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Jona Goldschmidt

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HAS HE "MADE HIS BED, AND NOW MUST LIE IN IT"? TOWARD RECOGNITION OF THE PRO SE DEFENDANT'S SIXTH AMENDMENT RIGHT TO POST-TRIAL READMONISHMENT OF THE RIGHT TO COUNSEL

JONA GOLDSCHMIDT*

Pro se defendants who unsuccessfully represent themselves at trial know they have a Sixth Amendment right to counsel because trial judges make sure they know about that right when considering their request to represent themselves. However, they do not necessarily know they have a right to counsel after a guilty plea, or a finding or verdict of guilt. Some courts hold that once a defendant has waived his right to counsel, that waiver continues throughout the subsequent stages of the prosecution. Other courts hold that judges should readmonish the defendant of his right to counsel, and appoint counsel upon request. Since the Supreme Court has come close but has not decided the issue, this article reviews these respective court decisions and argues that the Sixth Amendment requires judges to readmonish pro se defendants post-trial of their right to counsel, and reappoint counsel upon request.

* Professor, Department of Criminal Justice and Criminology, Loyola University Chicago; J.D., DePaul College of Law; Ph.D., Arizona State University. I wish to thank Jonathan Gradess, Executive Director of the New York Defender Association, who alerted me to the unsettled law on the issue of the pro se defendants' rights after trial and before sentencing, specifically, the readmonishment of the right-to-counsel, and reappointment of counsel, issues. I am indebted to Vincent Samar, Adjunct Professor at IIT Chicago-Kent College of Law, for his thoughtful comments on the manuscript, and to whom I must give credit for, among other things, referring me to the StarTrek metaphor used at the beginning of the paper.
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“I’m way over my head.”1

“I want to fire myself.”2

1 McCormick v. Adams, 621 F.3d 970, 973 (9th Cir. 2010).
2 Charles v. State, 646 F.3d 1243, 1246 (9th Cir. 2011).
Imagine a world in which people had many rights, but these rights were only vaguely known. This is what Captain Kirk encounters in an episode of *Star Trek*, in which he meets the Yangs, a people from the Omega IV planet, which has a culture that is a close parallel of Earth’s. Captain Kirk hears their chief recite the Yangs’ “holy words,” which he realizes is a badly slurred version of the Pledge of Allegiance. Kirk eventually informs the Yangs that their “holy words” “were not merely written for chiefs, but for everyone . . . He [also] reads the ‘greatest of holies’ – the preamble to the Constitution of the United States of America, and tells [their chief] the words must apply to everyone or they are meaningless.”

This scenario is relevant to the situation facing some pro se defendants who are found guilty after representing themselves at trial, and who come to the realization – as did the defendants quoted above – that the prosecutor outmatched them at trial, and have second thoughts about continuing to represent themselves. Such defendants may or may not know they have a Sixth Amendment right to counsel at sentencing. They may assume that they cannot have the assistance of counsel once they waived that right in order to represent themselves. So, what happens – and what should happen – upon the judge or jury finding the defendant guilty at trial? Should the defendant be readmonished that he has a right to counsel?

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4 Id.

5 The Supreme Court has not yet held that the Sixth Amendment right to self-representation extends to sentencing. For a thorough discussion of the question. *See State v. Reddish*, 859 A.2d 1173, 579-86 (N.J. 2004) (finding a Sixth Amendment right of defendants in both the guilt and penalty phases in capital cases to represent themselves).
Surprisingly, some courts hold that the defendant is not entitled to be readmonished because a waiver of the right to counsel at or before trial continues throughout post-trial proceedings. In so holding, these courts in effect—by not informing the pro se defendant of his right to withdraw or revoke his waiver of counsel—do not recognize that, while the pro se defendant may have waived his right to counsel before or during trial, he still, I argue, has a continuing right to assistance (or reappointment) of counsel under the Sixth Amendment at sentencing, absent bad faith (i.e., “gaming the system”) conduct. Some courts disagree, holding that the right to counsel is not a continuing and absolute (or presumptive) right once waived, and that the matter of reappointment of counsel is one for the court’s discretion. My argument against this view is premised on the clearly established Supreme Court case law recognizing that the right to counsel attaches at all “critical stages” of a prosecution, of which sentencing and post-trial motions are generally accepted to be, and the unique criticality and complexity of sentencing which makes the assistance of counsel a necessity. The minimal bur-

6 See infra notes 76-79, and accompanying text.
7 References to “he” include “she.”
8 “In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense.” Amendment 6, U.S. Const. Amend. VI.
9 See infra notes 208-278 and accompanying text.
10 See infra, notes 158, 285, and accompanying text.
11 Post-trial motions, sometimes taking place before and sometimes after sentencing, are by implication included in my argument whenever sentencing is mentioned. While we have no name for the post-trial, pre-sentencing stage, it is undeniably a critical stage in the prosecution, as is the sentencing stage itself. It is a crucial stage for filing mandatory post-trial motions, Menefield v. Borg, 881 F.2d 696, 699 (9th Cir. 1989) (motion for new trial is a critical stage in the prosecution); Johnston v. Mizell, 912 F.2d 172, 176 (7th Cir. 1990), cert. denied, 498 U.S. 11094 (1991) (post-trial motion for a new trial is a critical stage in Illinois); King v. State, 613 So.2d 888 (Ct. Ala. Crim. App. 1993) (motion for a new trial is a critical stage in the prosecution), and for requesting the trial court to reconsider certain rulings, or to preserve appellate issues.

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den on courts from post-trial readmonishment is far outweighed by the benefits to the defendant and the justice system.

Thus, a defendant in those courts that accept the "continuing waiver" theory is like a member of the Yangs on Omega IV, who only vaguely knows that he has a right (in this case, to counsel), without a further understanding that this right continues through all critical stages of the prosecution, including sentencing and post-trial motions, in the absence of disruptive or dilatory conduct by the defendant. While the courts that accept the continuing waiver theory appear to be in the minority,\(^\text{12}\) this article argues for a rejection of that theory. In so doing, it addresses two questions that were left unanswered by the Supreme Court when it recognized that the Sixth Amendment affords a right to self-representation:\(^\text{13}\) (1) Is the trial judge obligated before sentencing to re-admonish the pro se defendant of his continuing Sixth Amendment right to have the assistance of counsel? And, (2) whether or not there is such a judicial duty, does the court nevertheless have a presumptive, non-discretionary duty to appoint counsel upon the defendant’s specific request?

While some courts hold that no readmonishment of the right to counsel is necessary because pro se defendants are bound by their earlier waiver of counsel that continues through the sentencing stage,\(^\text{14}\) in some of these cases a dissenting opinion is heard arguing against the majority’s “they made their bed” justification for declining to inform the defendant of the right to

\(^\text{12}\) But see People v Baker, 440 N.E.2d 856, 859 (Ill. 1982), which referred to the “greater number of courts considering the precise issue here presented have held that a competent waiver of counsel by a defendant once made before the court carries forward to all subsequent proceedings unless defendant later requests counsel or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings.” (emphasis added)

\(^\text{13}\) Faretta v. California, 422 U.S. 806 (1975).

\(^\text{14}\) See infra Part IV.A.
counsel at sentencing. Fortunately, most courts find a Sixth Amendment violation whenever the trial judge fails to conduct a Faretta hearing at or before sentencing (or resentencing after an appeal), before allowing the defendant’s request for self-representation; these courts require that trial judges inform the defendant of his right to counsel, the dangers and disadvantages of self-representation, and the maximum possible sentence. Other courts acknowledge that Faretta warnings are required, but permit a modified, less detailed colloquy. Lastly, there are those courts that hold that generally no readmonishment of the right to counsel is required, subject to exceptions for special circumstances.

It is hoped that, in the event the Supreme Court hears a case involving the issues discussed, this article will contribute to its recognition of a generally-recognized Sixth Amendment right of pro se defendants to readmonishment of their right to counsel before sentencing, and a concomitant judicial duty to appoint counsel to such indigent defendants at sentencing upon their request, absent dilatory or obstructionist (“cat and mouse”) conduct regarding their representation.

Part I describes the English common law history of the right to counsel, and its evolution in American constitutional law. It also discusses the significance of the right to counsel as reflected in various Supreme Court decisions. Part II reviews the duty of courts to secure a valid waiver of the Sixth Amendment right to counsel from those who seek to dismiss their attorney, as well as

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15 See infra Part IV.B.
16 See infra Part IV.B.1-2.
17 See Id.
18 See infra Part IV.C.1-2.
19 Evans v. State, 273 So.2d 495, 564 (Miss. 1973); United States v. Smith, 413 F.3d 1253, 1280-81 (10th Cir. 2005). A WESTLAW search (“cat and mouse” representation counsel) in the combined all-state cases and all-federal cases database reveals the term has been used in 182 criminal case decisions involving issues of right to counsel and right to self-representation.
the additional requirements of conducting an adequate Faretta\textsuperscript{20} hearing to warn the defendant of the dangers and disadvantages of self-representation. It describes recent developments defining the required contents of the Faretta colloquy.

Part III describes the Supreme Court's characterization of some stages of a criminal prosecution as "critical," and what factors it considers in making this determination. It argues that sentencing is uniquely critical and complex, more so than other critical stages. Counsel is essential – not just in capital cases – to navigate sentencing and post-trial motion stages. It also discusses court approaches to the special case of pro se defendants who – often in capital cases – decline to present any evidence in mitigation. Courts have recognized the necessity of counsel under these circumstances and required counsel to be appointed.

Part IV then reviews the different positions courts now take to address the questions of post-trial readmonishment. There are those that hold no readmonishment is required, or may be required only in special circumstances, and those that recognize it should be given in all cases. Part IV also discusses two related readmonishment issues: the "clearly established" law requirement under the AEDPA for granting federal habeas relief, which results in a denial of collateral relief in many state prisoner cases, and the issue of whether a Sixth Amendment right-to-counsel violation constitutes structural error requiring reversal or is subject to the harmless error rule which does not.

The article concludes that the Constitution requires pro se defendants be specifically informed of their post-trial right to counsel to assist them in post-trial motions and at sentencing.

\textsuperscript{20} Faretta v. California, 422 U.S., supra note 13, at 806 (1975).
I. EVOLUTION AND SIGNIFICANCE OF THE RIGHT TO COUNSEL

Before the English Revolution of 1688, defendants in felony cases were not permitted to have counsel, except where questions of law would arise, and yet they were permitted to appear in petty offense cases.\(^\text{21}\) In 1696 Parliament passed The Treason Act, permitting lawyers to assist defendants in treason cases.\(^\text{22}\) Thereafter, throughout the eighteenth century courts began to permit counsel for the defense in felony cases as a consequence of the Crown’s and victims’ increasing use of private attorneys to prosecute crimes.\(^\text{23}\) Counsel’s role, however, was restricted because judges and jurors needed to hear the accused speak for himself and personally answer the charges.\(^\text{24}\) It took decades for lawyers in England to expand the scope of their assistance to the point at which they, and not the defendant, would be the sole spokesperson for the defense.\(^\text{25}\) Until then, it was the judge who safeguarded the interests of the private prosecutor (i.e., the victim of the crime, or a paid, private prosecutor) and the defen-

\(^{21}\) John H. Langbein, The Origins of Adversary Criminal Trial (Oxford Studies in Modern Legal History) 27 (2005) (hereafter Adversary Trial). Blackstone was highly critical of the refusal of courts to allow counsel for treason or felony cases: “[I]t seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?” 4 William Blackstone, Commentaries on the Law of England 49 (1769).

\(^{22}\) Langbein, Adversary Trial supra note 21, at 67.

\(^{23}\) Id. at 167-70.

\(^{24}\) Id. at 170-71.

\(^{25}\) Id. at 177.
dant. 26 It was not until 1836 that Parliament enacted a statute permitting defense counsel in felony cases. 27

In America, the Framers of the Constitution ensured that the right to “assistance of counsel” guaranteed by the Sixth Amendment was applicable to both felony and treason cases. 28 The question left open in the text of the Amendment is whether the government has any obligation to provide counsel to indigent defendants. While self-representation was common at the time the Bill of Rights was adopted, 29 the predominant practice in the first half of the eighteenth century was for members of the emerging bar to represent indigent defendants as a matter of public spirit or the quest for experience or publicity. 30

26 James J. Tomkovicz, The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution 5 (2002). “Ordinarily, the two sides were relatively equal in terms of legal training and skill. There was no great likelihood that a highly skilled prosecutor would take advantage of a less skilled defendant. There was no evidence imbalance of ability that called for the remedy of trained defense counsel. As long as the prosecution was handled by laypersons, an impartial judge could adequately protect the interests of the lay accused.” Id.

27 Trials for Felony Act, 1836, 6 and 7 W.4, c. 114, s. 1, 2 (1836).U.K.).

28 Several colonies and states included a right to defense counsel in their constitutions (Delaware, Maryland, Massachusetts, New York, and Pennsylvania), by statute (North Carolina, Rhode Island, South Carolina, and Virginia), or both (Delaware, Massachusetts, and Pennsylvania) before the right was enshrined in 1791 in the Sixth Amendment. Tomkovicz, supra note 26, at 10-11.

29 Tomkovicz, supra note 26, at 13-14. “One explanation offered for the prevalence of self-representation is the distrust of lawyers that flourished initially in the colonies ... [and another is] the fact that trained legal assistance was not generally available.” Id. at 14. The right to self-representation in the colonial era was reflected in charters and declarations of rights, and statutes that prohibited representation by counsel. Faretta, 422 U.S. supra note 13 at 826-27, 830, citing Daniel Boorstin, The Americans: The Colonial Experience 197 (1958). The right is now enshrined in the constitutions of 36 states. Faretta, 422 U.S. supra note 13 at 813.

The evolution of the right to assistance of counsel for indigent defendants in America is well known. It was not until 1932 in *Powell v. Alabama*, the infamous “Scottsboro Boys” case, that the Supreme Court held states were obligated under the Due Process Clause of the Fourteenth Amendment to appoint counsel for indigent defendants in serious felony or capital cases.\(^\text{31}\) In the oft-quoted language of Justice Sutherland’s opinion for the Court:

> The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have 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 dangers of conviction because he does not know how to establish his innocence. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.\(^\text{32}\)


\(^{32}\) 287 U.S. 45, *Id.* at 68 (1932).
READMONISHMENT OF THE RIGHT TO COUNSEL

In its 1938 decision in *Johnson v. Zerbst*, the Supreme Court recognized that the Sixth Amendment entitled indigent defendants in federal criminal cases to court-appointed counsel.33 In this case, two Marine enlistees were charged in the U.S. District Court in South Carolina with uttering and passing counterfeit U.S. currency.34 They were tried, convicted, and sentenced without counsel.35 After their imprisonment in the U.S. Penitentiary in Atlanta, they filed a petition for writ of habeas corpus based on Sixth Amendment right-to-counsel grounds, which was denied by the District Court.36 The Fifth Circuit affirmed, and the Supreme Court granted certiorari “due to the importance of the questions involved.”37

In finding a Sixth Amendment violation, the Court referred to the right to counsel as “necessary to insure fundamental human rights of life and liberty.”38

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’ It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intri-

34 Id. at 459-60.
35 Id. at 460.
36 Id. at 459. The District Court agreed that their right to counsel was denied, but held that the deprivation was “not sufficient ‘to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal’. ‘appeal.’” Id.
37 Id.
38 Id. at 462.
cate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to "... the humane policy of the modern criminal law..." which now provides that a defendant "... if he be poor, ... may have counsel furnished him by the state, ... not infrequently ... more able than the attorney for the state."39

After citing Justice Sutherland's characterization of the importance of the right to counsel in Powell, the Court held that the Sixth Amendment withholds from federal courts "the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."40 Moreover, while the purpose of the right to counsel is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights," the Court added: "the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."41 While the former portion of the Court's statement focused on the role of the right to counsel as being to protect an accused from a "conviction" based on the defendant's ignorance of legal and constitutional rights, the latter part has relevance to the issue discussed here, namely the situation of an accused's "failure to claim his rights" at sentencing.

The Court went on to state that compliance with the Sixth Amendment "is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."42

39 Id. (citations omitted).
40 Id. at 463.
41 Id. at 465.
42 Id. at 467-68 (emphasis added).
Through the italicized language, the Court recognized that the right to counsel extends not only to the guilt or innocence phase of the criminal prosecution, but to the sentencing stage of a prosecution as well.

In *Betts v. Brady*, the Supreme Court considered the habeas corpus petition of a state court defendant who had been denied his request for counsel because the State of Maryland only provided counsel for indigent defendants in cases of rape or murder.\(^{43}\) The issue presented was whether the denial of counsel amounted to a denial of Fourteenth Amendment’s Due Process Clause.\(^ {44}\) The Court held that the clause only applied to federal courts, and did not incorporate the rights set forth in the Sixth Amendment.\(^ {45}\) The Court supported its decision by referring to English common law, which permitted counsel to appear only for collateral matters and on questions of law,\(^ {46}\) and by reference to the early practice of the American states, which was not uniform with respect to appointment of counsel as a matter of right.\(^ {47}\) The Court concluded that the cases did not involve a


\(^{44}\) *Id.* at 461.

\(^{45}\) *Id.* at 461-62. The Court reasoned that:

> Asserted denial [of the Fourteenth Amendment Due Process Clause] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

*Id.* at 462.

