at 1062.

\textsuperscript{120} Id. at 1059.

\textsuperscript{121} Id. at 1060-62, 1068.

\textsuperscript{122} See id. at 1063-68.
the government. It is contrary to our adversarial system of justice to place
prosecutors in a position of having to serve as counselors to
defendants.123

Of course, in cases like Moya-Gomez and Fitzpatrick, it may be argued
that a prosecutor is performing the adversarial role by ensuring that a
waiver of counsel will not be overturned on appeal.124 However, this argu-
ment leads directly to the concern expressed in Moya-Gomez that defend-
ants should not be dependent on government agents for legal counsel and
aid.125

The adoption of the formal inquiry approach will ensure that prosecu-
tors are not put in the position of having to counsel defendants on the
dangers and disadvantages of proceeding pro se. This approach serves the best
interests of prosecutors and defendants under our adversarial system of
justice.

The other governmental interest, and perhaps the most important rea-
son for adopting the formal inquiry approach, is that engaging defendants
in a formal inquiry before permitting them to proceed pro se contributes to
the criminal justice system's efforts to ensure fairness at trial.126 The formal
inquiry approach assists in this objective by ensuring that all defendants are
made aware of the consequences of waiving their right to counsel before
they are permitted to proceed pro se. By explicitly warning all defendants,
regardless of their background, experience, or conduct, appellate courts will
no longer be placed in the difficult position of having to speculate from the
record whether a defendant is simply trying to manipulate the judicial sys-

tem or, in fact, did not make a knowing and intelligent waiver of counsel.127

123. Of course, prosecutors have a duty to ensure that justice is done. Berger v. United
States, 295 U.S. 78, 88 (1935). However, prosecutors should also prosecute with earnestness and
vigor. Id.

124. See supra text accompanying note 119.

125. Moya-Gomez, 860 F.2d at 735; see also supra text accompanying note 116.

126. The importance of the right to counsel as it relates to fairness in the criminal justice
system is a frequent theme in court opinions. See, e.g., Faretta v. California, 422 U.S. 806, 832-33
(1975) ("For it is surely true . . . that the help of a lawyer is essential to assure the defendant a fair
trial."); Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) ("The right of one charged with crime to
counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in
45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not
comprehend the right to be heard by counsel."); United States ex rel. Williams v. Twomey, 510
F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975) ("While a criminal trial is not a game in
which the participants are expected to enter the ring with a near [equal] match in skills, neither is
it a sacrifice of unarmed prisoners to gladiators.").

127. See, e.g., Strozier v. Newsome, 926 F.2d 1100 (11th Cir. 1991) (Strozier II); Strozier v.
Newsome, 871 F.2d 995 (11th Cir. 1989) (Strozier I). In Strozier I, the Eleventh Circuit Court of
Appeals reversed and remanded the district court's decision upholding the validity of the defend-
ant's waiver of counsel in order to develop a more complete record. Strozier I, 871 F.2d at 999-
A formal inquiry will not change a defendant's decision in many, perhaps most, cases. However, the mere fact that it will give defendants an opportunity to listen to some of the reasons why the assistance of counsel may be valuable to them and, in the process, provide defendants with information they otherwise might not have considered justifies inclusion of a formal inquiry requirement. It is one of the reasonable steps courts can take to ensure, to the extent possible, that defendants make a knowing and intelligent waiver of counsel before exercising their rights to proceed pro se.

Courts' efforts to dissuade defendants from proceeding pro se will also signal to society that the criminal justice system is not interested in easy convictions. Assuming that there is an imbalance between adversaries when defendants waive their right to counsel, a formal inquiry requirement serves the important function of demonstrating to society that courts are committed to taking all reasonable steps to fully apprise defendants of the consequences of waiving their right to counsel when defendants insist on representing themselves. This type of proactive response by the courts should promote citizens' continued respect and admiration for the fairness of their criminal justice system.

1000. On remand, a magistrate found that the defendant made a knowing and intelligent waiver of counsel. *Strozier II*, 926 F.2d at 1101-02. The magistrate's report and recommendation were adopted by the trial court, prompting a second appeal. *Id.* at 1102.

In *Strozier II*, the Eleventh Circuit Court of Appeals upheld the defendant's waiver of counsel on the basis of the magistrate's findings. *Id.* at 1107-08. The magistrate's report included the following factors as evidence that the defendant made a knowing and intelligent waiver of counsel: (1) the defendant's fifth-grade educational level and lack of health problems; (2) the defendant's extensive background with the criminal justice system as a result of prior convictions; (3) the defendant's contact with three attorneys, two of whom testified that they advised the defendant against proceeding pro se, although the defendant denied he was ever fully informed of the risks of self-representation; (4) the defendant's discussion with an attorney who informed the defendant of the charges and penalties brought against him, even though the record of his own defense indicated that the defendant either was not informed or misunderstood the charges; and (5) the defendant's limited knowledge of courtroom procedure. *Id.* at 1106.

The appellate court's displeasure with having to try to determine from an ambiguous record, and in the absence of a formal inquiry whether the defendant was simply trying to manipulate the judicial system or, in fact, did not understand the consequences of his decision to waive the assistance of counsel is readily apparent. In *Strozier I*, the court set forth a stern suggestion to the lower courts that the difficulties inherent in any criminal trial, including the importance of evidentiary rules, be made known to defendants who request to proceed pro se. *Strozier I*, 871 F.2d at 998. In *Strozier II*, the appellate court went so far as to "strongly urge" the lower courts to conduct an inquiry similar to that found in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES, supra note 81, § 1.02-2 to 1.02-5. *Strozier II*, 926 F.2d at 1109.
VI. CONCLUSION

The elevation of a defendant's privilege to proceed pro se to the status of a constitutional right has created the type of constitutional question that can only be resolved by the Supreme Court. That question concerns how to properly balance two competing constitutional rights: the right to proceed pro se and the right to have the assistance of counsel.

Underlying these rights are the interests they represent. Certainly, a defendant's individual interest in being free to decide whether to accept the assistance of counsel should be preserved. However, simply because a defendant's right to proceed pro se is recognized does not mean legitimate governmental interests should become subservient to the interests of the individual defendant. Governmental interests such as conserving judicial resources, maintaining the independence of prosecutors in criminal cases, and preserving confidence and integrity in the criminal justice system through fair trials are a few examples of why the Supreme Court should adopt the formal inquiry approach as the constitutional standard for finding a valid waiver of counsel in cases where defendants exercise their right to proceed pro se.

The formal inquiry approach, while not encroaching upon the constitutional right to proceed pro se, provides a framework to ensure that important governmental interests will not be glossed over when defendants exercise their right of self-representation. Anything less than a constitutional standard that requires some form of hearing or inquiry in which defendants are warned of the consequences of waiving their right to counsel is simply too deferential to the interests of individual defendants over the governmental interests triggered whenever defendants exercise their right to proceed pro se.

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