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"Can You Hear Me Now?" Terrance Egerson's Clear Invocation of the Constitutional Right to Self-Representation Gets Lost in Transmission

Aaron Loudenslager

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“CAN YOU HEAR ME NOW?” TERRANCE EGERSON’S CLEAR INVOCATION OF THE
CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION GETS LOST IN TRANSMISSION

AARON LOUDENSLAGER*

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*Just nod if you can hear me.*¹

INTRODUCTION

“Can you hear me now?” is the hallmark slogan for Verizon Wireless services. The popular Verizon commercial highlights Paul Marcarelli, an actor hired by Verizon, saying the slogan in various settings with his cellphone in his hand.² This Verizon slogan has one purpose: to communicate to potential (and existing) Verizon customers that its cellular phone coverage was superior to its competitors, resulting in Verizon’s customers being able to clearly hear what was being said to them. The importance of being heard and, more significantly, understood by others,

* Aaron Loudenslager, Staff Attorney, Dane County Circuit Court, March 2019-Present; Law Clerk to Judge Mark A. Seidl, Wisconsin Court of Appeals, 2016-2017; Law Clerk, Sauk County Circuit Court, 2015-2016; J.D., University of Wisconsin Law School, 2015; B.S., Northern Michigan University, 2012. The views expressed herein are solely those of the author.

¹ PINK FLOYD, *Comfortably Numb*, on THE WALL (Columbia Records 1979).

² See jwyong5, *Verizon Wireless “Test Man Launch,”* 0:14-0:17, YOUTUBE (Jan. 26, 2009), <https://www.youtube.com/watch?v=OPwPo-IAQ-E>.

is not limited to the context of communication via cellular or other electronic devices. Another context in which it is imperative that people are clearly understood by others is when criminal defendants invoke their Sixth Amendment right to self-representation.

The legal question of whether a criminal defendant has clearly communicated his or her intention to forgo legal representation and instead choose self-representation is not easily distinguished when the Sixth Amendment is actually applied.³ Numerous cases from across the country demonstrate that although the Sixth Amendment question facially appears to be straightforward, in actuality the analysis is rarely that simple.

This Essay explores the United States Supreme Court's seminal decision in *Faretta v. California*⁴ from various aspects in addition to providing an analysis of recent *Faretta* jurisprudence, including *State v. Egerson*,⁵ a recent Wisconsin appellate case addressing what constitutes a clear and unequivocal invocation of the Sixth Amendment right to self-representation in a criminal prosecution. First, this Essay recounts the right to self-representation enunciated in *Faretta*. Second, this Essay describes how lower courts initially struggled to clearly articulate the contours of the right to self-representation. Third, this Essay highlights the Court's attempts to provide some additional guidance regarding the right to self-representation. Fourth, this Essay examines Wisconsin's most recent *Faretta* jurisprudence in *Egerson*. Finally, this Essay analyzes whether the defendant in *Egerson* has plausible grounds for successfully obtaining a writ of habeas corpus in federal court.

³ For instance, there is a split in judicial authority on the fundamental, threshold question of whether the determination of whether a defendant has clearly and unequivocally invoked the right to self-representation is a question of fact or, rather, a question of law. *Compare, e.g.,* Fields v. Murray, 49 F.3d 1024, 1032 (4th Cir. 1995) (en banc) (question of fact), with State v. Flanagan, 978 A.2d 64, 75 n.10 (Conn. 2009) (question of law).

⁴ 422 U.S. 806 (1975).

⁵ 2018 WI App 49, 383 Wis. 2d 718, 916 N.W.2d 833, review denied, 2018 WI ___.

In short, the Wisconsin Supreme Court had an opportunity to resolve inconsistencies and unanswered questions in its *Faretta* jurisprudence, and also to ensure that defendants' clear invocation of their constitutional right to self-representation in a criminal prosecution is scrupulously honored by trial courts. However, as a result of the decision to deny Egerson's petition for review, Wisconsin's *Faretta* jurisprudence remains logically fragmented. The fragmentation increases the likelihood of more fallacious reasoning in the future. Even so, the defendant in *Egerson* has plausible grounds for obtaining habeas relief in federal court, however, the viability of those federal claims is outside the scope of this Essay.

I. *FARETTA V. CALIFORNIA: AN ACCUSED'S RIGHT TO SELF-REPRESENTATION IS IMPLICIT IN THE SIXTH AMENDMENT*

More than forty years ago in its landmark decision *Faretta v. California*,⁶ the United States Supreme Court held that under the Sixth Amendment, an accused person has a constitutional right to self-representation in a criminal prosecution.⁷ The Court's decision rested on the text, structure, and history of the Sixth Amendment.⁸ Although the Court determined that the Sixth Amendment embodies the right to self-representation, the Court also noted that this right is not absolute in

⁶ 422 U.S. 806 (1975).

⁷ Although *Faretta* was the first case in which the United States Supreme Court recognized a defendant's constitutional right to self-representation in a criminal prosecution, *see id.* at 814-17, the Court's prior cases had: (1) indicated a defendant could waive his or her Sixth Amendment right to counsel with the permission of a trial court and (2) strongly suggested the Sixth Amendment provided a defendant with an independent right to self-representation in a criminal prosecution, *see Price v. Johnston*, 334 U.S. 266, 285 (1948) ("The absence of [a defendant's right to personally argue his case on appeal] is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution and to his recognized privilege of conducting his own defense at the trial." (citations omitted) (footnote omitted)); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (concluding that "an accused, in the exercise of free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel").

⁸ *See Faretta*, 422 U.S. at 818-31; *see also* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 494 (1996) ("The [*Faretta*] decision centered on a discussion of the language, logic, and history of the Sixth Amendment.").

nature and, in appropriate circumstances, could be curtailed by a trial court.⁹ In addition, when a defendant decides to forgo representation by counsel and proceed alone (meaning, as a factual matter, the defendant gives up “many of the traditional benefits associated with the right to counsel”¹⁰), the Court noted the defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish” the defendant’s decision “is made with eyes open.”¹¹ The Court’s opinion also suggested, but did not necessarily require, that a defendant’s request for self-representation be clear and unequivocal.¹²

Justice Harry Blackman noted in his dissent that the Court’s decision left many potential practical questions surrounding an accused’s right to self-representation unanswered.¹³ As one commentator noted:

The Justice’s concerns included whether every defendant must be advised of the right to self-representation, how waiver should be measured, whether there existed a right to standby counsel, whether a defendant may switch mid-trial, how soon in the proceeding must a defendant decide to proceed pro se, whether a violation of the right to self-representation could ever constitute harmless error, and how a trial court is to treat a pro se defendant.¹⁴

⁹ See *Faretta*, 422 U.S. at 834 n.46 (noting that “[t]he right of self-representation is not a license to abuse the dignity of the courtroom” and concluding that a “trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct”).

¹⁰ *Id.* at 835.

¹¹ *Id.* (citation omitted) (quotation mark omitted).

¹² See *id.* at 835-36 (observing that “weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel” and holding that “[i]n forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense”); accord *State v. Darby*, 2009 WI App 50, ¶ 18, 317 Wis. 2d 478, 766 N.W.2d 770 (“[A]lthough the Court in *Faretta* approved a clear and unequivocal request to proceed pro se as triggering the trial court’s obligation to insure a valid waiver of the right to counsel and competency to proceed pro se, the Court did not expressly hold that *only* a clear and unequivocal declaration of the desire to proceed pro se triggers these trial court obligations.”). Nonetheless, lower courts appear to have uniformly concluded that a defendant’s invocation of the right to self-representation needs to be unambiguous. See *Darby*, 2009 WI App 50, ¶ 19 (collecting cases); cf. *Raulerson v. Wainwright*, 469 U.S. 966, 970-71, (1984) (Marshall, J., dissenting from the denial of certiorari) (“If a request is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel. If the request is clear, however, a *Faretta* hearing must follow, to assure that the defendant is not required to proceed with the unwanted assistance of counsel.”).