\(^{46}\) *Id.* at 466.

\(^{47}\) After reviewing various state constitutions and statutes at the time of the adoption of the Bill of Rights, the Court concluded:

> This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the con-
denial of “fundamental fairness,” thus the petitioner was not denied his right to due process under the Fourteenth Amendment.48

There then followed a series of Supreme Court cases in which the Court applied the language in *Powell v. Alabama*, which referred to the right to counsel as applying only in “special circumstances,” such as capital cases.49 In *Hamilton v. Alabama*, the Court held a defendant in a capital case did not need to make a showing of specific need for or prejudice from the lack of counsel because in a capital case there is an inherent right to counsel.50 In non-capital cases, the Court continued to find that a deprivation of “fundamental fairness” would result if counsel

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48 *Id.* at 470. In reaching its conclusion, the Court noted that the defendant, charged with robbery, adequately represented himself:

> The simple issue was the veracity of the testimony for the State and for the defendant. . . . [T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction.

*Id.* at 472-73.


were not appointed where the defendant’s personal characteristics made it unlikely that he could present an adequate defense on his own, where the charges or possible defenses were complex, or where events occurred at trial that raised issues of prejudice.

Then, in *Gideon v. Wainright*, the Supreme Court finally held that the Sixth Amendment right to assistance of counsel was incorporated into the meaning of the Due Process Clause of the Fourteenth Amendment, and was binding on states. Defendant Clarence Gideon was charged with breaking into a pool room with the intent to commit a misdemeanor, which was a felony under Florida law. He was unable to afford an attorney, and his request for appointment of counsel was denied. He conducted his defense “about as well as could be expected from a layman.” Noting the similarity of the facts in *Betts v. Brady*, the Court concluded that *Betts* should be overruled.

The Court reasoned that at the time *Betts* was decided, there was “ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth

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55 Id. at 336-37.
56 Id. at 337.
57 Id. “He made an opening statement to the jury, cross-examined the State’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument ‘emphasizing his innocence to the charge contained in the Information filed in this case.’ The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison,” quoting his habeas corpus petition. Id. (footnote omitted).
58 Id. at 339.
Amendment.\textsuperscript{59} The Court noted the existing precedents that recognized the fundamental character of the First Amendment, the Fifth Amendment's just compensation clause, the Fourth Amendment, and the Eighth Amendment's ban on cruel and unusual punishment.\textsuperscript{60} It declared that, "the Court in Betts was wrong in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."\textsuperscript{61}

Citing, inter alia, the earlier precedents of\textit{Powell v. Alabama} and\textit{Johnson v. Zerbst}, the\textit{Gideon} Court concluded:

\[\text{[T]he Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers...}\]

\textsuperscript{59} Id. at 341.
\textsuperscript{60} Id. at 341-42.
\textsuperscript{61} Id. at 342.
in criminal courts are necessities, not luxuries. 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 ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.62

Commentators have for many years expounded on the significance of the right to counsel. The right to counsel has been characterized as “the lynchpin of constitutional protection,”63 the “master key”64 to all the rules and procedures designed to ensure the reliability of the guilt-determining process, and “the most pervasive right” of the accused.65

Without a lawyer’s aid, it is quite unlikely that an accused will be able to enjoy the advantages of the other enumerated rights. Without counsel, there

62 Id. at 344. See also, ANTHONY LEWIS, GIDEON’S TRUMPET 218 (1964) (“His triumph there shows that the poorest and least powerful of men – a convict without even a friend to visit him in prison – can take his case to the highest court in the land and bring about a fundamental change in the law.”)
65 Walter V. Shaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956). See Penson v. Ohio, 488 U.S. 75, 84-85 (1988), where the Supreme Court quoted Shaefer in support of its holding that the Ohio appellate court erred in allowing appellate counsel to withdraw without filing an Anders brief verifying a total lack of viable issues, and without later appointing counsel after that court identified certain colorable issues, which “deprived both petitioner and itself of the benefit of an adversary examination and presentation of the issues.”).
is little chance for a fair battle between equally able adversaries. Counsel’s most basic role is to ensure that the confrontation between opponents contemplated by our Constitution actually does take place.\textsuperscript{66}

Professor Tomkovicz, in his seminal study of the right to counsel, points out that courts have taken two perspectives of the right. One focuses on the substantive value of counsel’s assistance: “This view holds that the object of a lawyer’s assistance is primarily, if not exclusively, to ensure that criminal prosecutions arrive at reliable, truthful, resolutions.”\textsuperscript{67} The other view is that the procedural value of the right is also critical: “This perspective maintains that excessive emphasis on the substantive contributions that defense lawyers make to the outcomes of proceedings is misguided and fails to account for the essential role that counsel plays in ensuring that those outcomes are achieved by means of fair procedures.”\textsuperscript{68} The Supreme Court has not provided clear support for one or the other perspective, but readers of its decisions “should be attentive to this basic conceptual tension and to the impacts that it has on right to counsel law.”\textsuperscript{69} This article approaches the right to counsel from the latter perspective, focusing on the significance of the right in so far as the sentencing stage of a criminal case, rather than on the guilt or innocence phase.

\textsuperscript{66} \textsc{Tomkovicz}, supra note 26, at. 128.
\textsuperscript{67} \textit{Id.} at xxiv.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
II. WAIVER OF THE RIGHT TO COUNSEL, AND THE RIGHT TO SELF-REPRESENTATION

A. Waiver Requirements

Johnson v. Zerbst\textsuperscript{70} continues to be the leading case that sets forth the general principles that guide courts in the determination of whether a defendant has properly waived his right to counsel. First, courts are to "‘... indulge every reasonable presumption against waiver of fundamental constitutional rights.'"\textsuperscript{71} Courts "‘do not presume acquiescence in the loss of fundamental rights'".\textsuperscript{72} Second, a waiver of a constitutional right is ordinarily "an intentional relinquishment or abandonment of a known right or privilege."\textsuperscript{73} There is no one test for waiver: "The determination of whether there has been an intelligent waiver of 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."\textsuperscript{74}

In addition, the trial court has certain duties in so far as the waiver determination:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. 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

\textsuperscript{70} 304 U.S. 458 (1938). Zerbst, supra note 33.
\textsuperscript{71} Id. at 464, citing Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937) and Hodges v. Easton, 106 U.S. 408, 412 (1882).
\textsuperscript{73} Id. at 464 (emphasis added).
\textsuperscript{74} Id.
be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.\textsuperscript{75}

Note the descriptive words used for the required waiver colloquy in the Court's language just cited: "intentional" relinquishment or abandonment (which generally equates to "voluntary"\textsuperscript{76} relinquishment); a "known" right; an "intelligent" and "competent" waiver. Subsequent waiver case law from the Supreme Court\textsuperscript{77} and lower courts often use the terms interchangeably,\textsuperscript{78} and in different combinations, but each of these terms can give rise to separate appellate issues and claims. These appellate waiver cases arise from all stages of a prosecution: pretrial, trial, and post-trial (including post-trial motions or sentencing) stages.

A defendant may claim that his waiver was ineffective because he felt compelled to waive counsel (i.e., forced to proceed pro se) for various reasons.\textsuperscript{79} It may be that the trial judge had

\textsuperscript{75} Id. at 465.

\textsuperscript{76} See e.g., Pazden v. Maurer, C.A.3 (N.J.) 2005, 424 F.3d 303 (3d Cir. 2005) (waiver held involuntary where trial judge unreasonably denied a defense lawyer's request for continuance, the lawyer admitted he was unprepared for trial, and the defendant was thereupon forced to proceed pro se).

\textsuperscript{77} See, e.g., As to guilty pleas, the Court has described the required waiver of the right to counsel and trial rights as having to be both "knowing and voluntary" and "voluntary and intelligent," Parke v. Raley, 506 U.S. 20, 28-29 (1992); Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (presiding judge must ensure that defendant's waiver of right to counsel is "intelligent and competent" before permitting the entry of a guilty plea); North Carolina v. Alford, 400 U.S. 25, 31 (1970) (holding that guilty plea that is not "voluntary and knowing" it denies due process).

\textsuperscript{78} See e.g., United States v. Vasquez, 7 F.3d 81, 86 (5th Cir. 1993) ("[T]here is no reason to believe that Vasquez was aware of his right to counsel at the hearing. Nowhere in the transcript of the hearing did the Judge inform Vasquez of this right or in any way seek to insure that Vasquez had voluntarily chosen to waive this important right. Thus, there is simply nothing to support any argument that Vasquez knowingly and intelligently waived his right to counsel at this hearing.").

\textsuperscript{79} Lopez v. Thompson, 202 F.3d 1110, 1117-18 (9th Cir. 2000) (affirming denial of state prisoner's habeas petition where trial judge granted his motion
improperly encouraged self-representation, or did not do enough to try to dissuade him from proceeding pro se. Dissuasion such as failing to explain the ways in which a lawyer could assist him, or because granting his motion to proceed pro se in and of itself denied him the right to a fair trial since his “performance at trial was – as everybody involved except him surely expected – a complete disaster.” Those claims would be based on a lack of voluntariness.

Another defendant may claim a lack of knowing and intelligent waiver if the trial court failed to inform him, after his guilty plea, of the dangers and disadvantages of proceeding pro se at sentencing. The court also could have failed to do so before denying his right to self-representation, failed to provide the defendant with the possible maximum sentence during the waiver colloquy, and failed to inquire about his knowledge of the charges against him. Other defendants may argue that their waiver was not “intelligently” made because they did not have certain information (beyond the potential maximum penalties), such as the collateral consequences that may result from a conviction, or were not warned that if they proceeded pro se and took the witness stand, that their prior convictions could be brought out for impeachment. Lastly, because waiver of the right to counsel can occur at any stage, waiver case law arises at different stages of the prosecution. The only exception to the

\[\text{to proceed pro se after trial, and then denied his request for counsel after sentencing hearing began, holding his original waiver was valid).}\]

80 People v. Burgener, 206 P.3d 420, 427 (Calif. 2009).
81 United States v. Dahler, 171 F.3d 441 (7th Cir. 1999).
82 United States v. Farhad, 190 F.3d 1097, 1102 (9th Cir. 1999).
83 United States v. Balough, 820 F.2d 1485, 1489 (9th Cir. 1987).
84 United States v. Hernandez, 203 F.3d 614, 626 (9th Cir. 1999) (Plea held involuntary where “wrongful refusal of Hernandez’s self-representation request imposed ‘unreasonable restraints’ on his decision whether to plead guilty.”).
85 United States v. Crowhurst, 596 F.2d 389, 390 (9th Cir. 1979).
86 United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995).
87 Strozier v. Newsome, 926 F.2d 1100, 1104 (11th Cir. 1991).
right to waive counsel in a criminal case\textsuperscript{88} is for “gray area” pro se defendants. That is, those who are found competent but have mental or emotional problems; for these pro se defendants the trial court has the discretion to appoint unwanted counsel.\textsuperscript{89}

\textbf{B. The Faretta Colloquy Requirement}

The substance of the colloquy in which trial judges must engage with defendants who seek to represent themselves has certain basic elements, as first established by the Supreme Court in \textit{Faretta v. California}.\textsuperscript{90} The Court in \textit{Faretta} was presented with the following issue:

[W]hether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and then force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.\textsuperscript{91}

The state trial judge had first permitted the defendant’s request to proceed pro se, but then reversed himself at a subsequent pretrial hearing based on the defendant’s answers to

\textsuperscript{88} Obviously, courts have the authority to appoint counsel in civil cases over the objection of a minor, a mentally incompetent person, or a ward of the state.

\textsuperscript{89} \textit{Indiana v. Edwards}, 554 U.S. 164, 172-17373 (2008), critiqued in Jona Goldschmidt, \textit{Autonomy and the “Gray-Area” Pro Se Defendants: Ensuring Competence to Guarantee Freedom}, 6 Nw. J. L. & Soc. Pol’y 130 (2011) (arguing that the Court improperly elevated justice system’s interest in avoidance of a “spectacle” over the pro se defendant’s right to autonomy, and proposing alternative methods of pro se assistance to supplement the current “all or nothing” forms of representation).

\textsuperscript{90} 422 U.S.\textit{Faretta}, \textit{supra} note 13 at 806 (1975).

\textsuperscript{91} \textit{Id.} at 807.
questions that the judge posed about his ability to represent himself, the hearsay rule, and the law governing challenges to prospective jurors.92

The Court first reviewed the history of the right to self-representation in American state and federal law, and cited its earlier opinion in Adams v. United States ex rel. McCann,93 in which it had recognized the Constitution "'does not force a lawyer upon a defendant'."94 The Court recited this language from Adams:

'The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . .

' . . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

' . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.'95

After finding that its own cases and those of federal courts showed "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling

92 Id. at 808-10.
94 Id. at 815, quoting Adams, 317 U.S. at 279.
defendant is contrary to his basic right to defend himself if he truly wants to do so,”96 the Court proceeded to a close reading of the Sixth Amendment, and found:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’ Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. . . . An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.97

96 422 U.S.Faretta, supra note 13, at 817.
97 Id. at 819-21 (emphasis added) (citations omitted). A similar point is made later in the opinion:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.

Id. at 834 (emphasis added). The emphasized wording in the opinion about the defendant being the one who suffers the consequences of a failed defense (and should therefore be given the right to choose between representation or no representation) is central to the Court’s reliance upon the notion of autonomy to justify the right. Yet, ironically, there are some courts that view
Having concluded that "[t]he Sixth Amendment, when naturally read, implies a right of self-representation," the Court found further support for its conclusion in English common law, many colonial charters and declarations of rights, and federal legislation.

The entirety of the Court's comments on what sort of warnings need to be administered to a defendant requesting leave to appear pro se appears in the following paragraph of the opinion:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. [citing Johnson v. Zerbst] . . . Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he 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.' [citing Adams v. United States ex rel. McCann]. . .

Justice Blackmun, dissenting on various grounds, pointed to future "procedural problems" he thought would arise from the majority's recognition of a Sixth Amendment right to self-representation:

sentencing post-Faretta as a stage in which defendants have — by virtue of their guilty plea or conviction at trial — lost their autonomy; therefore, they reason that courts may impose unwanted counsel on them as standby counsel, amicus counsel, or independent counsel to assist them, or to present mitigating evidence when they refuse to do so.

98 Id. at 821.
99 Id. at 821-31.
100 Id. at 835.
101 Id. at 852 (Blackmun, J., dissenting).
Must every defendant be advised of his right to proceed pro se? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed pro se, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the pro se defendant differently than it would professional counsel?  

While Justice Blackmun’s procedural concerns include the issue of whether a pro se defendant may “switch in midtrial,” they do not include the questions with which we are concerned here, namely: Does the court have a duty to readmonish a pro se defendant after trial that he has the right to counsel at sentencing?, and, Does the court have a presumptive duty to reappoint counsel upon a pro se defendant’s request at sentencing?

An examination of the current Benchbook for U.S. District Court Judges reveals that “assignment of counsel should be the first item of business before the judge” at the defendant’s first appearance. Then, if the defendant does not appear by counsel, the court must inform the defendant “of his or her constitutional right to be represented by an attorney at every stage of the proceedings.” If the defendant does not want counsel, his waiver must be “knowing and voluntary. This means that

102 Id.
103 BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (SIXTH) § 1.02, at 11(Sixth Ed.) (March, 5-8 (2013).
104 Id. at § 1.02, at 5.
105 Id. at Supra note 103, § 1.02(A)(1)(a), at 5 (emphasis added).
you must make clear on the record that the defendant is fully aware of the hazards and disadvantages of self-representation."

The Benchbook then lists the recommended questions to be posed in what has come to be known as a Faretta hearing.

106 Id. at Supra note 103, § 1.02(C), at 6.
107 The questions are:
1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?
4. Do you understand that if you are found guilty of the crime charged in Count 1, the court must impose a special assessment of $100 and could sentence you to years in prison, impose a term of supervised release that follows imprisonment, fine you and direct you to pay restitution? [Ask the defendant a similar question for each crime charged in the indictment or information.]
5. Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?
6. Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?
7. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.
8. Are you familiar with the Federal Rules of Evidence?
9. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?
10. Are you familiar with the Federal Rules of Criminal Procedure?
11. Do you understand that those rules govern the way a criminal action is tried in federal court, that you are bound by those rules, and that they will not be relaxed for your benefit? [Then say to the defendant something to this effect:]
12. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure.
13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you

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Two of the recommended questions pertain to sentencing: "Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?" and, "Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?" Interestingly, while judges are required to advise defendants they have a right to counsel "at every stage of the proceedings," there are neither recommendations provided in the Benchbook for the situation discussed here in which a pro se defendant is found (or pleads) guilty, nor whether he court should readmonish the defendant of his right to counsel at that stage.

C. Post-Faretta Developments

The Supreme Court in Patterson v. Illinois adopted a so-called "pragmatic approach" to the issue of adequacy of warnings regarding the right to counsel.\(^{108}\) There, the defendant gave a post-indictment statement to the police in a conversation they had initiated before an attorney was assigned to him and after he was properly Mirandized.\(^{109}\) The Court rejected the defendant's claim that his Sixth Amendment right to counsel was violated because the Miranda warnings he received were not sufficient to waive Sixth Amendment rights:\(^{110}\)

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\(^{109}\) Id. at 298.