¹³ See *Faretta*, 422 U.S. at 852 (Blackman, J., dissenting).

¹⁴ *Decker*, *supra* note 8, at 498 (footnote omitted).

Justice Blackman predicted that many of these unanswered questions would be difficult for trial courts to answer because of the lack of guidance provided by the Court,¹⁵ suggesting future inconsistent application of *Faretta* among the lower courts.

II. POST-*FARETTA*: LOWER COURTS STRUGGLE TO DEMARCATÉ THE CONTOURS OF AN ACCUSED'S RIGHT TO SELF-REPRESENTATION

Twenty years after *Faretta*, a survey of lower court decisions demonstrated that Justice Blackman's concerns were well-founded.¹⁶ As Justice Blackman predicted, lower courts initially struggled to demarcate the contours of an accused's right to self-representation in criminal prosecutions.

For instance, lower courts initially split on the issue of whether a defendant's constitutional right to self-representation extends to a first appeal.¹⁷ The lower courts also widely diverged on the issue of the appropriate standard of competency to apply to a defendant's waiver of counsel.¹⁸ Other issues the lower courts diverged on include: (1) whether it is a question of law or a question of fact when determining whether a defendant has clearly and unequivocally invoked the right to self-representation¹⁹ and (2) the significance of a trial court's failure to conduct a formal inquiry

¹⁵ See *Faretta*, 422 U.S. at 852 (Blackman, J., dissenting) (predicting "procedural problems" would occupy "trial courts in the future" and opining that "[t]he procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself").

¹⁶ See Decker, *supra* note 8, at 498 ("A review of lower court case law, which follows, will demonstrate that for the past twenty years, the criminal justice system has struggled to mend the procedural holes left by the *Faretta* decision.").

¹⁷ Compare, e.g., *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985) (holding that Sixth Amendment right to self-representation does not extend to first appeal), with *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) ("We hold here that the right of an accused to reject the services of counsel and instead represent himself extends beyond trial into the appellate process.").

¹⁸ Compare, e.g., *United States v. Clark*, 943 F.2d 775, 782 (7th Cir. 1991) (holding that the standard of competence required to stand trial is identical to the standard of competence required to waive counsel), with *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975) (holding that "the standard of competence for making the decision to represent oneself is vaguely higher than the standard for competence to stand trial").

¹⁹ See, e.g., *State v. Towle*, 35 A.3d 490, 502 (N.H. 2011) (Dalianis, C.J., dissenting) (asserting that the determination of whether a defendant has clearly and unequivocally invoked the right to self-representation "is a question of fact," but citing split of judicial authority with regard to that assertion).

on the record, after a defendant's clear invocation of the right to self-representation, to ensure that the defendant's waiver of the right to counsel is knowingly and intelligently made.²⁰ Unfortunately, courts continue to struggle with this task.

III. THE U.S. SUPREME COURT PROVIDES LOWER COURTS WITH MORE GUIDANCE?

Although lower courts struggled with defining the boundaries of the Sixth Amendment right to self-representation over the decades since *Faretta*, the United States Supreme Court has provided some guidance in subsequent cases. For example, in *Godinez v. Moran*,²¹ the Court determined the standard of competence required to waive the right to counsel is the same as the standard of competence required to stand trial.²² However, more than two decades later in *Indiana v. Edwards*,²³ the Court appeared to backtrack and distinguished *Godinez*, holding "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."²⁴ Additionally, in *Martinez v. Court of*

²⁰ See, e.g., *Raulerson v. Wainwright*, 469 U.S. 966, 970-71 (1984) (Marshall, J., dissenting from the denial of certiorari) ("If a request is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel. If the request is clear, however, a *Faretta* hearing must follow, to assure that the defendant is not required to proceed with the unwanted assistance of counsel."); Jeffrey M. Rosenfeld & Shri Klintworth, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: III. Trial: Right to Counsel*, 89 GEO. L.J. 1485, 1493-94 (2001) (stating that "the trial judge's failure to hold a waiver hearing, however, may not be sufficient error to warrant reversal, particularly if the trial record otherwise demonstrates a knowing and intelligent waiver"); Frederic Paul Gallun, Note, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 N.E. J. ON CRIM. & CIV. CON. 559, 601 n.63 (1997) (noting "seven circuits follow the 'record as a whole approach,' and five circuits follow the 'formal inquiry approach'").

²¹ 509 U.S. 389 (1993).

²² See *id.* at 396-99; see also Decker, *supra* note 8, at 518 ("In *Godinez*, the Court ruled that the competency standard used to determine a defendant's ability to waive the right to counsel is no higher than that used to determine a defendant's ability to stand trial." (footnote omitted)).

²³ 554 U.S. 164 (2008).

²⁴ *Id.* at 178.

Appeal of California, Fourth Appellate District,²⁵ the Court held there is no “constitutional right to self-representation on direct appeal of a criminal conviction.”²⁶

Even though later cases provided lower courts with some much-needed guidance in the legal vacuum created by *Faretta*, the Court has left many other important questions surrounding the right to self-representation unanswered. It is these unanswered questions, at least in part, that explain the recent murkiness of Wisconsin’s *Faretta* jurisprudence.²⁷

IV. WISCONSIN’S EARLY SELF-REPRESENTATION JURISPRUDENCE

Prior to the United States Supreme Court’s landmark decision in *Faretta*, the Wisconsin Supreme Court held a defendant has a right to self-representation in a criminal prosecution under the Wisconsin Constitution.²⁸ But given the development of the right to court-appointed counsel for indigent defendants in the Sixth Amendment context, the Wisconsin Supreme Court later clarified in *Laster v. State*²⁹ that an indigent defendant does not have a right to unilaterally forgo court-appointed counsel.³⁰ Rather, a defendant may forgo court-appointed counsel and proceed

²⁵ 528 U.S. 152 (2000).

²⁶ *Id.* at 163; *see also id.* at 165-66 (Scalia, J., concurring in judgment) (“Since a State could, as far as the Federal Constitution is concerned, subject its trial-court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts. Adversarial review with counsel appointed by the State is even less questionable than that.”).

²⁷ In addition to the unanswered questions raised by *Faretta* that were previously mentioned in this Essay, *see supra* notes 19-20 and accompanying text, other unanswered questions include what constitutes a timely invocation of the constitutional right to self-representation, *compare* *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982) (holding that “a motion to proceed pro se is timely if made before the jury is empaneled”), *with* *Russell v. State*, 383 N.E.2d 309, 314 (Ind. 1978) (noting the disagreement among courts “about how the timeliness requisite is to be phrased and applied” and concluding “that the right of self-representation must be asserted within a reasonable time prior to the day on which the trial begins”).

²⁸ *See* *Browne v. State*, 24 Wis. 2d 491, 509-11b, 129 N. W. 2d 175 (1964); *Dietz v. State*, 149 Wis. 462, 479, 136 N.W. 166 (1912).

²⁹ 60 Wis. 2d 525, 211 N.W.2d 13 (1973).

³⁰ *See id.* at 539 (stating that a defendant “does not have the right, however, to individually dispense with court-appointed counsel”).

alone only once the trial court has determined that the defendant has knowingly and intelligently waived the right to counsel.³¹

After *Faretta*, Wisconsin appellate courts, similar to other lower courts, struggled to develop answers to the many explicit and implicit questions raised by the Court's decision. For instance, in *Pickens v. State*,³² the Wisconsin Supreme Court addressed the issue of what constitutes a valid waiver of the right to counsel.³³ The state supreme court admonished trial courts "to conduct a thorough and comprehensive examination of the defendant" to ensure that a defendant's waiver of counsel is knowingly and intelligently made.³⁴ This admonishment was consistent with *Faretta's* admonition that a defendant who requests self-representation be made aware of the dangers and disadvantages of self-representation.³⁵

However, the court ultimately concluded "it is the accused's apprehension, *not* the trial court's examination, that determines whether the waiver is valid. If the defendant's understanding of the necessary facts appears in the record other than in response to specific questions put to him by the trial court, a knowing waiver can be found."³⁶

More than fifteen years later, the Wisconsin Supreme Court changed course. In *State v. Klessig*,³⁷ the court overruled *Pickens* and mandated "the use of a colloquy in every case where a defendant seeks to proceed *pro se*,"³⁸ a colloquy that addressed the four specific factors articulated

³¹ See *State v. Johnson*, 50 Wis. 2d 280, 283-84, 184 N.W.2d 107 (1971) (noting that "[w]hether the request of either defendant or appointed counsel for termination of services is to be granted is directed to the sound discretion of the trial court" and concluding that waiver of appointed counsel "must be intelligently, voluntarily and understandingly made").

³² 96 Wis. 2d 549, 292 N.W.2d 601 (1980).

³³ See *id.* at 563-64.

³⁴ *Pickens*, 96 Wis. 2d at 564.

³⁵ See *Faretta v. California*, 422 U.S. 806, 835 (1975).

³⁶ *Id.* (emphasis added) (citation omitted).

³⁷ 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

³⁸ *Id.* at 206 (citing *Pickens*, 96 Wis. 2d at 563-64).

by the court in *Pickens*.³⁹ In contrast to *Pickens*, *Klessig* precluded reviewing courts from concluding, based on the record alone and without the required colloquy, that a defendant's waiver of counsel was valid.⁴⁰ Instead, when a trial court fails to conduct the required colloquy and a defendant seeks to vacate a conviction on the basis that the defendant's waiver of counsel was not knowingly and intelligently made, "the circuit court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary."⁴¹ *Klessig*'s procedural framework remained settled for more than a decade, which provided parties with a degree of predictability and consistency.

V. WISCONSIN'S RECENT *FARETTA* JURISPRUDENCE—LOSING SIGHT OF DEFENDANT AUTONOMY?

A. *The Curious Case of Rashaad Imani*

The Wisconsin Supreme Court changed legal direction again in *State v. Imani*,⁴² while not explicitly overruling *Klessig*.⁴³ In effect, the Wisconsin Supreme Court significantly modified a circuit court's duty to conduct a colloquy when a defendant invokes the constitutional right to self-representation.⁴⁴ Whereas *Klessig* required a circuit court to conduct a discussion addressing the four factors enunciated in *Pickens* once a defendant invokes the right to self-representation,⁴⁵

³⁹ The four factors under *Pickens* that a circuit court must address to ensure that a defendant's waiver of counsel is valid are that the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him [or her], and (4) was aware of the general range of penalties that could have been imposed on him [or her]." *Id.* (citing *Pickens*, 96 Wis. 2d at 563-64).

⁴⁰ *See id.*

⁴¹ *Id.* at 207.

⁴² 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40.

⁴³ *See id.* ¶ 34 ("Today we uphold *Klessig* as the controlling authority for determining whether a defendant validly waived the right to counsel and the preferred method for a circuit court to engage in such a colloquy.").

⁴⁴ *See id.* ¶ 48 (Crooks, J., concurring in part and dissenting in part) (arguing that "the majority's reformulation effectively overrules the clear, useful bright-line rule in *Klessig* requiring circuit courts to conduct a full and complete colloquy with all defendants seeking to waive assistance of counsel").

⁴⁵ *See Klessig*, 211 Wis. 2d at 206 (citing *Pickens v. State*, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980)).

Imani does not require a court to address all four *Pickens* factors, so long as the defendant fails to satisfy a single *Pickens* factor.⁴⁶

In *Imani*, the Wisconsin Supreme Court held the circuit court engaged the defendant, Rashaad Imani, on two of the *Pickens* factors, and that the record reflected that Imani did not satisfy either of those two factors.⁴⁷ Specifically, the state supreme court held that Imani “did not make a deliberate choice to proceed without counsel” and “was unaware of the difficulties and disadvantages of self-representation.”⁴⁸ The court relied on the circuit court’s characterization of Imani’s request to represent himself as “flippant,” “short term,” “immature,” “episodic driven,” and “disgruntled” to determine that Imani did not make a “deliberate” choice to proceed alone.⁴⁹ By relying on Imani’s purported emotional state (e.g., anger and frustration) when he requested to represent himself to conclude that his request was not a “deliberate” one, the state supreme court

⁴⁶ See *State v. Imani*, 2010 WI 66, ¶¶ 33, 35 (admonishing circuit courts to engage in the full colloquy when a defendant invokes the right to self-representation, but holding that “if any one of the four conditions is not met, the circuit court is required to conclude that the defendant did not validly waive the right to counsel”).

⁴⁷ See *id.* ¶¶ 26, 28, 32.

⁴⁸ *Id.* ¶¶ 28, 32.

⁴⁹ *Id.* ¶¶ 27-28.

appeared to import a legal principle from other jurisdictions *sub silentio*,⁵⁰ a principle never explicitly adopted or utilized by Wisconsin courts before *Imani*.⁵¹

Not only did the Wisconsin Supreme Court hold that Imani failed to knowingly and intelligently waive his constitutional right to counsel, it also concluded “that the circuit court’s determination that Imani was not competent to proceed *pro se* [was] supported by the facts in the

⁵⁰ One of the seminal cases regarding the import of a defendant’s emotional state—especially anger or frustration—when invoking the constitutional right to self-representation originates from California. See *People v. Marshall*, 931 P.2d 262, 271-73 (Cal. 1997) (noting that if a defendant’s request for self-representation is “made in passing anger or frustration” it may be denied by a trial court as equivocal). However, *Marshall* is better understood as applying *Faretta*’s intimation that a defendant is not permitted—when purportedly invoking the constitutional right to self-representation—to abuse the dignity of the judicial system by manipulating the judicial process with obstreperous conduct. See *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (noting that “[t]he right of self-representation is not a license to abuse the dignity of the courtroom” and concluding that a “trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct”); accord *Marshall*, 931 P.2d at 268, 274 (noting how the trial court expressed concern that the “defendant was attempting to manipulate the court by seeking self-representation in order to secure the dismissal of the public defender’s office, and then giving up *pro se* status in order to have a certain attorney appointed” and holding that the trial court later properly denied the defendant’s purported request to represent himself because the request “was made to delay and disrupt the proceedings”); cf. Marc C. McAllister, *Forfeiture-by-Wrongdoing and Faretta: Reaffirming Counsel’s Vital Role When Defendants Manipulate Competing Sixth Amendment Representation Rights*, 44 HOFSTRA L. REV. 1227, 1245 (2016) (noting that several “federal circuit courts have determined that a defendant’s obstructionist or dilatory conduct should result in [forfeiture] of the right to self-representation”). Nonetheless, before and after *Marshall* was decided, other courts have likewise concluded that a defendant’s emotional state when invoking the right to self-representation may render the defendant’s request ambiguous—or even insincere. See, e.g., *Love v. Raemisch*, 620 Fed. Appx. 642, 648 (10th Cir. 2015) (upholding state court’s determination on habeas review that defendant’s request to proceed without counsel was ambiguous because it was “an impulsive act borne of frustration”); *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000) (holding that defendant’s request to proceed alone, after expressing dissatisfaction with counsel’s refusal to present frivolous arguments to the trial court, was not “a sincere desire to dispense with the benefits of counsel”); *Reese v. Nix*, 942 F.2d 1276, 1281 (8th Cir. 1991) (concluding that defendant’s request to proceed alone was equivocal because it was an “impulsive response to the trial court’s denial of his request for new counsel” and that “a reasonable person could have concluded that [the defendant] was merely expressing his frustration and not clearly invoking his right to self-representation”); *Jackson v. Ylst*, 921 F.2d 882, 888-89 (9th Cir. 1990) (holding that defendant’s request to proceed without counsel was ambiguous because it was an “emotional” and “impulsive” response to the trial court’s denial of the defendant’s prior motion to substitute counsel); *People v. Hacker*, 563 N.Y.S.2d 300, 301 (N.Y. App. Div. 1990) (holding that defendant’s request to proceed *pro se* was equivocal because “it was a spur of the moment decision, prompted more by defendant’s dissatisfaction with the denial of his request to change assigned counsel”).