\(^{110}\) Id. at 297-98.
We have never suggested that one right is “superior” or “greater” than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

Instead, we have taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.\textsuperscript{111}

The Court found that whatever warnings suffice under \textit{Miranda} are also adequate for a Sixth Amendment waiver of counsel.\textsuperscript{112} Commencing formal adversarial proceedings against the defendant “does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. . . [W]e do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at post indictment questioning.”\textsuperscript{113}

The “pragmatic approach” was utilized to clarify the constitutionally minimum \textit{Faretta} warnings to be given pro se defendants in the Supreme Court’s subsequent decision in \textit{Iowa v. Tovar}, involving a defendant who entered a plea of guilty pro

\textsuperscript{111} \textit{Id.} at 298. The Court cited \textit{United States v. Ash}, 413 U.S. 300 (1973), one of the few cases in which a particular stage in the prosecution (post-indictment photographic display) was found not to be sufficiently critical to warrant a right to counsel.

\textsuperscript{112} 487 \textit{U.S.}\textit{Patterson}, \textit{supra} note 108, at 298.

\textsuperscript{113} \textit{Id.} at 298-99.
The defendant signed a form waiving his right to counsel during his initial interrogation about his Operating Motor Vehicle While Intoxicated (OWI) charge, and then orally waived appointment of counsel at his first appearance. After a colloquy regarding waiver of his rights to counsel and various trial rights, he was advised of the maximum penalty for the charge and then pled guilty. He later appeared at a sentencing hearing on the OWI charge, as well as a later driving while license suspended charge, during which the trial court engaged in a similar colloquy and imposed a sentence for the offense. About two years later Tovar then pled guilty with counsel to a second OWI charge. Finally, about two and one-half years later Tovar was again charged with a third OWI charge that, if proven, would constitute a felony.

Defense counsel argued that the first OWI conviction could not be used to enhance the third charge because Tovar’s waiver in the first case was not made knowingly, intelligently, and voluntarily. Specifically, the defendant claimed the court did not make him aware of the dangers and disadvantages of self-representation. The court denied the motion on grounds that the Faretta warnings did not need to be more detailed because the crime was “readily understood by laypersons” and the penalty was “not unduly severe.” The Iowa Court of Appeals affirmed, but the Iowa Supreme Court reversed. That court held that, while the dangers of proceeding pro se at a guilty plea

\[^{114}\text{Iowa v. Tovar, 541 U.S. 77, 80 (2004).}\]
\[^{115}\text{Id. at 82.}\]
\[^{116}\text{Id. at 82-84.}\]
\[^{117}\text{Id. at 84.}\]
\[^{118}\text{Id. at 85.}\]
\[^{119}\text{Id.}\]
\[^{120}\text{Id. at 8685.}\]
\[^{121}\text{Id. Presumably, the trial court cited the Patterson case in support of its ruling, but the Court’s opinion is silent on this point.}\]
\[^{122}\text{Id.}\]
READMONISHMENT OF THE RIGHT TO COUNSEL

are different than the dangers of doing so at trial, the inquiries will also be different.\textsuperscript{123}

The \textit{Tovar} Court described the new “pragmatic” approach announced in \textit{Patterson} as one that asks “what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage” in order to determine “the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.”\textsuperscript{124} Specifically, the Iowa Supreme Court held that the colloquy in the first case was constitutionally inadequate because he should not only should have been advised of the usefulness of an attorney and the dangers of self-representation. But he also should have been told that “there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving assistance of counsel in deciding whether the plead guilty is the is that a viable defense will be overlooked.” He should have been told that, by waiving counsel, he will “lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.”\textsuperscript{125}

In reversing the Iowa Supreme Court, the U.S. Supreme Court applied \textit{Patterson} and struck down the two aforementioned admonitions (i.e., without counsel defenses may be overlooked, and an opportunity will be lost to get an independent opinion regarding the wisdom of entering guilty plea) as constitutionally unnecessary.\textsuperscript{126} The Court reasoned that,

\begin{quote}
[I]t is far from clear that the warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar’s decision whether to seek counsel or represent himself. . . [T]he admonitions
\end{quote}

\begin{footnotes}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 90. Note that this is the same test for determining whether a particular stage in the prosecution in “critical.” \textit{See infra} Part II(A).
\textsuperscript{125} \textit{Id.} at 86-87-88.
\textsuperscript{126} \textit{Id.} at 94.
\end{footnotes}
at issue might confuse or mislead a defendant more than they would inform him... [They] might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one... [and] the prompt disposition of the case will be impeded and the resources of the state or defendant will be wasted.\textsuperscript{127} The Court in \textit{Iowa v. Tovar}, narrowed the \textit{Faretta} inquiry, relying on the language in \textit{Patterson} to the effect that the pragmatic approach asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage."\textsuperscript{128} The Court found a "less searching inquiry" than required at trial, like the post-indictment questioning in \textit{Patterson}, is required at a guilty plea hearing.\textsuperscript{129}

The reasoning of \textit{Tovar} in limiting the \textit{Faretta} colloquy should of course not be applied to the sentencing context. Sentencing is far more complex and significant than the guilty plea hearing, or the trial itself, requiring that pro se defendants' request for counsel after trial be presumptively honored. This principle was recognized but not addressed by the Supreme Court in \textit{Grandison v. Maryland}, an opinion denying a petition for certiorari, which concerned the reappointment of counsel issue discussed here.\textsuperscript{130} This was a capital case in which the defendant presented two issues, one of which was whether the state trial

\textsuperscript{127} Id. at 9893. \textit{See Jona Goldschmidt, Ensuring Fairness or Just Cluttering up the Colloquy? Toward Recognition of Pro Se Defendants’ Right to be Informed of Available Defenses, 61 DRAKE L. REV. 667, 703-13 (2013) (criticizing \textit{Iowa v. Tovar} on multiple grounds, and arguing for restoration of pro se defendants’ right to be informed of available defenses before entry of a guilty plea or trial).}

\textsuperscript{128} 541 U.S.\textit{Supra} note 114, at 8990, quoting \textit{Patterson}, 487 U.S.\textit{Supra} note 108, at 298.

\textsuperscript{129} Id.

\textsuperscript{130} \textit{Grandison v. Maryland}, 479 U.S. 873 (1986).
court erred in denying his request that his former standby counsel be appointed counsel at “the first scheduled sentencing proceeding.” The trial court refused the request on grounds that it was untimely made, and once the decision to self-represent is made, “the request to change rests solely within the discretion of the trial court.”

Justice Marshall, joined by Justice Brennan, wrote an opinion dissenting from the Court’s denial of certiorari in which he concluded that the refusal to appoint counsel at sentencing “deprived petitioner of his constitutional right to be represented during his sentencing hearing.” Justice Thurgood wrote:

Assuming for the sake of argument that in a non bifurcated criminal proceeding a trial judge could in some circumstances deny a defendant who initially asserted his right to represent himself the right to later change his mind and proceed with counsel, such a rule would not imply that a waiver of counsel in the guilt phase of a capital proceeding requires a defendant to proceed pro se, against his will, in the sentencing phase. The Maryland Court of Appeals cursorily dismissed petitioner’s claim that, because capital sentencing constituted a separate trial, he was entitled to make a new decision about whether he wanted counsel or not. . . . I find this claim worthy of considerably more attention than the Maryland court gave it.

The opinion cited to previous Supreme Court language referring to sentencing (for double jeopardy clause purposes) as a separate trial: “the presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the

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131 Id. at 874.
132 Id.
133 Id. at 876.
134 Id. at 875.
issue of punishment". The dissent also cited Maryland statutes indicating sentencing is considered "a separate trial" on the issue of punishment, concluding,

The waiver of the right to counsel at the first "trial" on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase than it would on that defendant's right to counsel in a separate trial on related crimes. It should under no circumstances irrevocably bind a defendant in the sentencing phase.

The trial court articulated no basis for refusing petitioner's request to appoint counsel. Even at mid-trial in a non-bifurcated proceeding, a trial court's unexplained refusal to permit a defendant to revoke his assertion of the right to self-representation would surely constitute an abuse of discretion. A trial court cannot insist that a defendant continue representing himself out of some punitive notion that that defendant, having made his bed, should be compelled to lie in it. Yet in this case, where petitioner's right to counsel was triggered anew by the start of a new trial on the issue of punishment, the trial court refused, entirely without justification, to permit him to assert that right to counsel. This refusal deprived petitioner of his constitutional right to be represented during his sentencing hearing.

There was a time at common law when sentencing was considered an inexorable part of the criminal trial. Our modern expectation is that sentencing will occur in a separate post-verdict phase, after the trial

136 Id. at 876 (emphasis added).
has determined guilt. Furthermore, in jury-tried cases, we expect the judge, not the jury, to exercise whatever sentencing discretion the law might bestow. In early modern times, however, these divisions of functions in sentencing matters between trial and post-trial, and between jury and judge, were less distinct . . . Only a small fraction of eighteenth-century criminal trial were genuinely contested inquiries into guilt or innocence. . . . To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction. . . [T]he main purpose of defending such a case was to present the jury with a sympathetic view of the offender and the circumstances of the crime that would encourage a verdict of mitigation . . . By structuring sentencing as an incident of the trial, the procedure foreclosed the defendant from participating in what was in function his sentencing hearing unless he spoke about the circumstances of the offense.137

Unfortunately, some courts still view the sentencing hearing as an extension of the trial. This view is outdated given modern sentencing law and practice.

III. SENTENCING: A CRITICAL STAGE OF THE PROSECUTION

A. Factors Determinative of a “Critical Stage”

Since the Supreme Court of the United States decided Mempa v. Rhay138 in 1967, sentencing has been considered a “critical stage” of the criminal prosecution process to which the

137 Langbein, Adversary Trial, supra note 21, at 58-59.
Sixth Amendment right to counsel attaches.\textsuperscript{139} That case involved a defendant who was represented at his guilty plea hearing, but appeared pro se at his probation revocation hearing, which resulted in a revocation and a substantial prison term. The presiding judge had failed to ask the defendant about his former attorney, and whether he wished counsel to be appointed.\textsuperscript{140} The denial of counsel was held to be a Sixth Amendment right-to-counsel violation.\textsuperscript{141} The Court held that sentencing was a critical stage of the prosecution for which counsel was a matter of Sixth Amendment right because “appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,”\textsuperscript{142} and because “the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.”\textsuperscript{143}

\textit{Mempa v. Rhay} was preceded and followed by many other decisions in which the Court found that the right to counsel attached because the stage of the prosecution in which the issue arose was a “critical” one. The earlier decision in \textit{Townsend v. Burke} involved a similar situation of a defendant who was represented at a plea hearing, but not at a later sentencing.\textsuperscript{144} In finding a Sixth Amendment violation, the Court pointed out:

\begin{quote}
[C]ounsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on mis-
\end{quote}

\textsuperscript{139} Three years later the Court defined a “stage” in the prosecution not so much as a point in time, but as an “event” in the course of the prosecution that may occur at pretrial, trial, or post-trial. Coleman v. Alabama, 399 U.S. 1, 17 (1970) (White, J., concurring) (“[R]ecent cases furnish ample ground for holding the preliminary hearing a critical event in the progress of a criminal case.”).
\textsuperscript{140} 389 U.S. at 130.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} at 134.
\textsuperscript{143} \textit{Id.} at 135
\textsuperscript{144} Townsend v. Burke, 334 U.S. 736, 738 (1948).
information or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.\footnote{Id. at 741.}

Where a trial court sentences a defendant to death based in part on confidential information that is not disclosed to him or defense counsel, the Supreme Court’s decision in \textit{Gardner v. Florida} held that the defendant is denied due process.\footnote{\textit{Gardner v. Florida}, 430 U.S. 349, 362 (1977).} The Court in that case stated;

\begin{quote}
[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . [T]he sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.\footnote{Id. at 358.}
\end{quote}

The factors which constitute a critical stage of the prosecution vary depending upon the stage in question. In appeals, the lawyer for the defendant acts “as a shield to protect him against being ‘haled into court by the State and stripped of his presumption of innocence’.”\footnote{Ross v. Moffitt, 417 U.S. 600, 610-11 (1975) (refusing to find discretionary appeals to be a critical stage).} When a post-indictment lineup was found in \textit{United States v. Wade} to constitute a critical stage, the Court held that the right to counsel attaches at post-indictment lineups because “the results might well settle the accused’s fate and reduce the trial to a mere formality.”\footnote{\textit{United States v. Wade}, 388 U.S. at 224.} A lawyer’s presence during a post-indictment lineup is necessary, the Court said,
because "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." A lawyer will be able to object to "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification," "be alert for conditions prejudicial to the suspect," and be able to bring such matters to the attention of the jury, instead of allowing the jury to choose between "the accused's unsupported version and that of the police officers present."

The reason for finding an arraignment to be a critical stage in Hamilton v. State of Alabama was that "[a]vailable defenses may be irretrievably lost, if not then and there asserted" (as required by state law). The Court also quoted from a previous decision regarding the need for what Justice Sutherland in Powell v. Alabama had called the "guiding hand of counsel". The guiding hand of counsel is needed at the trial "'lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed'." In Hamilton the Court noted that the prejudice from lack of counsel "can never be known. Only the presence of counsel could have ena-

\[150\] Id. at 228.
\[151\] Id.
\[152\] Id. at 230.
\[153\] Id. at 231.
\[156\] 368 U.S. Hamilton, supra note 50, at 159154-55, quoting Tompkins v. State of Missouri, 323 U.S. 485, 489 (1945) (reversing conviction where court failed to appoint counsel in a capital case, and defendant was ignorant of his right to request counsel). The same result as in Tompkins should obtain where, as argued here, a pro se defendant is convicted and at trial (or a plea) and proceeds to sentencing without proper admonishment of the continuing right to counsel.
bled this accused to know all the defenses available to him and to plead intelligently.”

In finding preliminary hearings as being critical stages, the Court in *Coleman v. Alabama* described the advantages of having counsel as follows:

> The determination whether the hearing is a ‘critical stage’ requiring the provision of counsel depends, as noted, upon an analysis ‘whether potential substantial prejudice to defendant’s rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.’ . . . Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer’s skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

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157 369 U.S. at 159155.
158 *Coleman v. Alabama*, 399 U.S. 1, 8 (1970). Similar descriptions of the value of defense counsel can be found in the decisions holding that post-
Lawyers at sentencing perform many of these same functions, and more. The authors of a recognized sentencing practice manual characterize the significance of the sentencing stage this way:

The vast majority of cases not dismissed ultimately result in conviction, either after trial or as a result of a negotiated plea. That fact makes sentencing the most critical stage of a criminal prosecution, and the proceeding having the greatest personal


We cannot agree that petitioner’s refusal to be represented by counsel at the trial constituted a waiver of his right to counsel at the settlement proceedings. Moreover, it is at least doubtful whether, as a matter of due process, any such waiver would be effective to relieve the trial judge of a duty to appoint counsel for petitioner in connection with the settlement of this record, which was a necessary and integral part of the compulsory appeal provided by California in capital cases. We need not decide that question, however, for the record fails to show that petitioner ever waived his right to counsel in connection with the settlement of the appellate record.

Id. at 162-63 (footnotes omitted) (emphasis added).

159 See infra Part III(B).
impact on the defendant. For these reasons, counsel should be aware of the sentencing ramifications as a matter of first priority in any case, long before discovery, plea-bargaining, and trial preparation.\textsuperscript{160}

Noteworthy is the preceding description of the sentencing stage as, not just a “critical stage,” but “the most critical stage” of a criminal prosecution.\textsuperscript{161} We earlier saw how the right to counsel is the most important of all civil rights, and now we understand that experts consider sentencing to be \textit{the} most critical stage of all stages of a criminal prosecution. Thus, if the court is required to protect the rights of defendants so that they receive a fair trial, and make counsel available at all critical stages, then it stands to reason that trial judges will be expected to readmonish pro se defendants of their right to counsel at sentencing.

\textsuperscript{160} 3 CRIM. PRAC. MANUAL § 102:2 (2010)
\textsuperscript{161} The authors of this manual in a later section state: “It is to be noted, at the outset, that the first step toward assuring proper protection for the rights to which defendant are entitled at sentencing is the recognition by defense counsel that this may very well be the most important part of the entire proceeding.” \textit{Id.} at § 104.1. \textit{See also, United States v. Pinckney,} 551 F2dF.2d 1241, 1249 (D.C. Cir. 1976), an early, pre-guidelines decision in which Chief Judge Bazelon wrote that sentencing “may well be the most important part of the entire proceeding,” \textit{Id.} at 1249, and then set forth minimum duties for defense counsel at sentencing. The court required that counsel (1) “[f]amiliarize himself with all reports serving as a foundation for sentence sufficiently in advance of the sentencing hearing, assuming access to such reports at this time,” and “present to the court any ground which will assist in reaching a proper disposition favorable to the accused,” (2) “be prepared to present to the court all the factors and circumstances necessary to ensure “a reasonably meaningful hearing on sentence,” because it is essential in order for trial judges to discharge their own duty “to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.” \textit{Id.} at 1250-51 (footnotes omitted).
B. The Unique Criticality of the Sentencing Stage

Sentencing is not merely a critical stage. It is uniquely critical because it most resembles a trial, unlike the other stages in the prosecution that the Court has deemed to be “critical.”