⁵¹ One Wisconsin case could be construed as implying a defendant’s emotional state is relevant to the determination of whether a defendant has invoked the constitutional right to self-representation. See *Laster v. State*, 60 Wis. 2d 525, 539, 211 N.W.2d 13 (1973) (concluding that defendant’s “outburst” was not invocation of constitutional right to self-representation). However, *Laster* is better understood as being consistent with the now well-established rule that a defendant’s expression of dissatisfaction with counsel, without more, is not an invocation of the right to self-representation. See *State v. Darby*, 2009 WI App 50, ¶¶ 21, 26, 317 Wis. 2d 478, 766 N.W.2d 770 (collecting cases regarding the import of a defendant’s dissatisfaction with counsel); accord *Laster*, 60 Wis. 2d at 539 (concluding that defendant’s “outburst” of being “railroaded” by his counsel was not invocation of the right to self-representation).

record.”⁵² Although the court noted “a defendant’s ‘timely and proper request’ should be denied only where the circuit court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense,”⁵³ it did not identify Imani as having a specific problem or disability in this regard. Instead, the court explained Imani “possessed only a tenth grade education,” had “observational” experience with the criminal justice system, and “asserted, without more, that he read at a college level.”⁵⁴ In affirming the circuit court’s determination that Imani was not competent to proceed without counsel, the state supreme court illustrated the deferential nature of the court’s review on the issue; the circuit court’s determination regarding Imani’s competency was not “totally unsupported” by the court record.⁵⁵

Justice Patrick Crooks authored an incisive partial dissent, criticizing the majority opinion for a variety of reasons.⁵⁶ First, he noted the significant fact that neither party briefed the issue addressed by the majority opinion. The parties limited their argument to whether, as result of the circuit court not providing the required colloquy, Imani was entitled to a new trial or, rather, a retrospective evidentiary hearing as a remedy. The majority opinion addressed the broader issue

⁵² *Imani*, 2010 WI 66, ¶ 3.

⁵³ *Id.* ¶ 37 (quoting *Pickens v. State*, 96 Wis. 2d 549, 568, 292 N.W.2d 601 (1980)).

⁵⁴ *Id.* ¶ 38.

⁵⁵ *See id.* ¶¶ 37-38.

⁵⁶ Justice Patrick Crooks’ opinion was a partial dissent because he agreed “with the majority’s holding to the extent that it reverses the court of appeals’ remand for a new trial” but “strongly disagree with the majority’s failure to remand for a retrospective evidentiary hearing.” *Id.* ¶ 44 (Crooks, J., concurring in part and dissenting in part). However, the state court of appeals was correct in concluding that the appropriate remedy was a new trial. *Klessig* envisions a situation in which a defendant seeks self-representation, the circuit court fails to conduct a full colloquy, *but nevertheless permits the defendant to represent himself or herself*. *See State v. Klessig*, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997). A retrospective evidentiary hearing under *Klessig* addresses—not whether the right to self-representation was violated—but rather, whether the *right to counsel* was violated. *See id.* at 207. In *Imani*, the circuit court failed to conduct a full colloquy after the defendant sought self-representation, *and then refused to permit the defendant to represent himself*. *See Imani*, 2010 WI 66, ¶ 25 (“The case before us, however, is the converse scenario of *Klessig*. Unlike *Klessig*, Imani did not proceed to trial without counsel.”). By failing to conduct a full colloquy once Imani invoked his right to self-representation, coupled with not permitting him to represent himself, the circuit court violated his right to self-representation—which entitled him to a new trial. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (concluding violation of the right to self-representation is not subject to harmless error analysis); *United States v. Arlt*, 41 F.3d 516, 523 (9th Cir. 1994) (“[O]nce a defendant has stated his request clearly and unequivocally and the judge has denied it in an equally clear and unequivocal fashion, the defendant is under no obligation to renew the motion.”).

of whether Imani's constitutional right to self-representation was violated in the first place.⁵⁷ As a result, the majority opinion's legal analysis regarding the constitutional right to self-representation was conducted in a vacuum devoid of adversarial argumentation. Adversarial argumentation being one of the fundamental norms underlying the American legal system.⁵⁸ In addition, by addressing a broader legal issue than the one raised by the parties, the state supreme court also appeared to contravene the judicial norm that cases should generally be decided on the narrowest grounds possible.⁵⁹

Second, Justice Crooks argued that "the majority's view that a partial colloquy could be sufficient essentially overrules *Klessig* and fails to serve the purposes advanced by a full and complete colloquy."⁶⁰ He noted "*Klessig* sets a bright-line rule requiring a full and complete colloquy touching upon the four *Pickens* factors when an accused requests self-representation" and argued that "a partial colloquy eliminates helpful guidance for circuit courts from *Klessig* and the

⁵⁷ See *Imani*, 2010 WI 66, ¶¶ 41-48 (Crooks, J., concurring in part and dissenting in part). In addressing a broader legal issue than the one initially raised by the parties, the state supreme court's decision in *Imani* is similar to some notable United States Supreme Court's decisions. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 396 (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for deciding the "case on a basis relinquished below, not included in the questions presented to [the Court] by the litigants, and argued here only in response to the Court's invitation").

⁵⁸ See, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 2 (2011) ("The United States' commitment to an adversarial system of justice is a defining and distinctive feature of its legal system." (footnote omitted)); cf. *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."); *Maurin v. Hall*, 2004 WI 100, ¶ 120 n.1, 274 Wis. 2d 28, 682 N.W.2d 866 (Abrahamson, C.J., concurring) ("The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his [or her] own in an inquisitorial system." (quoting Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 247 (2002))).

⁵⁹ See *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Typically, an appellate court should decide cases on the narrowest possible grounds." (citation omitted)); *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (noting that only dispositive issues need be addressed); cf. *Society Ins. v. LIRC*, 2010 WI 68, ¶27 n.8, 326 Wis. 2d 444, 786 N.W.2d 385 ("A 'facial challenge should generally not be entertained when an 'as-applied' challenge could resolve the case." (quoting *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 624 (1996))).

⁶⁰ *Imani*, 2010 WI 66, ¶ 58 (Crooks, J., concurring in part and dissenting in part).

[Wisconsin Jury Instructions], and is likely to bog down post-conviction and appellate review of such cases.”⁶¹

Third, Justice Crooks observed how the majority opinion at times appeared “to sidestep the fact that the circuit court failed to engage in the full and complete colloquy as mandated [under] *Klessig*” by “shift[ing] the responsibility to the defendant to present evidence supporting the four *Pickens* factors as well as showing his competence.”⁶² He emphasized both *Klessig* and the Wisconsin Jury Instructions indicate it is the *circuit court’s* duty, not the defendant’s duty, to ensure that the defendant’s waiver of the right to counsel is valid.⁶³

Finally, Justice Crooks argued to the extent that the Wisconsin Supreme Court could determine from the record whether Imani’s waiver of counsel was valid, the record did not support the circuit court’s conclusion that Imani’s waiver of counsel was invalid.⁶⁴ Justice Crooks thought the majority opinion seemed to ignore in its analysis the significant statements⁶⁵ made by Imani to the circuit court. Instead, the majority focused on “the circuit court’s language opining, without the full and complete colloquy, that Imani’s decision to represent himself was not deliberate because his decision was ‘immature,’ ‘flippant,’ and ‘episodic driven.’”⁶⁶

In contrast, Justice Crooks argued, even if Imani’s decision to represent himself was the result of anger or frustration, “it is not necessarily a non-deliberate choice.”⁶⁷ In his view, the circuit court merely believed “that Imani was making a foolish choice by waiving counsel.”⁶⁸

⁶¹ *Id.* (Crooks, J., concurring in part and dissenting in part).

⁶² *Id.* ¶¶ 60, 67 (Crooks, J., concurring in part and dissenting in part).

⁶³ *See id.* ¶ 61 (Crooks, J., concurring in part and dissenting in part).

⁶⁴ *See id.* ¶ 68 (Crooks, J., concurring in part and dissenting in part).

⁶⁵ For instance, after invoking his constitutional right to self-representation, Imani said to the circuit court, “[W]hen it comes to trial I know, like I said before, ain’t nobody going to represent myself better than me.” *Id.* ¶ 8 (majority opinion).

⁶⁶ *Id.* ¶ 69 (Crooks, J., concurring in part and dissenting in part).

⁶⁷ *Id.* ¶ 70 (Crooks, J., concurring in part and dissenting in part).

⁶⁸ *Id.* (Crooks, J., concurring in part and dissenting in part).

Justice Crooks also suggested that the majority opinion's conclusion that the court record supported a determination that Imani was not competent to represent himself was inconsistent with the United States Supreme Court's decision in *Faretta* and the state supreme court's decision in *Pickens*.⁶⁹

In *Imani v. Pollard*,⁷⁰ the United States Court of Appeals for the Seventh Circuit addressed whether Imani was, as a result of the Wisconsin Supreme Court's decision, entitled to a writ of habeas corpus.⁷¹ A petitioner is entitled to a writ of habeas corpus from a federal court when a state court decision on the petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."⁷² A state court decision contravenes clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the United States Supreme Court or reaches a different conclusion than that Court based on materially indistinguishable facts.⁷³ Additionally, a state court decision unreasonably applies clearly established precedent if it identifies the correct governing legal principle, but nevertheless unreasonably applies that principle to the facts of the case.⁷⁴

However, this standard is deferential to state court decisions. The petitioner will not obtain relief under this standard unless no "fair minded jurists could disagree' on the correctness of the state court's decision."⁷⁵ Even with this high "demanding" legal standard of review, the Seventh

⁶⁹ See *id.* ¶ 72 (Crooks, J., concurring in part and dissenting in part).

⁷⁰ 826 F.3d 939 (7th Cir. 2016).

⁷¹ See *id.* at 941-42.

⁷² 28 U.S.C. § 2254(d)(1) (2018). A petitioner is also entitled to a writ of habeas corpus from a federal court when a state court decision on the defendant's claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2) (2018).

⁷³ See *Williams v. Taylor*, 529 U.S. 362, 404-08 (2000).

⁷⁴ See *Brown v. Payton*, 544 U.S. 133, 141 (2005).

⁷⁵ *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Circuit held Imani was entitled to a writ of habeas corpus because the “Wisconsin Supreme Court decision was flatly contrary to *Faretta* and its progeny in three distinct ways.”⁷⁶

“First, the [Wisconsin Supreme Court] in effect required Imani to persuade the trial judge that he was making a knowing and voluntary decision to waive the right to counsel when it was actually the judge’s job to make sure that Imani’s waiver would be knowing and voluntary.”⁷⁷ The Seventh Circuit noted the requirement that a defendant’s decision be knowing and intelligent “is not a condition that must be fulfilled before an accused may be ‘allowed’ to exercise his Sixth Amendment right to represent himself” but rather “a requirement for valid waiver of the right to counsel.”⁷⁸ The state supreme court’s ratification of the circuit court’s inadequate colloquy after Imani invoked his constitutional right to represent himself was “flatly contrary to *Faretta*” because it had the impermissible effect of shifting the burden of demonstrating knowing and intelligent waiver of the right to counsel from the trial court to the defendant.⁷⁹

“Second, the [Wisconsin Supreme Court] required Imani to persuade the trial judge that he had a good reason to choose self-representation. Under *Faretta*, however, a defendant’s reason for choosing to represent himself is immaterial.”⁸⁰ The Seventh Circuit noted that the state supreme court held Imani did not make a “deliberate” decision to proceed alone, based on the circuit court’s determination that due to his purported emotional state of frustration, his decision lacked a “sufficiently rational basis.”⁸¹ However, the Seventh Circuit concluded that “denying a defendant his Sixth Amendment right to proceed *pro se* because his choice is foolish or rash is also contrary

⁷⁶ Imani v. Pollard, 826 F.3d 939, 943 (7th Cir. 2016).

⁷⁷ *Id.* at 943-44.

⁷⁸ *Id.* at 944.

⁷⁹ *Id.* at 944-45.

⁸⁰ *Id.* at 944.

⁸¹ *See id.* at 945 (citing State v. Imani, 2010 WI 66, ¶ 27, 326 Wis. 2d 179, 786 N.W.2d 40).

to *Faretta*” because “[n]othing in *Faretta* or its progeny allows the judge to require the defendant to prove he is making the choice for a reason the judge finds satisfactory.”⁸²

“Third, the [Wisconsin Supreme Court] imposed a competence standard much more demanding than *Faretta* and its progeny allow, as if the issue were whether Imani was an experienced criminal defense lawyer.”⁸³ The Seventh Circuit noted there were no material differences between Imani’s background and *Faretta*’s background.⁸⁴ “Because Imani’s abilities were close enough to *Faretta*’s to be indistinguishable, the Wisconsin courts unreasonably applied *Faretta* in denying Imani his right to represent himself.”⁸⁵

Although the Seventh Circuit concluded the Wisconsin Supreme Court’s decision was contrary to *Faretta* and its progeny in three different ways, the state supreme court has yet to overrule *Imani*. Thus, *Imani* remains binding on Wisconsin courts,⁸⁶ even though it rests on a crumbling legal foundation. As a result, whether a defendant’s decision to forgo counsel in Wisconsin is appropriately respected by a court may depend on whether the defendant is tried in the state or federal system.⁸⁷

⁸² *Id.* The court also noted that, as a practical matter, “[o]nly in rare cases will a trial judge view a defendant’s choice to represent himself as anything other than foolish or rash.” *Id.*

⁸³ *Id.* at 944.

⁸⁴ *See id.* at 946.

⁸⁵ *Id.* (footnote omitted).

⁸⁶ *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (“The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court decision.”); *see also State v. King*, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996) (noting that, with regard to federal court decisions, Wisconsin courts “are bound only by the United States Supreme Court on questions of federal law”).

⁸⁷ *Cf. Decker*, *supra* note 8, at 516-17 (noting that as a result of lower courts not following a standardized practice in admonishing defendants about the dangers and disadvantages of self-representation, “the degree of protection afforded a defendant’s right to competent legal representation largely depends upon the courtroom in which they are prosecuted”).