Reviewing the authorities previously discussed, we see that each critical stage of the prosecution benefits from the presence of defense counsel in different ways. In lineups, the lawyer’s presence is necessary to ensure that the process is not suggestive because of the “innumerable dangers and variable factors” which might affect a fair trial.162 A lawyer is necessary at an arraignment to ensure the defendant is aware that there are “available defenses [that] may be irrevocably lost” if not asserted.163 For preliminary hearings, counsel is necessary because his skills of examination and cross-examination may persuade the court not to bind the defendant over for trial, will assist the lawyer in fashioning future “impeachment tool” in examining the prosecution’s witnesses at trial, to preserve favorable testimony for use at trial, for discovery of the state’s case, and to make arguments on matters such as the need for a psychiatric examination or bail.164 In misdemeanor cases, “[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.”165

Additional roles are played by counsel during long periods of time between court sessions, as the Court noted in Geders v. United States:

It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and

163 Hamilton v. Alabama, 368 U.S. at 54.
164 Coleman v. Alabama, 399 U.S. at 8.
165 Argersinger v. Hamlin, 407 U.S. at 34.
strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day’s testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events.\(^\text{166}\)

The Court has also noted the importance of having counsel present at a post-indictment confrontation between the defendant and a co-defendant who is a police agent:

[T]he Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, “critical” stages in the criminal justice process “where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”

While the necessity of counsel is recognized in order that these important pre-trial and post-indictment functions may be fulfilled, the Supreme Court’s comments about the role of counsel in capital sentencing hearings is directly relevant to the issue of the necessity of counsel at sentencing generally. Thus, in the well-known decision in \textit{Furman v. Georgia} the Court held that a death sentence imposed by the State of Georgia violated the Eighth Amendment’s cruel and unusual penalty clause because of the arbitrary manner in which the sentence was imposed.\(^\text{167}\)

\(^{166}\) 425 U.S. at 88.

\(^{167}\) 408 U.S. 238, 255 (1972) (citations omitted). As Justice Douglas, concurring, noted,

[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied,
In Georgia, the judge or jury had sole discretion to impose the death penalty, causing the Court to note that "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."\textsuperscript{168}

The Court thereafter decided \textit{Gregg v. Georgia}, in which it upheld a death sentence under a revised procedure in which a bifurcated sentencing hearing was conducted after the trial; the new procedure involved providing the sentence with a set of factors in mitigation and aggravation that suggested the appropriateness of a death sentence in a particular case, or lack thereof.\textsuperscript{169}

It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "(f)or the determination of sentences, justice gen-

\textsuperscript{168} Id. at 274 (citations omitted).
readmonishment of the right to counsel

erally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." . . . Otherwise, "the system cannot function in a consistent and a rational manner." 170

The differences, as noted in Furman and Gregg, between the trial process and sentencing are few; both proceedings require a fair, non-arbitrary, and rational fact-gathering process, for which counsel is critical. 171 At trial, counsel tests the state's case, and affirmatively attempts to persuade the trier of fact of an available defense. At sentencing, counsel challenges the introduction of aggravating factors, and affirmatively offers whatever evidence is available in mitigation. The same concerns for fairness and rational decision making applies to both stages, which are absent in the other critical stages discussed above. At trial, "external" facts are gathered to establish guilt or innocence, while at sentencing "internal" facts surrounding the personal characteristics of the defendant are gathered. Moreover, the inquiry during the sentencing stage has greater consequences than a trial, especially in capital cases, and certainly greater than those resulting from other critical stages such as a motion to suppress, a preliminary hearing, a recess during a trial, or any other stage of the prosecution.

The necessity for post-trial readmonishment of the right to counsel may not apply to most pro se defendants because most

170 Id. at 189 (citations omitted). As Justice Steward wrote for the majority: If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

judges already do so. In other cases, readmonishment occurs by virtue of the requirement to conduct a Faretta hearing at every critical stage. But, if one, or 20, or 200 pro se defendants receive the benefit of readmonishment, followed by appointment of counsel if requested, there will be that much less arbitrariness and bias, and more fair and rational hearings which thoroughly present the sentencer with all of the applicable factors and evidence in mitigation. Felony cases should not be treated differently from capital cases, where bifurcated hearings are constitutionally required, since the same need arises for rational, non-arbitrary decisions in all sentencing decisions.

C. Sentencing Complexity and the Necessity of Counsel

In addition to the unique criticality of the right to counsel at sentencing in so far as ensuring a fair and reliable hearing is the sheer complexity of the sentencing process. Since the creation of the U.S. Sentencing Commission\textsuperscript{172} and the adoption of its Sentencing Guidelines,\textsuperscript{173} the complexity of federal sentencing has surpassed that of the trial itself, such that defense counsel is a necessity.

Instead of determining the defendant's guilt or innocence of one or more crimes arising out of a criminal transaction, judges must conduct a trial on punishment. Every sentencing involving the use of the Sentencing Guidelines,

is virtually certain to involve a calculation of the appropriate guidelines range, including the assignment of criminal history points and the determination of a total offense level; the consideration of whether to grant upward or downward departures or variances; an analysis of the factors of 18 U.S.C.

§ 3553(a); a consideration of whether the sentence is reasonable; the application of mandatory minimum or maximum statutes; or an argument that the sentence is unconstitutional (e.g., cruel and unusual punishment in violation of the Eighth Amendment).  

As noted, judges first take a long list of statutory factors into consideration. They must also consult and be familiar with the

174 Duvall, suprainfra note 305, at 135.
175 The federal law is typical. The factors to consider by the court – and the purposes to be served– by an appropriate sentence are set forth in 18 U.S.C. § 3553: (2010):

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be
complicated labyrinth of the Federal Sentencing Guidelines (or equivalent state guidelines) themselves, which are known to be complicated, lengthy and challenging to apply.

The guidelines have been in existence for some 20 years. They continue to be the source of great controversy. They are also the basis of a mature, although constantly changing body of law. There are now hundreds of guideline amendments and thousands of reported decisions applying the guidelines. Every participant in the federal criminal justice system must be knowledgeable about the guidelines and the applicable case law because the guidelines affect every stage of the process, including plea negotiations, trial strategy, sentencing, and appeals.176

The Third Circuit commented on the complexity of sentencing in United States v. Salemo.177 There, the court held that “sentencing is a critical and often times complicated part of the criminal process that contains subtleties which may be beyond the appreciation of the average layperson seeking to represent him/

herself." In ruling that the trial court erred in giving the defendant pro se status without an adequate Faretta hearing, the Salemo court stated:

We have... previously noted that “[t]he Sentencing Guidelines contain a complex procedure for determining the appropriate increase in offense level for conviction of multiple counts.”... (“The guidelines... have created a complex hypertechnical system consuming great amounts of judicial time for both trial and appellate judges.”). Commentators have also bemoaned the complexities of our sentencing system... (citing articles that “call attention to the frustrations of lawyers, judges and probation officers who must try to understand the complexities of the... system”).

Indeed, in some cases, one’s ultimate fate is determined more by the application of the Guidelines than the determination of innocence or guilt. For example, sentencing judges are not limited to a consideration of the specific conduct that constitutes the offense of conviction in determining whether a given offense characteristic applies. Under USSG § 1B1.3, a judge generally must consider all “relevant conduct.” Thus, “[t]he Guidelines are clear that conduct beyond the precise acts of the offense of conviction may be used to determine specific offense characteristics.”... Given these intricacies, it is particularly important that a sentencing court be certain that a defendant understands the perilous path he/she is going down in attempting to proceed to sentencing without the benefit of counsel.

178 Id. at 220.
In addition, a defendant who is unfamiliar with the post conviction process may inadvertently waive a meritorious argument that he/she might otherwise have raised on appeal. Thus, at sentencing, just as at trial, “a defendant’s waiver of counsel can be deemed effective only where the district court has made a searching inquiry sufficient to satisfy him/her that the defendant’s waiver was understanding and voluntary.”

Beyond their inherent complexity is the procedure now required by the Supreme Court whenever sentencing guidelines are used to justify an enhanced sentence, or upward departure, from a stated penalty range. In Blakely v. Washington, the Supreme Court held that facts on which a judge bases a decision to sentence a defendant beyond state law sentencing guidelines must be proven by the state beyond a reasonable doubt:

This case requires us to apply the rule we expressed in Apprendi v. New Jersey, . . .: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the “truth of

179 Id. at 221 (citations omitted) (emphasis added). See also, United States v. Yagow, 953 F.2d 427, 431 (8th Cir. 1992), cert. denied, 506 U.S. 833 (1992) (describing the sentencing guidelines as complex, confusing, and “almost incomprehensible.”).


every accusation" against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,” . . . , and that “an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,” . . . These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing . . . .

The Blakely Court found that “[t]he facts supporting that finding were neither admitted by petitioner nor found by a jury.” The Court concluded:

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with “deliberate cruelty.” The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbours,” . . . rather than a lone employee of the State.

Blakely was followed by United States v. Booker, which extended the same principle to the Federal Sentencing Guidelines, making them (and their state counterparts) merely advisory.

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182 Id.Blakely, supra note 169, at 302301 (citations omitted).
183 Id. at 303302.
184 Id. at 313-14 (citations omitted).
The relevance of these rulings for the readmonishment and re-appointment of counsel issue is that sentencing complexity has substantially increased. Whenever the prosecution seeks a sentence greater than that dictated by a sentencing guideline, a jury trial will be necessary to find the facts upon which such departure must be based. Not all defendants (pro se or represented) are aware that after their jury trial on the issue of guilt or innocence, they potentially face another jury trial at sentencing.

Not only is sentencing now more complex than in the past, the Supreme Court has recently broadened the scope of resentencing hearings that may be required due to appellate reversals. In 2011 the Supreme Court in Pepper v. United States considered a case in which a trial judge, upon resentencing following an appellate reversal, refused to consider circumstances surrounding the defendant’s rehabilitation that arose since the time of the first sentencing.187 The Court held that the judge should have considered such information when imposing the sentence.188 In its reasoning, the Court noted that sentences are based on the principle that a sentence should fit the offender and not just the crime, that Congress placed no limitations on the facts and circumstances a court may consider in fashioning an appropriate sentence, that the court has wide discretion to consider all relevant facts, and that the “history and characteristics” of the offender should be taken into consideration in sentencing.189

Therefore, the breadth of the facts and circumstances a court must take into account may in some cases make the sentencing hearing longer and more complex than the trial itself, where the issue is solely guilt or innocence. The defendant’s “history and characteristics” may need to be established through more witnesses than were necessary at trial, including the possible use of experts (e.g., sentencing mitigation experts, psychologists, social workers, etc.) who may not have been needed at trial. Conse-

188 Id. at 1243.
189 Id. at 1240-42.
quently, pro se defendants who are not aware of the scope and complexity of sentencing are entitled to know after trial that they may re-invoke their right to counsel to assist them in the sentencing stage.

Representation at sentencing requires the mind of a technician, the skill of a mathematician, the intuition of a social worker, and the eloquence of an advocate. The technician must be familiar with the statutes that set the penalty range, the provisions for mandatory maximums or minimums, the enhancement provisions that tack additional time onto a sentence, and the sentencing guidelines that have been adopted in many jurisdictions. In a sentencing guidelines system, the mathematician needs to calculate the offense level, decreases for certain factors and increases for others, and a criminal history score, while in a non-guidelines system, the mathematician figures and refigures numbers to account for the various counts and enhancements. The social worker focuses on the particular characteristics of the defendant as they may play into the sentencing process—substance abuse that may warrant some form of treatment or a financial status that may affect the ability to pay restitution. The advocate, whose role subsumes all of the above, presses for the best possible result within whatever immutable confines exist.190

190 Practice Manual, supra note 157, § 102:1, at 102-3. That’s not all: The attorney must learn the answers to a number of discrete questions and analyze the interplay of the various answers to those questions. Will sentencing guidelines or a mandatory minimum tie the judge’s hands? Are there special enhancement provisions that would apply, e.g., for repeat offenses or for offenses committed while on release? Will a dismissal of certain charges in exchange for a plea actually result in a lesser sentence, or would the dismissed charges merge upon conviction anyway? Will the uncharged conduct be proven at a sen-
If pro se defendants were warned of the dangers and disadvantages of self-representation at sentencing, they would be unlikely to refuse the appointment (or reappointment) of counsel. There have, however, been cases of pro se defendants who not only refused counsel, but also refused to present any evidence in mitigation at their sentencing.

D. Pro Se Defendants' Refusal to Present Mitigating Evidence

The importance of counsel at sentencing cannot be denied. Often, the recognition is reflected in case law involving pro se defendants, or even some represented defendants, who refuse to introduce, or allow their attorneys to introduce, evidence in mitigation of their crime at sentencing. This phenomenon is problematic for courts, especially in capital cases where juries are entitled to be presented with evidence both in aggravation and in mitigation.191

Id.

Cf. Raulerson v. Wainright, 469 U.S. 966, 969-70 (1984), an example of a case in which no mitigation evidence was presented due to the trial judge’s rulings, not the defendant’s refusal. This is an opinion by Justice Brennan dissenting to the Court’s denial of certiorari in a case in which he argued the defendant had made an unequivocal demand to proceed pro se at a resentencing hearing, but whose request was improperly denied without a Faretta hearing by the state trial judge. Id. at 969. Most relevant here is the fact that the defendant had expressed dissatisfaction with his attorney before this resentencing hearing, and the trial court denied counsel’s motion to withdraw, and prohibited defendant from acting as co-counsel (after previously advising him that he could). Id. at 967. “As a result, no argument against the death penalty was presented on Raulerson’s behalf.” Id. at 968 (emphasis in original).

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This entitlement was recognized by the Supreme Court in its 1990 decision in *Blystone v. Pennsylvania*, in which a represented defendant did not allow any mitigating evidence to be introduced at his trial. At the time, Pennsylvania’s death penalty statute provided that “[t]he verdict must be a sentence of death if the jury unanimously finds at least one or more aggravating circumstances . . . and no mitigating circumstances[,] or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.” The issue presented was whether the mandatory aspect of the statute renders the defendant’s capital sentence unconstitutional because it “improperly limited the discretion of the jury in deciding the appropriate penalty for the crime.” The Court found it did not, and affirmed the conviction.

The *Blystone* majority first acknowledged its prior decisions holding that death penalty statutes must permit a jury to consider all relevant evidence, regarding not only why a death sentence should be imposed, but also why it should not be imposed. The jury must also be permitted to consider all relevant facets of the character and record of the offender or the circumstances of the offense, and must consider, as a mitigating factor, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant professes as a basis for a sentence less than death. The Court found the Pennsylvania statute constitutional, noting that in the list of

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193 *Id.* at 302 (emphasis added), citing 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1988). The petitioner challenged the mandatory nature of this language on several grounds, not relevant here.
194 *Id.* at 303.
195 *Id.*
statutory mitigating factors there existed a “catch-all” category: “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” In addition, the jury had been instructed that it may consider any mitigating evidence presented at trial, “including that presented by either side during the guilt phase of the proceedings.” “This was sufficient to satisfy the dictates of the Eighth Amendment.” In sum, both the statute and the jury instructions sufficed under the Eighth Amendment to provide the jury with mitigating factors, even without the presentation of mitigating evidence as such.

Having defined the jury’s role in capital cases to include an entitlement to mitigating evidence, the Court then decided Schriro v. Landrigran, involving a Sixth Amendment ineffective-

199 494 United States v. Blystone, supra note 181, at 305.
200 Id. at 306, n. 4.
201 Id. at 308.
202 The requirement of individualized sentencing through the introduction of both mitigating and aggravating factors also furthers our fundamental societal values:

If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human being[ ] and has made a reliable determination that death is the appropriate sentence. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime.

ness-of-counsel claim by a capital defendant. The defendant had instructed his attorney to not present any evidence in mitigation at his sentencing hearing, and then argued that his attorney was ineffective by obeying his instructions. The Court held that defense counsel was not ineffective when he failed to present mitigating evidence based on specific instructions of his client. Thus, we know that the jury is entitled to mitigating evidence, and that in the case of a represented defendant, counsel may obey the client’s instructions prohibiting introduction of such evidence.

What about pro se defendants and their Sixth Amendment right to self-representation? Does their Sixth Amendment right to self-representation trump the jury’s entitlement to mitigating evidence under the Eighth Amendment’s Cruel and Unusual Punishments Clause, and the numerous Supreme Court decisions interpreting the clause and establishing procedural obligations under it?

Lower courts encountering this problem have, not surprisingly, appointed counsel to offer such evidence in these situations, even over the defendant’s objection. The New Jersey Supreme Court in State v. Reddish, a pre-Schriro case, reversed

| 205 A controversy generated by Schiro/Schriro is how to determine “whether the defendant waived the right to present mitigating evidence while balancing the need to protect defendants’ rights in capital cases.” See Dylan J. Scher, Blystone v. Horn: The Third Circuit Guards Against Inadvertent Waiver of the Right to Present Mitigating Evidence During a Capital Case, 58 Vill. L. Rev. 869 (2014) (describing the Third Circuit’s approach of limiting Schiro/Schriro to cases where defendants undeniably waive their right to pre-
a defendant’s conviction because, inter alia, his right to self-representation was violated.\textsuperscript{206} The first part of the opinion addresses the threshold question of whether there is even a right to proceed pro se at sentencing.\textsuperscript{207} Having accepted the principle that there is a right to proceed pro se at sentencing,\textsuperscript{208} the New Jersey Supreme Court also noted that the right is not absolute: “There may be times, during both the guilt phase and penalty phase, where the defendant will be required to cede control of his defense to protect the integrity of the State’s interest in fair trials and permit courts to ensure that their judgments meet the high level of reliability demanded by the Constitution.”\textsuperscript{209}

The court thereupon ordered that there be “mandatory standby defense counsel in capital cases.”\textsuperscript{210} The court reasoned

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\item sent mitigating evidence, as distinguished from cases where defendants seek to bar only specific mitigating evidence).
\item \textsuperscript{206} 859 A.2d 1173,\textit{Reddish, supra} note 5, at 1189 (N.J. 2004).
\item \textsuperscript{207} \textit{Id.} at 1188-92. The issue arose from the decision in \textit{Martinez v. Court of Appeal of California, Fourth Appellate Dist., Martinez v. Court of Appeal of California, 528 U.S. 152 (2004) (holding that there is no Sixth Amendment right to self-representation on appeal).}
\item \textsuperscript{208} 859 A.2d \textit{Reddish, supra} note 5, at 1192
\item \textsuperscript{209} \textit{Id.} Not directly relevant here but noteworthy nevertheless is the \textit{Reddish} court’s suggested expansion of the contents of a \textit{Faretta} colloquy. The court “encourage[s] trial courts to explore subjects that are inherent in, or offshoots of,” those warnings required its prior decision in \textit{State v. Crisafi, 608 A.2d 317 (N.J. 1992), dealing with the contents of the colloquy. The \textit{Reddish} court then provided the following illustration:"
\item [T]hose additional areas would include whether defendant will experience difficulty in separating his roles as defendant and counsel; whether defendant understands that he not only has the right not to testify, but also the right not to incriminate himself in any manner; whether he understands that he could make comments as counsel from which the jury might infer that he had knowledge of incriminating evidence (and the difficulty in avoiding such comments); and whether he fully understands that if he crosses the line separating counsel from witness, he may forfeit his right to remain silent and subject himself to cross-examination by the State.
\item 859 A.2d \textit{Reddish supra} note 5, at 1197.
\item \textsuperscript{210} \textit{Id.} at 1198.
\end{itemize}
\end{scriptsize}
that trial judges under Faretta have the authority to appoint standby counsel over defendant’s objection, that death penalty cases are subject to Eighth Amendment requirements, and that one of these is that all mitigating evidence be introduced at sentencing.\textsuperscript{211} An “inadequate and incompetent” presentation of such evidence at sentencing,

“unacceptably poses a risk to the State of executing a defendant whose individual character and record do not warrant the ultimate punishment. The most ‘solemn business’ of executing a human being cannot be ‘subordinate[d] . . . to the whimsical—albeit voluntary—caprice of every accused who wishes” unwisely to represent himself. . . . Although Faretta, supra, discounted the fact that most pro se defendants would fare better with counsel’s guidance, . . . courts must recognize that unrestrained self-representation in capital trials has the potential to beget “state aided suicide,” . . . Honoring an incautious defendant’s choice to exercise his self-representation right does not mean a court must fulfill his death wish. That observation may overstate the dilemma in situations where the defendant sincerely believes that he can adequately represent himself. Yet, it is at least true, in some cases, that a well-intentioned defendant who proceeds pro se helps to execute his own death warrant.’”\textsuperscript{212}

Appointment of counsel to present mitigation evidence over a defendant’s objection has been approved by other state courts, even after the Court in Schriro held it is not ineffective assistance of counsel for defense counsel to obey his client’s instruction not to do so. The Florida Supreme Court has even gone

\textsuperscript{211} Id. at 1198-1201.
\textsuperscript{212} Id. at 1201.
beyond appointment of mitigation counsel; it permits trial judges to require the state to introduce evidence in mitigation in its possession, to call their own mitigation witnesses, or to require standby counsel to present mitigation evidence.213

Thus, some courts in capital cases are cognizant of the importance of the sentencer’s obligation to receive mitigation evidence, and – despite the pro se defendant’s refusal to offer it – are willing to order counsel (e.g., variously referred to as amici, standby counsel, independent counsel) to present it. This is done to ensure that the court is not a party to the defendant’s death wish. However, this procedure seems to conflict with the Supreme Court’s 2000 holding in Martinez v. Court of Appeal of California.214 Martinez is best known for a majority opinion that – in its language finding no Sixth Amendment right to proceed pro se on appeal – signaled that the Court may be considering overruling Faretta on grounds that trial judges have had practical difficulties implementing the right of self-representation.215

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213 Muhammad v. State, 782 So.2d 343, 364 (Fla. 2001). See also, Barnes v. State, 29 So.3d 1010, 1022-23 (Fla. 2010) (court may appoint “special mitigation counsel” to present mitigation evidence); State v. Koedatich, 548 A.2d 939, 937 (N.J. (1988) (trial court may appoint “new counsel” to present mitigation evidence); Lay v. State, 179 P.3d 615 (Okla. 2008) (affirming trial court’s denial of standby counsel to assist pro se defendant at sentencing, but holding prospectively that “In the future, we require that the trial court appoint standby counsel in all capital cases where an indigent defendant is representing himself/herself.”). Compare, Drinkard v. State, 777 S.2d 225, rev’d on other grounds, Ex Parte Drinkard, 777 So. 2d 295 (Ala. 2000) (finding no error in trial court allowing pro se defendant to waive presentation of mitigating evidence, where court reviewed all possible mitigating facts that were available from the trial record).


215 Id. at 163. As Justice Breyer put it, reacting in his concurrence to the majority’s apparent diminution of the defendant’s right to autonomy and self-representation: “I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of that holding... (right of self-representation “frequently, though not always, conflicts squarely and inherently with the right to a fair trial”). I have found no empirical research, however, that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guar-
347 READMONISHMENT OF THE RIGHT TO COUNSEL

The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court. Courts, of course, may still exercise their discretion to allow a lay person to proceed pro se. We already leave to the appellate courts’ discretion, keeping “the best interests of both the prisoner and the government in mind,” the decision whether to allow a pro se appellant to participate in, or even ↵, to be present at, oral argument. . .

Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in Faretta. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government’s interests outweigh an invasion of the appellant’s interest in self-representation.216

antee of fairness. And without some strong factual basis for believing that Faretta’s holding has proved counterproductive in practice, we are not in a position to reconsider the constitutional assumptions that underlie that case.” Id. at 164-65.

This view that there cannot be an absolute – or any, for that matter – right to self-representation consistent with the court’s duty “of ensuring that justice, in the broadest sense of that term, is achieved in every criminal trial,” was espoused by Justice Burger dissenting in Faretta. 422 U.S. Faretta, supra note 13 at 839. Ironically, Justice Burger goes on to say that “The system of criminal justice should not be available as an instrument of self-destruction” by recognition of a right to self-representation,” Id. at 840, when the majority of the Court years later in Schriro permitted lawyers to disregard their client’s instruction to not put on evidence in mitigation, resulting in a different and more serious “instrument of self-destruction” (or, “death wish” or “suicide pact”) that some courts wish to avoid by appointing counsel with instructions to present that evidence.

216 Id. at 163 (emphasis added).
The italicized language above in the *Martinez* suggests that greater restrictions, such as the denial of the right to proceed pro se on appeal, on the right to self-representation after conviction would not violate the Sixth Amendment due to the “less compelling” autonomy rights of the defendant. However, at sentencing the autonomy of the defendant is most at risk, recalling the discussion above regarding sentencing being more significant than the trial itself. Thus, some courts reject the principle that the trial judge may appoint counsel to present mitigation evidence at sentencing over defendant’s objection. The leading case is *United States v. Davis*, in which the Fifth Circuit reversed a District Court’s order appointing “independent counsel” to present evidence in mitigation of the pro se defendant’s sentence.217 The District Court had engaged in a lengthy justification for appointment of counsel to present mitigating evidence,218 but the Fifth Circuit reversed the appointment for

217 *United States v. Davis*, 285 F.3d 378, 382 (5th Cir. 2002).
218 *United States v. Davis*, et al., 180 F.Supp.2d 797, 797-98 (E.D. La. 2001): Society has a strong and compelling interest in a full and fair capital sentencing proceeding, regardless of the individual circumstances of a particular case. This interest requires the presentation of both aggravating and mitigating factors to the jury that will be deciding life or death. Without that information, the jury cannot perform its statutory function and make an informed, reliable decision. In this instance, Davis wishes to abrogate those requirements because of a desire to receive the death penalty. While these safeguards are intended to protect an individual defendant from an arbitrary and capricious execution, they serve an equally, if not more, important purpose in protecting society from participating in an execution that is not warranted. The jurors are not “potted plants” to be left in the dark by a headstrong defendant with a personal agenda, but rather are the representatives of a civilized society with the “awesome responsibility” of expressing the values and standards of that society in the most serious and final of all decisions. The law has set forth what is required for them to perform their duties, statutorily and morally. “The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants.” . . . This Court perceives itself as constitutionally obliged
two reasons: 1) there was no statutory, inherent, or case law au-

thority for the appointment,\textsuperscript{219} and, 2) because to do so would
violate the defendant’s right to employ “an admittedly risky
strategy during the penalty phase,” i.e., attacking the govern-
ment’s case as to his guilt.\textsuperscript{220} A number of other courts follow
the Davis holding, namely, that it is a violation of defendant’s
Faretta right of self-representation to appoint independent coun-
sel to present mitigating evidence over his objection.\textsuperscript{221}

\textsuperscript{219} 285 F.3d 378Davis, supra note 206, at 382-83.

\textsuperscript{220} \textit{Id.} at 384-85.

\textsuperscript{221} See e.g., \textit{People v. Blair}, 115 P.3d 1145, 1178 (CalifCal. 2005), reversed on
other grounds, \textit{People v. Black}, 320 P.3d 800, 805-06 (CalifCal. 2014)
(“[A]lthough the decision in Martinez speaks of the diminution of a defen-
dant’s autonomy interests after conviction and on appeal, Martinez does not
address the level of autonomy interest enjoyed by a defendant during sen-
tencing. We find nothing in Martinez to persuade us that a defendant’s au-
tonomy interests are any less compelling at the penalty phase of a capital trial
than at the guilt phase. The defendant at sentencing is still in the position
of being “hailed into court” by the state . . . and thus still has an interest in
personally presenting his or her defense.”); accord: \textit{Silagy v. Peters} (7th
Cir.1990) 905 F.2d 986, 1006-1008 (7th Cir. 1990) (the right to self-representa-
tion applies to the penalty phase of a capital case even if the defendant
chooses to forgo the presentation of mitigating evidence; Eighth Amendment
held no bar to the imposition of sentence under these circumstances); \textit{People v.
Silagy}, 461 N.E.2d 415, 429–432 (Ill. 1984) (defendant may waive counsel
and seek death at sentencing); \textit{Smith v. State}, 686 N.E.2d 1264, 1274–1276
(Ind. 1997) (reversing appointment of a special counsel to present mitigating
evidence over the defendant’s objection); \textit{Bridges v. State}, 6 P.3d 1000, 1012
Thus, courts that give greater weight to the necessity under the Eighth Amendment to present evidence in mitigation to the jury than the right to self-representation recognize the importance of counsel to the court for this purpose, while others reverse the weight given to these interests. The relevance here is that, alternative to the imposition of unwanted (or “independent”) counsel on the pro se defendant, courts could instead readmonish the defendant of the right to counsel immediately after a guilty plea or verdict. In the cases in which the pro se defendant takes up the court’s offer to reappoint counsel, the need to impose unwanted counsel is obviated.

IV. COURT APPROACHES TO THE ISSUE OF POST-TRIAL READMONISHMENT OF THE RIGHT TO COUNSEL

Given the foundational importance of the Sixth Amendment right to counsel, the need to ensure a fair and reliable process, the complexity of the sentencing stage itself, and the reality that sentencing is probably more important to the defendant than the trial, it may surprise some that courts differ on the question of readmonishment of the right to counsel at sentencing. The case law reveals variation in the approaches taken toward this question, as well as the factual circumstances and procedural posture of the cases in which the issue arises.

Many courts begin their analysis of a right-to-counsel issue with a recitation of the principle that a defendant’s right to counsel is not absolute, citing the Supreme Court’s language in McKaskle v. Wiggins, which states that a defendant is not entitled to “choreograph special appearances by counsel.” However, in McKaskle the Court’s focus was on a claim that the pro se defendant’s appointed standby counsel had exceeded the limited authority the defendant had given him, and had thereby de-

(Nev. 2002) (pro se capital defendant not required to introduce mitigating evidence and may seek the death penalty).

prived the defendant of a fair trial.223 The attorney was not acting as defense counsel, but rather as standby counsel, who by current definition plays only a limited role in the defense.224 In its comment about the choreographing counsel’s appearance, the Court appears to be referring to the possibility that a defendant would adopt a “hybrid” representation strategy at trial by dividing defense duties between himself and counsel almost equally, an arrangement of which the majority of courts disapprove.225 The Court was not referring to the case of a pro se defendant’s decision to revoke his waiver of counsel and turn the defense back over to a lawyer after being convicted at trial –

223 465 U.S. 173.
225 On hybrid representation, it is disfavored by the courts, but see e.g., Joseph A. Colquitt, Hybrid Representation: Standing the Two-Sided Coin on Its Edge, 38 Wake Forest L. Rev. 55, 79 (2003) (“While all federal circuits agree there is no federal constitutional right to hybrid representation, a question remains concerning whether such representation falls within the supervisory powers of the federal courts. Guided by considerations of justice, fairness, and necessity, federal courts exercise such powers to ‘formulate procedural rules not specifically required by the Constitution or the Congress.’ Federal courts may exercise their supervisory powers when necessary to fashion remedies for the violation of recognized rights, preserve judicial integrity, and deter illegal conduct.”). Some courts are willing to permit hybrid representation in the court’s discretion. State v. Figueroa, 897 A.2d 1050, 1052 (N.J. 2006) (hybrid representation within court’s discretion, “[t]hat exercise of discretion requires that the trial court start from the presumption that hybrid representation is to be discouraged.”). It is also a matter of concern to appellate courts. Commonwealth v. Jette, 23 A.3d 1032, 1049 (Pa. 2011) (referring to a proposed course of action for prisoner appeals that would keep in place “the prohibition against hybrid representation.”). Some jurisdictions permitted hybrid representation based upon the wording of a state constitution that permits a defendant to appear by himself “and” by counsel, rather than himself “or” by counsel. Allen v. Commonwealth, 410 S.W.2d 125, 133 (Ky. 2013) (noting that section 11 of the Kentucky Constitution provides for the right to be heard “by himself and counsel.”).
or after pleading guilty without counsel – for purposes of representation at sentencing or a post-trial motion.

Certainly, requests for reappointment of counsel may properly be denied because of untimeliness, equivocal requests, or if pro se defendants repeatedly alternate their position regarding their representation, possibly through multiple trial stages, for purposes of delay.226 To refuse counsel once, and then request counsel's reappointment (due to a pro se defendant’s legitimate questioning of his own competence to proceed to sentencing), should not be considered vacillation. The discussion here assumes no dilatory or obstructionist conduct. Rather, it assumes there has been a one-time waiver of counsel, followed by a desire of the pro se defendant post-trial to withdraw or revoke that waiver.

The question usually addressed in case law is whether a Faretta hearing should have been held at a particular time during the post-trial stage of the prosecution, after which the defendant was permitted, or continued to proceed, pro se. The Faretta hearing is the second part of a hearing that begins with the colloquy regarding whether there has been a knowing and intelligent waiver of the right to counsel. The Faretta hearing portion revolves around the question of whether the defendant’s intended invocation of the right to self-representation (as distinguished from the aforementioned waiver of the right to counsel)

226 See, e.g., McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir.), cert. denied, 474 U.S. 852 (1985) (late request for counsel could impede the proper and efficient administration of counsel); United States v. Magee, 741 F.2d 93, 95 (5th Cir. 1984) (grant of request to change counsel on the morning of trial a matter for court's sound discretion); Gill v. Mecusker, 633 F.3d 1272, 1295 (11th Cir. 2011) (“‘Even if defendant requests to represent himself, . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether.' ”) (alteration in original) (quoting Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir.1982)); United States v. Bennett, 539 F.2d 45, 51 (10th Cir.1976) (defendant “forfeited his right to self-representation by his vacillating positions,” and thereby failed to show “a clear and unequivocal position on self-representation”).

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is knowingly and intelligently made, and conveys to the defendant the dangers and disadvantages of proceeding pro se, as well as the maximum possible penalty. Thus, the issue of readmonishment can arise from either, or both, cases involving invalid waiver-of-counsel claims or ineffective Faretta hearing claims.

If an appellate court finds the Faretta colloquy is necessary, it thereby implicitly recognizes that a pro se defendant has a continuing right to counsel at sentencing. That is, by virtue of the requirements for the content of Faretta colloquies regarding the right to counsel (and the dangers and disadvantages of waiving that right) at certain points post-trial, these courts (contrary to those which follow the continuing waiver principle) recognize the right to be informed (or readmonished) of the right to counsel. Because the Supreme Court has not yet addressed the issue of whether the Faretta hearing (.e., readmonishment) is required at sentencing, this Part provides an overview of the approaches lower courts have taken, and their rationales and justifications for doing so.