B. The Curious Case of Terrance Egerson

In *State v. Egerson*,⁸⁸ the Wisconsin Court of Appeals addressed the question of what constitutes a clear and unequivocal invocation of the Sixth Amendment right to self-representation in a criminal prosecution.⁸⁹ Five months after Terrance Egerson was criminally charged, his counsel moved to withdraw from representation, citing “a disagreement over trial strategy.”⁹⁰ However, the circuit court denied the motion.⁹¹

Two months later, Egerson explicitly requested for his attorney to move to withdraw as counsel.⁹² In the motion, Egerson’s counsel predicted his client would “likely” choose self-representation “if the current representation is not withdrawn” because his client “has more faith in his own ability to represent himself than he does in his current representation.”⁹³ At the hearing on the motion, Egerson’s counsel stated that the attorney-client relationship had been “irreparably destroyed” as a result of Egerson’s various actions, including: (1) speaking to the media, (2) preparing motions on his own behalf, and (3) accusing his counsel of colluding with the district attorney’s office to subvert his rights.⁹⁴ Further, Egerson characterized his counsel as “totally deficient” and stated his communication with counsel had broken down.⁹⁵

Ultimately, the circuit court granted the motion to withdraw.⁹⁶ But, the court also admonished Egerson and referred to the allusions contained in the motion about self-

⁸⁸ 2018 WI App 49, 383 Wis. 2d 718, 916 N.W.2d 833, *review denied*, 2018 WI ____.

⁸⁹ *See id.* ¶¶ 11-12.

⁹⁰ *Id.* ¶ 3.

⁹¹ *Id.*

⁹² *See Reply Brief of Defendant-Appellant at 3, Egerson*, 2018 WI App 49 (noting that the motion requesting permission for counsel to withdraw from the case stated it was done “on the request of Mr. Egerson”).

⁹³ *Id.* at 3-4.

⁹⁴ *Egerson*, 2018 WI App 49, ¶ 4.

⁹⁵ *Id.*

⁹⁶ *Id.* ¶ 5.

representation. The court stated, “You’re heading down a slope, based on this record, where you’re going to find yourself . . . in a position where a court says you’re waiving your right to counsel and you’re going to be representing yourself, which would be the biggest mistake of your life.”⁹⁷

Later at the same hearing, as Egerson’s (former) counsel, the prosecutor, and the circuit court were “discussing the logistics of turning over discovery” to whomever would presumably become Egerson’s new appointed counsel, Egerson began discussing discovery that he believed had not been turned over by the prosecution to the defense.⁹⁸ The circuit court suddenly cut off Egerson as he was speaking and informed him that he was not the counsel of record in the case.⁹⁹ Egerson then said, “Well, you know what. Your Honor, let me represent myself and have co-counsel then.”¹⁰⁰ After the court curtly rejected his request, Egerson said, “Let me represent myself and have no counsel.”¹⁰¹ In response the court stated, “Better think about that one.”¹⁰² The hearing ended shortly afterward, with the court setting a date for future assignment of appointed counsel.¹⁰³

Before new counsel was appointed for Egerson, he filed his own motion to dismiss one of the criminal charges against him.¹⁰⁴ At the next hearing, the circuit court told the prosecutor and Egerson’s new appointed counsel about Egerson’s *pro se* motion, but the court decided to not address the substantive merits of the motion unless his new counsel decided to raise them.¹⁰⁵ Although Egerson made no more overtures towards self-representation,¹⁰⁶ months before trial he

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 6.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 7.

¹⁰⁴ Brief of Defendant-Appellant at 8, *Egerson*, 2018 WI App 49.

¹⁰⁵ *Id.*

¹⁰⁶ See *Egerson*, 2018 WI App 49, ¶ 7 (“There was no further mention of Egerson proceeding *pro se.*”).

expressed dissatisfaction with his new counsel, and again asked that he be appointed new counsel.¹⁰⁷

After his trial and sentencing, Egerson filed a post-conviction motion for a new trial on the ground that the circuit court violated his constitutional right to self-representation.¹⁰⁸ The circuit court denied his motion, reasoning that Egerson’s statements regarding self-representation at the hearing in question were “qualified, not unequivocal,” because they were made in the context of a conversation about discovery in the case and Egerson “was merely expressing dissatisfaction with his lawyer and trying to remedy what he believed his lawyer was not doing for him.”¹⁰⁹ To buttress its decision, the circuit court also noted “[t]he fact that Egerson accepted new counsel and never requested to represent himself again.”¹¹⁰

The Wisconsin Court of Appeals affirmed the circuit court’s decision, concluding that Egerson’s statements at the hearing in question were not sufficiently clear and unequivocal to invoke the constitutional right to self-representation.¹¹¹ First, relying primarily on *State v. Darby*,¹¹² the court analogized Egerson’s statements to those made by the defendant in *Darby* and characterized Egerson’s statements as being “disgruntled with his attorney.”¹¹³ Second, the court distinguished the Seventh Circuit’s nonbinding decision in *Imani v. Pollard*,¹¹⁴ contending that while the Seventh Circuit “had implicitly determined that the right of self-representation had been

¹⁰⁷ See Brief of Defendant-Appellant at 8, *Egerson*, 2018 WI App 49.

¹⁰⁸ *Egerson*, 2018 WI App 49, ¶ 9.

¹⁰⁹ Brief of Defendant-Appellant at 9, *Egerson*, 2018 WI App 49.

¹¹⁰ *Id.* at 10.

¹¹¹ See *Egerson*, 2018 WI App 49, ¶¶ 1, 26-30.

¹¹² 2009 WI App 50, 317 Wis. 2d 478, 766 N.W.2d 770. According to the *Darby* court, it faced what appeared to be a question of first impression in Wisconsin: what constitutes an invocation of the constitutional right to self-representation? See *id.* ¶¶ 1, 14. However, one pre-*Faretta* case suggests Wisconsin courts may have already resolved this question by the early 1970s. See *State v. Johnson*, 50 Wis. 2d 280, 284, 184 N.W.2d 107 (1971) (stating that a defendant’s waiver of counsel “must be definite, unequivocal and unconditional”). *But cf.* *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) (noting that “a defendant is not deemed to have equivocated in his desire for self-representation merely because” the request is conditional).

¹¹³ See *Egerson*, 2018 WI App 49, ¶ 30.

¹¹⁴ 826 F.3d 939 (7th Cir. 2016).

invoked,” it, in contrast, was explicitly addressing this threshold issue.¹¹⁵ Third, the court appeared to be concerned with Egerson’s emotional state when he requested self-representation.¹¹⁶

However, there are three fundamental flaws with the appellate decision. First, *Darby* does not support the court’s holding in *Egerson*. In *Darby*, the defendant sent the circuit court a letter complaining about a lack of communication with his counsel and a lack of access to the discovery materials; he also made an isolated reference in the letter to preparing for his case.¹¹⁷ Immediately preceding jury selection, the defendant again complained about his counsel and this time asked that his counsel be dismissed; also, he complained about not being able to access discovery materials, which prevented him from preparing for his case.¹¹⁸

Due to the defendant merely expressing dissatisfaction with counsel, coupled with the defendant’s other isolated references to “preparing” for his case which were ambiguous about whether he was seeking self-representation, the defendant did not invoke the right to self-representation.¹¹⁹ In contrast to *Darby*, Egerson’s statements at the hearing in question were not just general statements about how he was dissatisfied with counsel or that he wanted to “prepare” for his case; he specifically stated, “Let me represent myself and have no counsel.”¹²⁰ If this does not constitute an unequivocal invocation of the right to self-representation, it is hard to imagine what would satisfy that standard.¹²¹

¹¹⁵ See *Egerson*, 2018 WI App 49, ¶¶ 25-26.

¹¹⁶ See *id.* ¶¶ 12, 27-28, 30.

¹¹⁷ *Darby*, 2009 WI App 50, ¶ 5.

¹¹⁸ *Id.* ¶ 6.

¹¹⁹ *Id.* ¶¶ 5-6, 25-27.

¹²⁰ *Egerson*, 2018 WI App 49, ¶ 6.