A. Continuing Waiver

Federal and state courts are divided on the question of whether defendants who validly waive their right to trial counsel are entitled to be readmonished of their right to counsel at the sentencing or post-trial motion stages. Their reasons vary. Some courts hold there is no right to readmonishment unless the waiver is expressly limited to the trial or pre-trial stages, the defendant makes a specific request to withdraw his earlier waiver, or there have been some changed circumstances requiring readmonishment or reappointment.

One of the earliest decisions expressing the continuing waiver principle is United States v. Davis (published in 1955, reviewing a 1935 conviction), in which the Eighth Circuit held it could “see no reason why the court at each subsequent proceeding should go through the mere ceremony of again inquiring if the defen-
The defendant knew his rights and was then again willing to waive them.”

There, however, the defendant claimed that he was not advised of his right to counsel at his arraignment for kidnapping and conspiracy to kidnap, and “was led to believe he would be given a term of years if he entered a plea of guilty.”

Four days later, he was sentenced to life imprisonment, prompting the appellate court to remark that “[i]t would be straining human credulity to say that he did not possess the same knowledge and intelligence four days later on June 7th. The sentencing... was but an extension of the arraignment proceedings.”

The court in denying habeas relief reasoned:

The fact that the sentencing took place four days after the arraignment could create a need for further inquiry only if something transpired in the interim which justified such further inquiry, such as a request by Davis for counsel and advice when he appeared for sentencing. Davis made no request and made no statement, and accordingly Judge Joyce was entirely justified in taking his prior refusal of counsel as ‘definite’. There was indeed an implied waiver of counsel as to any proceedings subsequent to June 3, 1935. If this were not true, it would mean that in all criminal proceedings where the defendant competently waived the right to counsel and nothing happened in the meantime, such as an unreasonable lapse of time, newly discovered evidence which might require or justify

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228 Id. at 837.
229 Id. at 838. He claimed additionally that at the time of his arrest he was struck in the head, a gun had accidentally discharged near him, that he was questioned at length and kept in close custody, and that a plane on which he had flown had encountered severe turbulence, all of which would have made him incapable of ”intelligently and competently” waiving his right to counsel. Id.
advice of counsel, new charges brought, a request from the defendant, or similar circumstances, he would nevertheless have to be interrogated in the same fashion on each subsequent step therein. That would be neither good law nor good sense.

Noteworthy is the fact that the Davis court placed the onus on the pro se defendant to make a specific request for reappointment of counsel, absent other changed circumstances "which would require or justify the right to counsel," such as "unreasonable lapse of time," newly discovered evidence, or new charges. The court did not even consider the fact of a guilty plea or a conviction at trial as constituting a change of circumstances warranting the trial judge's readmonishment of a defendant of the right to reappointment of counsel.

Likewise, in Arnold v. United States,230 the Ninth Circuit rejected a pro se defendant's claim that his waiver of counsel was invalid because trial court failed to advise him, inter alia, of his right to counsel after trial, and before sentencing:

While it is true that the Sixth Amendment right to counsel applies at all critical stages of the prosecution, including the sentencing stage, it does not follow that once the assistance of counsel in court has been competently waived, a new waiver must be obtained at every subsequent court appearance by the defendant. A competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case unless appointment of counsel for subsequent proceedings is expressly requested by the defendant or there are circumstances which sug-

230 Arnold v. United States, 414 F.2d 1056, 1059 (9th Cir. 1968).
gest that the waiver was limited to a particular stage of the proceedings.”

Four years earlier the Ninth Circuit reached the same conclusion in White v. United States, in which a defendant pled guilty and was sentenced without having been admonished of his right to counsel at sentencing. In that case, the court also placed emphasis on the fact that the defendant failed to request counsel: “White gave no indication at the hearing at which the sentences were imposed that he did not understand that he had the right to the assistance of counsel at that hearing, or that he wished to withdraw his waiver previously given. Under these circumstances, the court was entitled to assume that the waiver was still in effect, and was not required to again advise White of his right to counsel.”

The Tenth Circuit reached the same result in Panagos v. United States, where the defendant was “clearly and adequately advised” of his right to counsel, and validly waived it. While the court recognized that the defendant was entitled to appointment of counsel at sentencing if he desired it, it rejected his claim that he was entitled to be readmonished because he had

231 Id. See also, United States v. Dujanovic, 486 F.2d 182, 186 (9th 1973) ("[I]t is that the keystone determination or resolution of the two-pronged problem in the first instance is whether the request to waive the assistance of competent counsel is competently and intelligently made because with that determination the die is cast.") (emphasis added); Jensen v. Hernandez, 864 F.Supp.2d 869, 897 (E.D. CalifCal. 2012) (holding that a valid waiver of counsel generally carries forward through all stages of the proceedings, unless defendant makes express request, the waiver was limited to a particular stage of the proceedings, or “significantly changed” circumstances indicate the defendant knowingly and intelligently waived his right to counsel).

232 White v. United States, 354 F.2d 22, 23 (9th Cir. 1965)
233 Id. See also, McCormick v. Adams, 621 F.3d 970, 978 (9th Cir. 2010) ("If McCormick’s waiver was subject to renewal at multiple pretrial hearings, the trial court would be required to determine that his waiver was knowing and voluntary at each relevant appearance . . . But this is not the law: the validity of a waiver is typically assessed at the time of entry.") (citation omitted).
234 Panagos v. United States, 324 F.2d 764, 765 (10th Cir. 1963).
235 Id.
failed to overcome the presumption of regularity that applies in collateral review of trial proceedings, citing Johnson v. Zerbst.\textsuperscript{236} In Zerbst the Supreme Court held in part that a judgment cannot be lightly set aside by collateral attack (such as habeas corpus), and when collaterally attacked, the judgment of a court has a presumption of regularity.\textsuperscript{237}

A second reason for denying relief to the defendant in Panagos was a lack of any change in circumstances since the initial waiver was given:

The record in the case at bar shows that the delay which ensued between the time of plea and the time of sentencing was due entirely to the need for preparation of a presentence report. There was no change in conditions and no other proceedings had during the interim. Appellant makes no contention that there was any actual change in appellant’s position during the this [sic] period of time. The record shows no facts or circumstances which would prevent the initial waiver of the right to counsel, knowingly and intelligently made, from extending to and being fully effective at the time of sentencing. Nothing intervened between the plea and sentencing except time, and not an unreasonable amount of that.\textsuperscript{238}

\textsuperscript{236} The Panagos court also cited Moore v. Michigan, 355 U.S. 155 (1957), and Christakos v. Hunter, 161 F.2d 692 (10th Cir.), cert. den., 332 U.S. 801 (1947). See also, United States v. Erskine, 355 F.3d 1161, 1165 (9th Cir. 2004) (holding reversal necessary due to failure of trial judge to advise defendant of the correct maximum penalty he faced when obtaining his waiver of counsel, and the failure at a second trial due to mistrial to conduct a Faretta hearing to determine whether defendant desired to withdraw his previous waiver); Schell v. United States, 423 F.2d 101, 103 (7th Cir. 1970) (same).

\textsuperscript{237} 324 F.2d Panagos, supra note 223, at 765.

\textsuperscript{238} Id. See also, United States v. Fazzini, 871 F.2d 635, 643 (7th Cir. 1989) ("Once the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier
The third rationale the Panagos court gave for refusing to recognize the right to readmonishment was based on the theory that a waiver, once validly made, is an implied waiver for all other subsequent stages of the prosecution.\(^{239}\) The court relied upon the aforementioned Eighth Circuit decision in Davis v. United States\(^{240}\) for this proposition.

Sometimes a new charge, added after a valid waiver of counsel, is alleged to be the substantial change in circumstances warranting a Faretta hearing and appointment of new counsel. That was the claim in Arrellanes v. United States, where the Government charged the pro se defendant with being a second-offender after his waiver of counsel.\(^{241}\) The Court held:

The circumstances here did not require further direct intervention by the court with respect to the assistance of counsel. After the verdict was returned, motions for new trial and judgment notwithstanding the verdict were made and appellant

\(^{239}\) Id. See also Jennifer E. Parker, Constitutional Law – United States v. Goldberg: The Third Circuit’s Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel, 41 VILL. L. REV. 1173, 1203-07 (1996) (describing the three categories of waiver of counsel first enunciated in United States v. Goldberg, 67 F.3d 1092, 1100 [3d Cir. 1995], i.e., [1] express waiver; [2] implied waiver, or waiver by conduct; and [3] forfeiture, and arguing that the Third Circuit should clarify the nature and extent of disruptive conduct by a defendant that would suffice to meet its respective – seemingly overlapping – definitions of implied waiver and forfeiture).

\(^{240}\) 226 F.2d 834, Davis, supra note 216, at 840, cert. den. 351 U.S. 912 (1956) (holding that defendant’s waiver of counsel when pleading guilty was an implied waiver as to any subsequent proceedings, including sentencing four days later). Also following Davis was United States v. Washington, 341 F.2d 277, 286 (3d Cir. 1965) (“Although at his sentencing, appellant appeared in court without counsel, he does not complain that his sentence is voidable for that reason. Nevertheless, we do not think it amiss to point out that it has been held that waiver of counsel at the time of arraignment is an implied waiver of that assistance during the sentencing proceeding,” citing Davis)).

\(^{241}\) Arrellanes v. United States, 302 F.2d 602, 610 (9th Cir. 1962).
requested a continuance for the purpose of consulting counsel and preparing for the presentation of these motions, and the taking of an appeal. A week’s continuance was granted. At the postponed time appellant appeared and in the meantime had consulted counsel. Nevertheless, he moved for a further continuance solely for the purpose of further preparing the presentation of the motions. The court denied this motion together with others appellant made, and proceeded to pronounce judgment.

While appellant and [sic] the same right to counsel in these later proceedings as at all stages, . . . it would constitute an excessive burden to require the trial court to intervene at each potentially separable stage of trial to conduct an inquiry respecting a party’s continuing wishes with respect to counsel, . . . when, as here, appellant’s continuing state of mind respecting his original waiver is clear. This is not a case where the situation with reference to the representation has changed between trial and sentencing . . . Nor is it a situation where the filing of the second-offender information gives rise to a full-scale trial of complex issues, as in some state habitual criminal practice . . . Here, on the contrary, the sole issue is that of the identity of the defendant, a narrower inquiry . . . In any event, whether he was the same person named in the information was a fact peculiarly within the knowledge of defendant. Counsel could not have helped him to determine this; hence, no prejudice resulted.242

242 Id. at 610-11 (citations omitted).
A review of the state court authorities rejecting the right to readmonishment reveals more recent examples. About five state high courts take the position that readmonishment of the right to counsel is unnecessary given a valid prior waiver, because the criminal trial includes sentencing, and the waiver once made is continuing. Thus, the Illinois Supreme Court has held that a waiver of counsel at arraignment applies to all stages of the proceedings:

In the absence of some circumstances indicating that the waiver is limited, or other facts which would give the trial court reason to conduct a further inquiry, we hold, consistent with the weight of authority, that a competent waiver of counsel at arraignment by a defendant who is advised that he has a constitutional right to counsel at all stages of the proceedings is operative at the time of sentencing.\(^{243}\)

\(^{243}\) *People v. Baker*, 440 N.E.2d 856, 860-61 (Ill.1982) According to the court, The record clearly establishes that his election to [waive counsel] . . . was voluntarily, knowingly and understandingly made. Under these circumstances, we do not believe the trial judge was required to renew the offer of counsel or ascertain whether defendant had changed his mind when he appeared for sentencing two weeks later. The greater number of courts considering the precise issue here presented have held that a competent waiver of counsel by a defendant once made before the court carries forward to all subsequent proceedings unless defendant later requests counsel or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings."

Another high court held that a waiver at trial applies to the penalty phase. 244 A third held that “[t]his court has consistently described the guilt and penalty portions of a capital case as being ‘phases’ of the same trial.” 245

244 Lay v. State, 179 P.3d 615, 620 (Okla. 2008) (defendant’s “waiver of counsel was valid for the entire trial, including the sentencing phase”).

245 Commonwealth v. Jermyn, 709 A.2d 849 (Penn. 1998) (Defendant “points to nothing which supports his assertion that the two phases of his capital case were two separate trials.”). Accord, State v. Modica, 149 P.3d 446, 452 (Wash. App. 2006) (“[A] valid waiver of the right to assistance of counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was limited . . . [I]t is not ordinarily incumbent upon a trial court to intervene at a later stage of the proceedings to inquire about a party’s continuing desire to proceed pro se.”) (citations omitted); and, State v. Winkler, 698 S.E.2d 596 (S.C. 2010):

“[O]nce a trial has begun, a defendant’s right to represent himself ‘is sharply curtailed,’ and the judge considering the motion must weigh ‘the prejudice to the legitimate interests of the defendant’ against the ‘potential disruption of proceedings already in progress.’ ”). The sentencing phase of a capital trial does not constitute a separate trial. . .

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant’s right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

Id. at 602-03 (citations omitted).

The issue has also arisen in the probation revocation context. The case involved a pro se defendant who pled guilty to probation violation after signing a written waiver of counsel at the previous trial. Hatten v. State, 71 S.W.3d 332 (Tex. 2000) (Ct. Crim. App.). 2000). The court found that the trial court only needed to conduct a waiver inquiry where the pro se defendant desires to plead guilty, which it did, and that no Faretta warnings were thereafter required. Id. at 334. In its reasoning the court noted an “important distinction in Texas criminal jurisprudence that must be drawn,” that “this court determined that Faretta is triggered when a defendant appears without an attorney to contest his guilt, but it is not triggered when a defendant appears without an attorney to plead guilty or nolo contendere.” Id. (citations omitted).
A case illustrating the discretionary approach to the issue of reappointment of counsel is *John-Charles v. California*, where the pro se defendant received several postponements of his multi-defendant state court trial, and then sought reappointment of counsel on the opening day of *voir dire*. On habeas appeal, the Ninth Circuit held that the right to counsel after a valid waiver is discretionary with the court, citing cases from the Third, Fourth, Seventh, and Tenth Circuits.

In *John-Charles* the defendant engaged in conduct causing delay before making the request, leading the court to conclude that "a state court could make a principled distinction between *Gideon*’s general standard and the factual scenario here, where a defendant has waived the right to counsel established by *Gideon.*" In the cases cited in *John-Charles*, the pro se defendants had (1) filed a civil action against the trial judge pretrial, and sought reappointment of counsel when jury selection was about to begin, (2) made the request for reappointment 11 days before trial, (3) made the request for reappointment

246 *John-Charles v. California*, 646 F.3d 1243, 1250 (9th Cir. 2011).
249 *United States v. Solina*, 733 F.2d 1208, 1211-12 (7th Cir. 1984).
250 *United States v. Merchant*, 992 F.2d 1091, 1095 (10th Cir. 1993).
251 646 F.3d *John-Charles*, supra note 235, at 1250.
252 *Leveto*, 540 F.3d *supra* note 236, at 205.
253 *West*, 877 F.2d *supra* note 237, at 286:
Nor was it error to deny Mills’ subsequent request eleven days before trial to substitute Mr. Yannerella for himself as counsel. The determination of whether or not a motion for substitution of counsel should be granted is within the trial court’s discretion, and the court is entitled to take into account the countervailing public interest in proceeding on schedule. . . This countervailing interest has no less weight merely because the motion is filed by a pro se defendant. . . (trial court is necessarily entitled to take into account the countervailing interest in proceeding on schedule when defendant requests continuance on basis that he does not have counsel to represent him). We have said that “[t]he defendant cannot be allowed to continue the practice, with little or no apparent reason, of hiring and
of standby counsel as defense counsel on the day of trial,\textsuperscript{254} and (4) "made [the request] well after meaningful trial proceedings had begun and after the government had completed nearly two-thirds of its case."\textsuperscript{255}

firing attorneys," . . . and this remains true when the defendant is "hiring and firing" himself.

\textit{Id.} (citations omitted).

\textsuperscript{254} United States v. \textit{Solina}, 733 F.2d\textsuperscript{supra} note 238, at 1211.

The judge refused the continuance, and again we think he was acting within his discretion in doing so. A criminal defendant has a constitutional right to defend himself; and with rights come responsibilities. If at the last minute he gets cold feet and wants a lawyer to defend him he runs the risk that the judge will hold him to his original decision in order to avoid the disruption of the court's schedule that a continuance granted on the very day that trial is scheduled to begin is bound to cause.

Both defendants have previous experience with the criminal justice system. That both should have moved for continuances on the opening day of trial suggested to the district judge, who has long experience with litigation out of Marion—the nation's maximum-security federal prison (successor to Alcatraz), . . . — that these last-minute changes of mind were intended to delay the trial. We are inclined to defer to his intuition but in any event believe that the scheduling problems the continuances would have caused were in themselves sufficient ground for refusing to delay the trial, in the absence of any showing that either Brusco's appointed counsel or Solina (assisted by standby counsel) were incapable of conducting an adequate defense.

\textit{Id.} at 1211-12 (citations omitted).

\textsuperscript{255} \textit{Merchant}, 992 F.2d\textsuperscript{supra} note 239, at 1095-96.

Once a defendant exercises his constitutional right to defend himself and proceed pro se, he does not have the absolute right to thereafter withdraw his request for self representation and receive substitute counsel. . . . ("Since he has waived his right to counsel, he cannot now assert that the trial court erred in not replacing the attorney whose assistance he has waived."). We review a district court's refusal to substitute counsel for an abuse of discretion. . .

In reviewing requests for the substitution of counsel, courts consider, inter alia, the degree to which a defendant has shown good cause and the timeliness of the request. \textit{Id.} "It is well
The foregoing decisions presume extreme dilatory or bad faith conduct in the pro se defendant's decision to request reappointment of counsel. The rationales given by the courts which hold the right to counsel (or reappointment of counsel) is not absolute based on the rationale of avoiding delay and inconvenience to the court, witnesses, etc., simply do not apply to the sentencing or post-trial motion context. In those cases, where pro se defendants have a change of heart and simply decide they would be better off for sentencing purposes with counsel than without, there is no reason to deny reappointment of counsel if the request is timely made (presumably at the conclusion of the trial or a reasonable time thereafter), or, as I argue here, where the court makes the initial offer to reappoint counsel even where no request is even made.

There are, however, a few decisions in which courts have found a Sixth Amendment right-to-counsel violation at sentencing due to a change in circumstances. These involve situations in which the defendant appeared pro se and the trial judge made no inquiry concerning the absence of counsel who had represented petitioner at the time the guilty plea was entered, and cases in which there was a lengthy delay between a guilty plea hearing and sentencing. It stands to reason that to have been found guilty of one or more criminal charges after unsuccessfully defending oneself pro se in a criminal trial would also constitute a change in circumstances sufficient to justify readmonishing the defendant of his right to withdraw his earlier waiver, and to re-invoke his right to counsel.

within the discretion of the court to deny as untimely requests for counsel made after meaningful trial proceedings have begun."

Id. at 1095 (citations omitted).


257 Schell v. United States, 423 F.2d 101, 103 (7th Cir. 1970).
READMONISHMENT OF THE RIGHT TO COUNSEL

B. Courts Recognizing the Right To Readmonishment

A study of those decisions which recognize the right to readmonishment reveals that some reach that conclusion by finding that a trial court erroneously failed to conduct a Faretta colloquy (sometimes couched in terms of invalid waiver), or conducted an imperfect one, due to inadequate warnings about self-representation. Others reach their conclusion based on the more direct question of whether a pro se defendant is permitted to withdraw a previously-made waiver of counsel. Still others reach the issue in terms of whether there was a judicial duty to, sua sponte, inform the defendant of his right to counsel. In both contexts, i.e., the hearing on waiver of counsel and a Faretta hearing to determine whether defendant chose self-representation “with eyes open,” the warnings by definition relate to the existence of the right to counsel.

1. Federal Cases

Examples of claims of erroneous grants of motions to proceed pro se at sentencing include United States v. Salameh, where the Second Circuit reversed the district court’s grant of defendant’s pro se request because Faretta warnings had not been administered.258 The defendants sought, and were granted, vacatur of their sentences because, after discharging their trial counsel, they were granted leave to represent themselves at sentencing without first knowingly, intelligently, and voluntarily waiving their right to counsel.259 Likewise, in United States v. Virgil, the Fifth Circuit found the Sixth Amendment was violated because no Faretta hearing was conducted at sentencing.260

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258 United States v. Salameh, 152 F.3d 88 (2d Cir. 1998).
259 Id. at 161.
260 United States v. Virgil, 444 F.3d 447 (5th Cir. 2006).
In *Hall v. Moore*, the trial judge was required to re-sentence the represented defendant after two appeals.\(^{261}\) The judge, however, resented the defendant at a hearing at which defense counsel was unable to attend.\(^{262}\) Rejecting the state’s argument that the judge’s re-sentencing was merely a ministerial act, the Eleventh Circuit found a Sixth Amendment violation because no *Faretta* hearing was conducted upon the re-sentencing:

“This court has not addressed the specific issue presented here: whether the absence of counsel at a re-sentencing violates a petitioner’s Sixth Amendment right. We have precedent, however, that lends guidance to a resolution of this issue. In *Golden v. Newsome*, . . ., this court discussed the absence/presence of counsel at a sentencing proceeding. We stated:

‘Obviously, where the precise sentence for a particular offense is mandatorily fixed by law such that its imposition is merely a ministerial ceremony, with no discretion to be exercised by the sentencing judge, the absence of counsel at such a proceeding could not *possibly* be prejudicial.’

The court also commented that if the sentencing proceeding is more than ministerial, the presence of counsel is essential to guide the sentencing court in the exercise of its discretion. . . . “[T]he absence of counsel is therefore legally presumed to be prejudicial if the sentencing court had the legal authority to impose a more lenient sentence than it actually did.” . . . The Supreme Court has also noted that the total denial of counsel at a critical stage such as sentencing is presumptively prejudicial. . . Moreover, the Florida appellate courts

\(^{261}\) *Hall v. Moore*, 253 F.3d 624, 625 (11th Cir. 2001).

\(^{262}\) *Id.* at 626.
recognize that re-sentencing hearings are critical stages where the right to counsel attaches. . . . It is clear from the record that the entire sentencing package was set aside. Therefore, Hall’s presence and his counsel’s presence were a necessity, not a “luxury.” . . . The trial court did not conduct a *Faretta* hearing before it sentenced Hall. The judge appeared to recognize the importance of the absence of Hall’s counsel, but he did not question Hall to ensure that his choice to appear without counsel was made with “eyes open.” . . . Moreover, Hall never clearly declared to the sentencing judge that he wanted to represent himself and that he did not want counsel’s assistance. In light of Hall’s failure to clearly and unequivocally assert his right to self-representation, there is a presumption of prejudice to Hall.”

As distinguished from the absence of any *Faretta* hearing, other courts have found deficiencies in such hearings leading to inadequate waivers of counsel at sentencing, and a Sixth Amendment violation. Generally, the problem is a lack of adequate discussion regarding the dangers and disadvantages of proceeding pro se. Courts not only have found Sixth Amendment violations where judges failed to address the dangers and disadvantages of proceeding pro se, but also because they

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263 *Id.* at 627 (citations omitted).
264 The Court in *Faretta* required judges to ensure defendants waiving counsel do so “knowingly and intelligently,” and that they also “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’.” *Faretta*, 422 U.S. supra note 13, at 835.  
265 See e.g., *United States v. Balough*, 820 F.2d 1485, 1488 (9th Cir. 1987) (citations omitted) (“At no point in the record, however, does it appear that the district court apprised Balough that self-representation presented any dangers or disadvantages. At Balough’s hearing to waive counsel, the district court only advised Balough that he had a right to counsel and would be required to handle the rest of his case himself if allowed to proceed without
failed to provide the defendant with correct maximum penalty information.  

A case involving a hybrid representation request is *United States v. Cano*, another Fifth Circuit case, where the defendant unsuccessfully moved, early in the prosecution, for an order permitting hybrid representation (he and his present attorney), which was denied. Citing *McKaskle v. Wiggins* for the proposition that there is no constitutional right to hybrid representation, the trial judge’s ruling meant the defendant would have to represent himself. The defendant then withdrew the request because of a claimed inability to represent himself due to a lack of access to a law library.

Then, eighteen days before sentencing the defendant moved to proceed pro se because he was dissatisfied with the lack of consultations with his attorney – this motion was also denied. The Fifth Circuit found a Sixth Amendment violation where the trial court failed to conduct a *Faretta* hearing before denying the defendants “clear and unequivocal” invocation of his right to self-representation. The Circuit Court first noted, “[a]t

counsel; at his sentencing hearing, Balough was merely asked whether he wished to continue without counsel. At each crucial stage, Balough was allowed to proceed on his own without being warned that he would be at a disadvantage doing so or advised how trained counsel could assist him.”).  

266 *United States v. Silkwood*, 893 F.2d 245, 249 (10th Cir. 1989) (“Besides its general statements about the seriousness of sentence enhancement, the trial court informed Mr. Silkwood that his sentence ‘could be enhanced up to fifteen years and a substantial fine.’ This statement is not only inadequate but also incorrect. In fact, the trial court sentenced Mr. Silkwood to twenty-five years without parole. Since the trial court’s inquiry could not have ensured that Mr. Silkwood voluntarily, knowingly, and intelligently waived his right to counsel, we remand this case for resentencing and direct the sentencing court to appoint counsel to assist Mr. Silkwood unless, after proper inquiry, Mr. Silkwood waives that right.”).  

267 *United States v. Cano*, 519 F.3d 512 (5th Cir. 2008).  

268 *Id.* at 516.  

269 *Id.*  

270 *Id.*  

271 *Id.* at 516.
issue is whether, in light of the new request [to proceed pro se], the district court was obligated to hold a hearing on Cano’s motion. This is an issue of first impression in our circuit.”  

In its reasoning, the court first discussed the factors that trial judges should consider in determining whether waivers of the right to counsel are “knowingly and intelligently” made, and then found that these factors mean that “the district court must conduct a meaningful investigation into a defendant’s constitutionally protected request to represent himself; summary dismissal is insufficient.”

*United States v. Mateo* is a case in which defense counsel was discharged after a guilty plea and during sentencing, and in which no *Faretta* hearing was conducted. There, the First Circuit found a Sixth Amendment violation where, after the defendant discharged his defense lawyer before sentencing, the trial court neither ruled on counsel’s request to withdraw, nor appointed new counsel before sentencing.

In addition to cases in which the pro se defendant does not request counsel at sentencing, there are other cases in which the defendant expressly requests representation at sentencing, but the request is denied. This was the situation in *United States v. Taylor*, where the Fifth Circuit reversed a district court’s ruling that had denied the pro se defendant’s request for counsel made after the guilty verdict in his trial. The request was denied on grounds that “his initial election to proceed pro se was valid and still effective.” While the trial court did appoint the federal counsel, the defendant declined the appointment.

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272 *Id.*
273 *Id.* “‘Where a fundamental constitutional right, such as the right to counsel, is concerned, courts indulge every reasonable presumption against waiver’ . . . The record does not indicate that Cano waived his right to self-representation.” *Id.* at 517.
274 *United States v. Mateo*, 950 F.2d 44 (1st Cir. 1991). The case was remanded for resentencing. *Id.* at 50.
275 *Id.* at 49.
277 *Id.* at 313.
defender who had been representing the defendant as standby counsel during the sentencing proceeding, the circuit court held that this was not the equivalent of appointment of counsel, because standby counsel “does not represent the defendant,” and “does not speak for the defendant or bear responsibility for his defense.”

Other circuits have also held that a defendant may revoke his earlier waiver of counsel. In Menefield v. Borg, the defendant requested an attorney at the post-trial motion stage. Although he had previously waived his right to counsel and represented himself at trial, the Ninth Circuit held that, absent a showing that his request is made in bad faith, and because the motion for a new trial is a “critical stage” to which sixth amendment protections attach, the Sixth Amendment was violated by denial of his request.

We are certainly unwilling to deny counsel because of some conception that the defendant’s initial decision to exercise his Faretta right and represent himself at trial is a choice cast in stone. It is not surprising that a criminal defendant, having decided to represent himself and then having suffered a defeat at trial, would realize that he would be better served during the remainder of the case by the assistance of counsel. A criminal defendant may initially assert his right to self-representation for reasons that later prove unsound. The accused may doubt the willingness of an appointed attorney to represent his interests. More often, the accused may have a baseless faith in his ability to

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278 Id.

279 See, e.g., United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990); United States v. Fazzini, 871 F.2d 635, 643 (7th Cir. 1989), cert. denied, 493 U.S. 982 (1990); United States v. Holmen, 586 F.2d 322, 324 (4th Cir. 1978).

280 Menefield v. Borg, 881 F.2d 696 (9th Cir.1989)

281 Id. at 699.
mount an effective defense. The lure of self-representation may, however, exact a significant price; lost at trial, the defendant may miss important opportunities and even create gaping holes in his own case.\textsuperscript{282}

The court in \textit{Menefield} acknowledged that a pro se defendant’s decision to request counsel after a waiver might be properly denied where delay may occur. However, it distinguished between concerns arising from a delay of the trial versus delay at sentencing or other post-trial stage:

There is, however, a substantial practical distinction between delay on the eve of trial and delay at the time of a post-trial hearing. . . Delay immediately prior to trial engenders a significant potential for disruption of court and witness scheduling. Witnesses may have travelled long distances and may be unable to accommodate more than one trip. Losing or substantially inconveniencing witnesses may prejudice the trial and the efficient administration of justice. Shifting lengthy trials may disrupt the court’s docket.

Conversely, it is unlikely that a continuance after the verdict will substantially interfere with the court’s or the parties’ schedules. Witnesses and jurors will have been dismissed. Moreover, the

\textsuperscript{282} \textit{Id.} at 700 (footnotes omitted) (emphasis added).

The accused has little recourse against the failings caused by his own inartfulness. . . . ([A] defendant representing himself may not claim ineffective assistance of counsel). Forcing the defendant to stumble through post-trial proceedings serves neither the individual nor our system of adversarial justice well. Therefore, although we recognize that the right to counsel—once waived—is no longer absolute, we start with the strong presumption that a defendant’s post-trial request for the assistance of an attorney should not be refused. \textit{Id.} (citing \textit{United States v. Holman}, 586 F.2d 322 (4th Cir.1978) (per curiam) (pro s plaintiff at trial retained constitutional right to counsel at sentencing).
hearing on a post-trial motion is generally a brief affair, lasting substantially less than a day. Rescheduling such a hearing—more likely than not—will not involve a significant disruption of court scheduling. While we are aware that as a general matter it may be more efficient to have the motion for a new trial presented when the issue is fresh in the minds of the parties and court, that is an insufficient interest to warrant denying defendants the assistance of counsel. We therefore hold that, at least in the absence of extraordinary circumstances, an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed, unless the government can show that the request is made for a bad faith purpose.283

2. State Cases

The wide range of circumstances in which the issue of the propriety or adequacy of the Faretta hearing, or a state-court equivalent, that appears in federal jurisprudence, is also found in state law. The cases include those in which defendants claim they were denied the right to proceed pro se at sentencing,284 or they were erroneously permitted to do so.285 They revolve around the question of whether Faretta warnings were given, or given properly, and thereby impliedly recognize the right to readmonishment of the right to counsel at sentencing and post-trial motions.

In Meuhleman v. State, the Florida Supreme Court directly addressed the question of whether the trial court is required to obtain a knowing and intelligent waiver of counsel at every criti-

283 Id. at 699-701 (citations omitted).
285 Meuhleman v. State, 3 So.3d 1149 (Fla. 2009).
cal stage of the proceedings (including sentencing), by one who understands the dangers and disadvantages of representing him or herself:

Meuhleman was granted leave to represent himself . . . after a Faretta hearing . . . Even so, a defendant's right to counsel applies at each crucial stage of the proceedings, and “[w]here the right to counsel has been properly waived, the State may proceed with the stage at issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.” . . . Fla. R.Crim. P. 3.111(d)(5) (2003) (“If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.”). . . [T]he trial court held a proper Faretta hearing before allowing Meuhleman to represent himself at his resentencing proceeding.286

286 Id. at 1156-57. See also, Amos v. State, 618 So.2d 157 (Fla. 1993), where a defendant discharged counsel after conviction but before sentencing; the trial court then permitted him to proceed pro se, but failed to conduct a Faretta hearing:

With regard to the penalty phase, we believe it is also necessary to comment on the trial court's granting of Amos's motion to discharge his attorney and requiring him to proceed without counsel after Amos had requested that another attorney be appointed. No Faretta inquiry was made on the record in this proceeding and the trial court required Amos to represent himself almost immediately after granting his motion to discharge his counsel. Further, the trial judge gave Amos approximately ten minutes to read depositions that had been presented to him prior to the beginning of the penalty phase that morning.

We are not unmindful that Amos is very familiar with the criminal justice system and could have been proceeding in such a manner in an attempt to frustrate his trial on these charges. Nevertheless, that does not justify the manner in which the trial
The Alabama Court of Criminal Appeals in *King v. State* held that a motion for new trial is a critical stage of the prosecution, entitling the defendant (who discharged his attorney after sentencing) to appointment of counsel.\(^\text{287}\) The court first noted the Ninth Circuit's holding in *Menefield v. Borg*,\(^\text{288}\) in which the appellate court in a habeas proceeding found a Sixth Amendment violation by a state court judge who had denied the defendant's request for counsel to prepare a post-trial motion.\(^\text{289}\) Applying that precedent and its rationales, i.e., that significant rights are affected in such motions, that counsel is usefulness in preserving claims and explaining the post-trial process, and because these motions test the merits of the case against the defendant, the *King* court found that "if an indigent defendant is constitutionally entitled to the assistance of counsel at sentencing and in the first appeal as a matter or right, that defendant would be entitled to the assistance of counsel in the interim period, absent a waiver."\(^\text{290}\)


\(^\text{288}\) *Menefield v. Borg*, 881 F.2d 696 (9th Cir.1989).

\(^\text{289}\) The *Menefield* court relied on three factors in deciding whether a post-trial motion was a critical stage for purposes of entitlement to the right to counsel: "First, if failure to pursue strategies or remedies results in a loss of significant rights, then Sixth Amendment protections attach. Second, where skilled counsel would be useful in helping the accused understand the legal confrontation, we find that a critical stage exits. Third, the right to counsel applies if the proceeding tests the merits of the accused's case." 881 F.2d *Id.* at 890.