¹²¹ Cf. *State v. Klessig*, 211 Wis. 2d 194, 196-99 564 N.W.2d 716 (1997) (remanding case back to the circuit court to conduct a retrospective evidentiary hearing to determine whether defendant had knowingly, intelligently, and voluntarily waived the right to counsel after defendant sent a letter to the circuit court which said, “I would like to inform you that I will be acting on my own behalf in this case”).

Second, the appellate court did not satisfactorily distinguish the Seventh Circuit’s *Imani* decision. Although the Seventh Circuit may have assumed that Imani had unambiguously invoked his right to self-representation, it analyzed a related question addressed by the state supreme court: whether Imani’s invocation of the right to self-representation was “deliberate.”¹²² The Seventh Circuit concluded that the state supreme court’s determination that Imani’s invocation of the right to self-representation was not deliberate (on the basis that it was purportedly rash or foolish) was contrary to *Faretta*; a defendant’s emotional state is not an appropriate basis in itself to deny his or her request to proceed without counsel.¹²³ The state court of appeals appeared to ignore the larger concerns explicitly addressed by the Seventh Circuit in *Imani* by focusing on Egerson’s emotional state when he requested to represent himself.¹²⁴

Third, the state court of appeals ignored critical facts in the record when determining that Egerson’s statements were not a clear and unequivocal invocation of the constitutional right to self-representation—a notable oversight given the opinion’s repeated emphasis on the particular context of Egerson’s statements.¹²⁵ While the court focused on Egerson’s purported emotional state when he requested to represent himself and the fact that he did not ask to represent himself again after the hearing in question,¹²⁶ it conveniently left out the fact that Egerson filed a *pro se* motion after the hearing to dismiss one of the criminal charges against him.¹²⁷ Additionally, the court downplayed the fact that: (1) at the hearing, it was the circuit court that initially brought up the subject of self-representation; and (2) after Egerson clearly requested to represent himself

¹²² See *Imani v. Pollard*, 826 F.3d 939, 945 (7th Cir. 2016).

¹²³ See *id.* at 945 & n.1; *cf.* *State v. Imani*, 2010 WI 66, ¶ 70, 326 Wis. 2d 179, 786 N.W.2d 40 (Crooks, J., concurring in part and dissenting in part) (“Here, even if Imani’s request was ‘flippant’ or ‘episodic-driven,’ it is not necessarily a non-deliberate choice. Rather, the language cited reflects the circuit court’s opinion that Imani was making a foolish choice by waiving counsel.”).

¹²⁴ See *Egerson*, 2018 WI App 49, ¶¶ 12, 27-28, 30.

¹²⁵ See *id.* ¶¶ 12, 26-30.

¹²⁶ See *id.*

¹²⁷ *Cf.* Brief of Defendant-Appellant at 8, *Egerson*, 2018 WI App 49.

without counsel, the circuit court responded, "Better think about that one."¹²⁸ The circuit court's response alone indicates that Egerson's request to represent himself was unequivocal.¹²⁹

Although the state court of appeals correctly noted whether a defendant's constitutional right to self-representation has been violated is a question of law,¹³⁰ the court could have taken one or two prudent steps. First, it could have concluded that it did need not address the issue of what the standard of review is regarding the determination of whether a defendant has clearly and unequivocally invoked the right to self-representation is a question of fact or, rather, a question of law, because the result would be the same under either standard of review.¹³¹ Second, based on the State's concession, the court could have explicitly decided that for purposes of *Egerson*, this foundational issue is a question of law.¹³² Instead, the court did neither, further muddling Wisconsin's already inconsistent *Faretta* jurisprudence.

After the appellate decision, Egerson filed a petition for review with the Wisconsin Supreme Court, arguing that *Egerson* is inconsistent with the Seventh Circuit's (nonbinding) decision in *Imani* and that Wisconsin's labyrinth of *Faretta* jurisprudence needs to be modified.¹³³ However, the state supreme court denied his petition for review. The state supreme court failed to take advantage of an opportunity to resolve inconsistencies and unanswered questions in its *Faretta* jurisprudence while ensuring defendants' clear invocation of their constitutional right to self-representation in a criminal prosecution is scrupulously honored by trial courts. As a result, Wisconsin's *Faretta* jurisprudence remains logically fragmented, no doubt increasing the likelihood of more fallacious reasoning in the future.

¹²⁸ *Egerson*, 2018 WI App 49, ¶ 6.

¹²⁹ *Cf.* *State v. Flanagan*, 978 A.2d 64, 78 (Conn. 2009) (concluding that the substance of the trial court's response to defendant's request to proceed pro se indicated that the defendant's request was unequivocal).

¹³⁰ *See Egerson*, 2018 WI App 49, ¶ 10.

¹³¹ *Cf. State v. Towle*, 35 A.3d 490, 493 (N.H. 2011).

¹³² *See* Brief of Plaintiff-Respondent at 8, *Egerson*, 2018 WI App 49.

¹³³ *See* Petition for Review of Defendant-Appellant at 24, 26-27, 29, *Egerson*, 2018 WI 49.

C. Are Wisconsin Courts Losing Sight of Defendant Autonomy?

Faretta has been controversial since its inception. Yet, in its aftermath, even though the United States Supreme Court has at times expressed some doubts as to the foundational underpinnings of *Faretta*,¹³⁴ the Court has recognized *Faretta* as embodying the value of defendant autonomy,¹³⁵ invoking the Kantian ideal that each person, and criminal defendant, is an end in itself,¹³⁶ and ultimately the master of one's fate.¹³⁷ Prior to *Faretta*, the Wisconsin Supreme Court justified the right to self-representation under the Wisconsin Constitution, at least in part, on the value of defendant autonomy.¹³⁸

Wisconsin's recent *Faretta* jurisprudence,¹³⁹ however, like much of the jurisprudence from other jurisdictions,¹⁴⁰ and even a large swath of the academic literature on the Sixth Amendment

¹³⁴ See, e.g., *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 158 (2000) (noting that with the increased availability of competent counsel, many of the historical reasons for recognizing the right to self-representation “do not have the same force”).

¹³⁵ See, e.g., *Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting) (“[T]he dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.”); *McKaskle v. Wiggins*, 465 U.S. 168, 178-179 (1984) (“The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.”); *United States v. Frazier-El*, 204 F.3d 553, 571 (4th Cir. 2000) (Murnaghan, J., dissenting) (discussing “the unmistakable command of *Faretta*, which held that courts should not be in the business of paternalistically second-guessing the wisdom of a defendant's desire to proceed *pro se*”); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.C. L. Rev. 1147, 1154-55 (2010).

¹³⁶ See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (describing the concept of autonomy as “the Kantian right of each individual to be treated as an end in himself [or herself], an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others”).

¹³⁷ Cf. REBECCA NEWBERGER GOLDSTEIN, *PLATO AT THE GOOGLEPLEX: WHY PHILOSOPHY WON'T GO AWAY* 96 (2014) (“[A]ll people have a stake in believing themselves masters of much of the domain of philosophy, most especially the questions of how life should be lived. To think oneself to be anything less than a master seems to diminish one's very humanity.”); FRIEDRICH NIETZSCHE, *THE GAY SCIENCE: WITH A PRELUDE IN GERMAN RHYMES AND AN APPENDIX OF SONGS* 170 (Bernard Williams ed., Josefine Nauckhoff & Adrian Del Caro trans., Cambridge Univ. Press reprinted 2008) (contending that people “want to be poets of [their] lives, starting with the smallest and most commonplace details”).

¹³⁸ Cf. *Browne v. State*, 24 Wis. 2d 491, 511-11a, 129 N. W. 2d 175 (1964) (“[D]ue process also requires that throughout the criminal process the state must treat a defendant as a person possessing human dignity (after all it is the defendant who is going to suffer if he makes the wrong decision and forgoes a lawyer) and, in most instances, a defendant would be denied this treatment if counsel were imposed upon him against his wishes.”).