\(^\text{290}\) 613 So.2d *King*, supra note 276, at 891. On the question of whether the defendant had waiver his right to counsel at the post-trial motion stage, the court held that the record did not reflect that the defendant waived his right to counsel and asserted the right to represent himself:

In fact, the record reflects that the appellant requested the dismissal of his trial counsel and requested that another attorney be appointed to represent him. While the record contains a
375 READINGMISHMENT OF THE RIGHT TO COUNSEL

C. The AEDPA’s “Clearly-Establish Law” Requirement in Habeas Cases

Once a defendant waives his right to counsel, does he have an absolute (or at least presumptive) right to re-appointment of counsel upon request at sentencing? In this article, I argue that the right to counsel is a continuing one, limited only as a consequence of a defendant’s obstructionist or other bad faith conduct. Judges should not, in general, have discretion in the matter. A number of state courts disagree with this position, and the Supreme Court of the United States has not ruled on the issue. That is why the law is not yet “clearly established” for federal habeas corpus purposes. The latter phrase is found in a

notation from the trial judge that the appellant had indicated a desire to represent himself on appeal and while the appellant did indicate in his sentencing hearing that he wanted all documents sent to him for purposes of his appeal, we can find no clear indication that the appellant knowingly and intelligently waived his right to counsel and asserted his right to proceed pro se, ... and we will not infer one from the record in this case. It would appear that the appellant proceeded to represent himself because the trial court did not promptly appoint another attorney to represent the appellant when his trial counsel was allowed to withdraw. In the hearing conducted on the appellant’s pro se motion for a new trial, the trial court informed the appellant that because it could not find anyone to represent the appellant, he would be allowed to represent himself on the motion for a new trial.

Accordingly, this cause is due to be, and it hereby is, remanded for appointment of counsel to assist the appellant in the preparation of his motion for a new trial.

Id. at 891-92. See also, State v. Pitts, 319 P.3d 456, 458 (Haw. 2014) (holding pro se defendant who was “overwhelmed” after conviction and requested former counsel be re-appointed was entitled to appointment of counsel to prepare post-verdict motions). In finding that the trial judge had erred in “insisting that Pitts’ earlier mid-trial waiver of counsel carried through postverdict.” Id. at 461, the court noted that the Supreme Court had not yet considered “whether a criminal defendant has a Sixth Amendment right to counsel for post-verdict motions,” Id. at 462. It then went on to recognize the right under Article I, Section 14, of the Hawaii State Constitution, and based on the “critical” nature of the post-trial motion stage. Id. at 463.
provision of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which states that a federal court may not grant a state prisoner’s petition for a writ of habeas corpus “unless the state court’s adjudication on the merits was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” A decision is contrary to clearly established law if the state court “applies a rule that contradicts the governing law set forth in [Supreme Court] cases.”

The relevance of this habeas provision, intended to stem the flow of habeas petitions to federal courts, is that it prevents federal courts from granting relief to state court pro se defendants whose post-trial requests for counsel were denied (or who were never even given a Faretta hearing upon being convicted). Federal courts have routinely denied relief in those situations on grounds that the Supreme Court has not yet ruled on the issue of readmonishment of the right to counsel after trial.


292 *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion for the Court by O’Connor, J.). See also, *Wright v. Van Patten*, 552 U.S. __, 128 S.Ct. 743120 (2008) (state appellate court determination that defendant’s right to counsel was not violated when defense counsel appeared by speaker phone at plea hearing was not contrary to, or unreasonable application of, clearly established federal law); *Glebe v. Frost*, ___ U.S. __, 135 S.Ct. 429 (2014) (same holding on issue of improper trial judge’s restriction upon defense counsel’s closing argument);


294 See e.g., *John-Charles v. California*, 646 F.3d 1243, 1249 (9th Cir. 2011) (denying habeas relief where state court denied defendant’s requests to revoke pretrial waiver of counsel made at voir dire and again before trial began because the Supreme Court has made no specific rule on the issue of reappointment of counsel); *McCormick v. Adams*, 621 F.3d 970, 980 (9th Cir. 2010) (denying habeas relief because the state’s rule that a trial judge is not obligated to restore counsel if the defendant no longer wants to represent
Most salient to the issue under discussion is the Supreme Court’s recent holding in *Marshall v. Rodgers.*295 In *Rodgers,* a state prisoner sought habeas relief, claiming that his right to assistance of counsel was violated by the court’s refusal to appoint an attorney to assist him in preparing a post-trial motion.296 The defendant had vacillated on whether he wanted counsel or not, surrendered his right three times, and eventually proceeded pro se through the trial.297 After the verdict was ruled against him, the defendant requested counsel to help him with his post-trial motion.298

The Ninth Circuit had reversed the District Court’s denial of the Writ, and “invoked certain Sixth Amendment precedents from its own earlier cases and from cases in other Circuits” in support of its decision:299

From those precedents, the panel identified two relevant principles that it deemed to have been clearly established by this Court’s cases: first, that a defendant’s waiver of his right to trial counsel does not bar his later election to receive assistance of counsel at a later critical stage of the prosecution, absent proof by the State that the reappointment request was made in bad faith, . . . and, second, that a new-trial motion is a critical stage. . . Combining these two propositions, the court held that respondent had a clearly established right to the reappointment of counsel for himself does not contradict clearly established federal law); *Nelson v. Alabama,* 292 F.3d 1291, 1296-97 (11th Cir. 2002) (denying habeas relief where record showed that state court’s decision that a waiver of counsel in 1987 also applied to a 1994 re-sentencing was not in conflict with clearly established federal law).

296 Id. at 1448.
297 Id.
298 Id.
299 Id. at 1448-49.
purposes of his new-trial motion, and that the California courts—which vest the trial judge with discretion to approve or deny such requests based on the totality of the circumstances, . . . violated that right by refusing to order the reappointment of counsel.300

The Supreme Court “assumed, without so holding” that a post-trial, pre-appeal motion for a new trial is a critical stage of the prosecution.301 On the second question of whether, after a defendant’s valid waiver of counsel, a trial court has discretion to deny a later request for reappointment of counsel, the Court stated that the Circuit Court had correctly concluded that the Court had never explicitly decided the question.302 It further held that the Circuit Court’s statement that “a general standard” set forth by Supreme Court rulings could satisfy the “clearly established” habeas requirement.303 It was in applying the latter principle, however, that the Circuit Court erred:

Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, . . . (“We are bound by prior Sixth Circuit determinations that a rule has been clearly established”); . . . [I]t may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct. The Court of Appeals failed to abide by that limi-

300 Id. at 1449.
301 Id.
302 Id.
In reversing the Court of Appeals, the Supreme Court held that it “expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial.” This is as close as the Supreme Court has come to considering the issue addressed in this article.

**D. The Structural v. Harmless Error Issue**

When it comes to sentencing in a pro se case, the issues of the right to counsel, the right to self-representation, waiver of the right to counsel, harmless error, and structural error “can simultaneously be implicated.” Courts apply “harmless error” review to avoid granting relief in many criminal appeals on grounds that the Constitution guarantees “a fair trial, not a perfect one.” A large jurisprudence is devoted to deciding whether a given claimed constitutional violation by a trial judge error was harmless, i.e., the error did not influence the jury, or only had a slight affect, or it was “structural” in the sense that it “cast[s] so much doubt on the fairness of the trial process that, as a matter of law, . . . [it] can never be considered harmless.”

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304 Id. at 1450-51.
305 Id. at 1451.
306 Michael Duvall, Judicial Review of Right-to-Counsel Violations that Occur at Sentencing: The Rule of Automatic Reversal and the Doctrine of Harmless Error, 23 ST. JOHN’S J. LEGAL COMMENT. 111, 125 (2008) (arguing that harmless error review is appropriate in right-to-counsel cases involving sentencing, where the judge imposed the lowest possible statutory minimum and counsel could not have further aided the defendant).
309 Satterwhite v. Texas, 486 U.S. 249, 256 (1988). The right to have the assistance of counsel, for example, is too fundamental and absolute to allow
Defendants must establish prejudice from an error that falls into the harmless category, but convictions are automatically reversed for structural error unless the error was harmless beyond a reasonable doubt. The nature, significance, and circumstances surrounding the constitutional violation, however, may dictate whether it is harmless or structural.

In a case involving a claimed error in the admission of a coerced confession, the Supreme Court in Arizona v. Fulminante reviewed the law on this issue, giving examples of different types of claims and their categorization:

The admission of an involuntary confession—a classic “trial error”—is markedly different from the other two constitutional violations . . . [that are] not being subject to harmless-error analysis. One of those violations, . . . was the total deprivation of the right to counsel at trial. The other violation, involved . . . a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by “harmless-error” standards. . . . [O]ther cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant’s race from a grand jury, . . . ; the right to self-representation at trial, . . . ; and the right to public trial, . . . Each of these constitutional deprivations

courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, 315 U.S. 60, 76 (1942).

Chapman v. California, 386 U.S. 18, 24 (1967) “[I]t is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor’s comments and the trial judge’s instruction did not contribute to petitioners’ convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners’ version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.” Id. at 26 (citations omitted).

is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.312

The question here is, given that the right to counsel applies to the sentencing stage of the prosecution under Mempa v. Rhay,313 does a Sixth Amendment violation at that stage constitute harmless or structural error? There are two scenarios in which the issue arises: (1) where counsel is denied and (2) where the right to self-representation is violated.

A recent decision involving a denial of counsel is United States v. Gonzalez-Lopez, in which the Supreme Court found a Sixth Amendment violation when the trial judge erroneously disqualified defendant’s chosen counsel for a courtroom protocol violation314:

The right to select counsel of one’s choice, . . . has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. Where the right to be assisted by counsel of one’s choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regard-

312 Id. at 309-310 (citations omitted). The Court in Fulminante ultimately held that the coerced confession claim is subject to harmless error analysis, Id. at 295, and that the state did not meet its burden of proving its introduction was harmless beyond a reasonable doubt. Id. at 297.
314 United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). Pro hac vice defense counsel passed notes to local counsel prompting the trial judge to find he had violated court rule prohibiting more than one lawyer on a side to conduct cross-examination of a witness. Id. at 142.
less of the quality of the representation he received.315

The ruling in *Gonzalez-Lopez* arises in the trial context. But in *Lockhart v. Fretwell*, the Supreme Court addressed a claim of ineffectiveness of counsel at sentencing based on a failure to raise an objection. Namely, that the trial court had unconstitutionally “double-counted” an element of the crime (pecuniary gain) for which he was convicted for guilt purposes, and again for sentencing purposes as an aggravating factor.316 The Supreme Court reasoned that this objection would have been based on a case that was later overruled, thus, “The result of the sentencing proceeding in the present case was neither unfair nor unreliable.” The Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* four years later. Had the trial court chosen to follow *Collins*, counsel’s error would have “deprived respondent of the chance to have the state court make an error in his favor.”317 The fact an ineffectiveness claim during sentencing was recognized as a Sixth Amendment structural violation gives support to the argument here regarding the right to readmonishment of the right to counsel after trial.

The Fifth Circuit in *United States v. Virgil* held that the trial judge erred by not conducting a *Faretta* inquiry when the defendant sought to proceed pro se at sentencing.318 That error, the court held, was not subject to harmless error review:

If a court’s error in denying counsel at trial, . . . and on appeal, . . . cannot be rehabilitated with harmless error analysis, we fail to see how at sentencing this type of Faretta error, which is the functional equivalent of improperly proceeding

317 *Id.* at 371.
318 444 F.3dVirgil, supra note 249, at 456.
without any counsel, can be reviewed for harmless error. Accordingly, we hold that Faretta violations of this type, even at the sentencing stage, are so fundamentally violative of due process that the error is harmful per se. Our holding today surely is not groundbreaking; rather, we merely clarify and explicitly state that which our precedent has long recognized.\textsuperscript{319}

Similarly, in \textit{Hays v. Arave}, the Ninth Circuit addressed the question of whether a state court defendant was denied due process when he was extradited to another state and was therefore unable to attend his sentencing.\textsuperscript{320} Holding that it was a denial of due process, the court found the error not subject to harmless error review: "[W]e hold that unconstitutional in absentia sentencing is a 'structural' error and that a sentence resulting from such a proceeding cannot be affirmed on the basis of harmless error."\textsuperscript{321} The court gave three reasons for its conclusion:

Our conclusion that unconstitutional in absentia sentencing constitutes a structural error under \textit{Fulminante} follows partly from an analysis of the nature of sentencing proceedings. The outcome of that process—a crucial and wholly separate part of a criminal prosecution—quite literally can mean the difference between life and death. It is frequently the most important part of the criminal proceeding; in fact, because approximately ninety percent of all prosecutions culminate in guilty pleas, sentencing often is the only contested proceeding—the only one in which the individual and the state disagree about the proper outcome. Constitutional errors affecting the entire sentencing proceeding, like constitutional errors affecting

\textsuperscript{319} Id. at 456-57 (citations omitted) (footnotes omitted).

\textsuperscript{320} \textit{Hays v. Arave}, 977 F.2d 475, 477 (9th Cir. 1992).

\textsuperscript{321} Id. at 479.
the entire trial, must be viewed with the utmost concern. . . . [T]he right to be present and participate in one’s own sentencing is at least as critical and, like lack of counsel, results in the defendant’s fate being determined without the presence of a crucial participant in a criminal proceeding.322

For the second scenario where the right of self-representation is denied, albeit also at trial, we have the language in McKaskle v. Wiggins,323 stating that an improper denial of a request to proceed pro se at trial is “not amenable to harmless error analysis. The right is either respected or denied; its deprivation cannot be harmless.”324 But, some courts have nevertheless created an exception to the structural error rule for cases in which defendants complain that the court denied their request to proceed pro se.

For instance, the Ninth Circuit in United States v. Maness rejected on harmless error grounds the defendant’s claim that the trial court erred in denying him his right to proceed pro se at a resentencing hearing.325 It held that “violating a defendant’s Sixth Amendment right to counsel of his choice is subject to harmless error analysis if the violation occurred only at sentencing and not at the guilt phase of trial.”326 The court reasoned that “structural errors—which are not subject to harmless error review—are defined as errors that ‘permeate[ ] the entire conduct of the trial from beginning to end or affect[ ] the framework within which the trial proceeds.’”327 Because the denial to proceed pro se at (re)sentencing did not “permeate[ ] the entire

322 Id. at 479-80 (citations omitted).
324 United States v. Maness, 566 F.3d at 896. The court also cited United States v. Arlt, 41 F.3d 516, 524 (9th Cir.1994), for this proposition.
325 566 F.3dManess at 894 (9th Cir. 2009).
326 566 F.3dId. at 896.
327 Id.
conduct of the trial from beginning to end or affect[ ] the framework within which the trial proceeds’.”

Similar analysis applies to Maness’ request to proceed pro se at his Ameline sentencing remand. We hold that an improper denial of a defendant’s motion to proceed pro se at sentencing, rather than at trial, is not a structural error and is thus subject to harmless error analysis. The error is not intrinsically harmful to the entire proceedings. . . . The appellate court may review the sentencing proceedings and ascertain beyond a reasonable doubt whether the error contributed to the sentence imposed. . . . Indeed, the record here is quite evident that the district court’s denial of Maness’ request to represent himself did not cause any error because, although it did not allow Maness to proceed without an attorney, the court did permit Maness to file briefs and motions pro se. The court acted upon those pro se filings, ordering the government to respond to several motions and granting one. It is thus clear beyond a reasonable doubt that the Sixth Amendment error did not result in prejudice.

CONCLUSION

We return to the case of the Yangs, the people on another planet in a Star Trek episode who knew they had certain rights, but were not aware of their specific nature. Pro se defendants are in a similar position when they unsuccessfully defend themselves at trial, or enter a guilty plea without counsel, knowing

328 Citing Id., citing United States v. Walters, 309 F.3d 589, 592–93 (9th Cir.2002) (omitting internal quotations) (holding that denial of substitute, out-of-state counsel’s motion to appear pro hac vice was harmless, and not a structural error).
329 566 F.3dWalters at 896-97.
that they have waived their right to counsel. They may assume that their original waiver of counsel is binding at the sentencing stage, and may never even request counsel to represent them to prepare a post-trial motion or for sentencing. Their assumption is supported by some courts, which have held that their waiver of counsel, once made, applies to the remaining stages of the prosecution, and hold that judges are not required to admonish them of their right to counsel. Other courts, however, recognize the pro se defendant's right to counsel at the post-trial motion or sentencing stages, require the trial judge to conduct another Faretta hearing, and permit reappointment of counsel upon request, absent bad faith conduct on the part of the defendant.

This article argues that pro se defendants, like the Yangs, are entitled to be informed of their post-trial right to counsel upon a finding or verdict of guilt. They should be admonished that their Sixth Amendment right to counsel continues through all critical stages of the prosecution, a right which is even stronger in capital cases because of Eighth Amendment requirements that their mitigation evidence be presented to the sentencer. Given the complexity of contemporary guideline sentencing, the importance of sentencing to the defendant and society, the significance of counsel's role in sentencing, and the cherished nature of the right to counsel generally, it is only reasonable, and consistent with the Fourteenth Amendment Due Process Clause, the Sixth Amendment, and the Eighth Amendment – as well as Supreme Court decisions interpreting those amendments – that courts readmonish pro se defendants post-trial of their right to counsel for post-trial motions and sentencing, and presumptively reappoint counsel for them upon request.

Neither the Yangs nor unsuccessful pro se defendants should be denied knowledge of their rights. Pro se defendants in particular need to know – and the Constitution requires – that, while they have “made their bed,” they need not lie in it.