¹³⁹ Cf. *Tatum v. Foster*, 847 F.3d 459, 467 (7th Cir. 2017) (“This is the third time in recent months that we have had to consider a habeas corpus petition based on *Faretta* and the application of Wisconsin's *Klessig* decision.”).

¹⁴⁰ See, e.g., *Frazier-El*, 204 F.3d at 574 (4th Cir. 2000) (Murnaghan, J., dissenting) (“While the majority pays nominal deference to the *pro se* right recognized in *Faretta*, the unmistakable subtext of its opinion is that the right is a nuisance and a constitutional anachronism that courts should curtail whenever possible.”); *Adams v. Carroll*, 875 F.2d 1441,

right to self-representation,¹⁴¹ reflects a distrust of both the motives and abilities of indigent defendants to represent themselves without the assistance of counsel. This institutional distrust of a defendant's decision to engage in self-representation, whether explicit or implicit, has a deleterious effect on defendant autonomy.

For example, the decisions in *Imani* and *Egerson* illustrate the tendency for courts to provide post ad hoc rationalizations for a trial court's denial of a defendant's request to exercise the right to self-representation.¹⁴² In *Imani*, after invoking his right to self-representation, the circuit court failed to conduct a full *Klessig* colloquy and then did not permit Imani to represent himself.¹⁴³ On appeal, the state supreme court determined that the circuit court had engaged Imani on two of the *Pickens* factors and that the circuit court determined that Imani did not satisfy those two factors.¹⁴⁴ However, the circuit court never stated it was addressing the *Pickens* factors, nor did it state that Imani had failed to satisfy those factors. Rather, the circuit court admonished Imani's decision as "flippant" and "short-term," and essentially required him to convince the circuit court he could proceed without counsel. Simply put, the state supreme court's analysis of the circuit court's decision was a post ad hoc rationalization.

1444 (9th Cir. 1989) (asserting that "a defendant normally gives up more than he gains when he elects self-representation"); *People v. Marshall*, 931 P.2d 262, 272 (Cal. 1997) ("We share the concern that some assertions of the right of self-representation may be a vehicle for manipulation and abuse."); cf. German Lopez, *This is the Most Obscene, Vulgar Court Transcript You'll Ever See*, VOX (Oct. 6, 2016, 12:20 PM), <https://www.vox.com/policy-and-politics/2016/10/6/13186708/judge-durham-rick-and-morty> (posting video with "Rick & Morty" characters reenacting a trial court judge characterizing the constitutional right to self-representation to a criminal defendant as the "constitutional right to be a dumbass").

¹⁴¹ See, e.g., *Decker*, *supra* note 8, at 485 ("[W]hile some pro se defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves." (footnote omitted)); cf. *Hashimoto*, *supra* note 135, at 1150 n.8 ("Most of the literature on the criminal defendant's autonomy interest argues that any such interest should be limited." (citations omitted)).

¹⁴² Cf. *Frazier-El*, 204 F.3d at 566 (Murnaghan, J., dissenting) (arguing that "the majority provides a post hoc rationalization for the [trial] court's denial of [the defendant's] request for self-representation"); *McAllister*, *supra* note 50, at 1245-46 (noting how some appellate court "decisions reflect an overriding desire to affirm a defendant's conviction," which causes courts "to affirm the trial court's ruling on the representation issue, regardless of the Sixth Amendment outcome").

¹⁴³ *State v. Imani*, 2010 WI 66, ¶¶ 7-10, 326 Wis. 2d 179, 786 N.W.2d 40.

¹⁴⁴ See *id.* ¶ 3.

Likewise, in *Egerson*, after requesting to represent himself, the circuit court told Egerson, “Better think about that one.”¹⁴⁵ Although the circuit court’s response alone suggests that Egerson’s request to represent himself was unambiguous,¹⁴⁶ the state court of appeals nonetheless concluded that his request was equivocal on the basis that his statements were merely expressing his disgruntlement with his counsel.¹⁴⁷ The court of appeals analysis, at best, was highly flawed.¹⁴⁸ In reality, the court of appeals’ analysis of the circuit court’s decision is indicative of a post ad hoc rationalization.

The state supreme court in *Imani* reasoned that a defendant’s emotional state alone may render the defendant’s choice to proceed *pro se* as not deliberate.¹⁴⁹ Additionally, the state court of appeals in *Egerson* appeared to treat Egerson’s emotional state when requesting to represent himself as relevant to whether his request was clear and unambiguous.¹⁵⁰ In doing so, the Wisconsin appellate courts permitted their trial courts to substitute their own judgment as to what was best for those particular defendants. Instead, those appellate and trial courts forsook the Kantian ideal that each person is an end in itself and the master of his or her own fate by invalidating the legitimacy of those defendants’ requests to represent themselves based, at least in part, on the purported content of their emotional state.

VI. PETITION FOR WRIT OF HABEAS CORPUS: *IMANI* REDUX?

Although Egerson failed to successfully find recourse in the Wisconsin state court system, he is not completely out of options. First, like Imani, he could find recourse in the federal court

¹⁴⁵ State v. Egerson, 2018 WI App 49, ¶ 5, 383 Wis. 2d 718, 916 N.W.2d 833, *review denied*, 2018 WI ___.

¹⁴⁶ Cf. State v. Towle, 35 A.3d 490, 493 (N.H. 2011).

¹⁴⁷ See *Egerson*, 2018 WI App 49, ¶ 30.

¹⁴⁸ See *supra* notes 117-29 and accompanying text.

¹⁴⁹ See *supra* notes 49-51 and accompanying text.

¹⁵⁰ See *Egerson*, 2018 WI App 49, ¶¶ 12, 27-28, 30.

system. Further, he has plausible grounds to obtain a writ of habeas corpus—likely from the United States Court of Appeals for the Seventh Circuit.

Similar to *Imani*, Egerson can argue the state court decision was contrary to, or an unreasonable application of *Faretta*. The *Egerson* court, while not as explicit as the state supreme court in *Imani*, appeared to utilize the defendant's emotional state, at least in part, to refuse the defendant's request to proceed without counsel. In *Imani*, the Seventh Circuit concluded that a court may not deny a defendant's invocation of the constitutional right to self-representation on the basis of the defendant's emotional state; doing so is contrary to *Faretta*.¹⁵¹

Alternatively, Egerson could argue that the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹⁵² The *Egerson* court stated, “we find these facts to be more in line with those of *Darby*: a defendant who is disgruntled with his attorney and thus expresses an opinion that he could do a better job representing himself.”¹⁵³

But again, as a factual matter, Egerson did not merely express dissatisfaction with his counsel and say he could do a better a job. Rather, after the circuit court initially brought up the subject of self-representation at the hearing in question, he clearly asked to be allowed to represent himself, the clarity of which is evident from how the circuit court responded to his request. Then after the hearing, Egerson filed a *pro se* motion to dismiss one of the charges against him. The court of appeals ignored, or downplayed, these significant facts in its analysis. Under either of these arguments, it appears Egerson is plausibly entitled to habeas relief in federal court.

¹⁵¹ See *Imani v. Pollard*, 826 F.3d 939, 945 (7th Cir. 2016); see also *Tatum v. Foster*, 847 F.3d 459, 467 (7th Cir. 2017) (“Although this court’s decisions are not authoritative for purposes of AEDPA, they can present useful examples.”).

¹⁵² 28 U.S.C. § 2254(d)(2) (2018).

¹⁵³ *Egerson*, 2018 WI App 49, ¶ 30.

CONCLUSION

With its decision to deny Egerson's petition for review, Wisconsin's *Faretta* jurisprudence remains a dangerous labyrinth for practitioners and judges alike to traverse. Nonetheless, Egerson has plausible grounds for obtaining habeas relief in federal court. Whether or not those grounds would ultimately be successful in federal court is another question.