THE RIGHT TO HAVE A FOOL FOR A CLIENT: OKLAHOMA'S STANDARD FOR SELF-REPRESENTATION AS APPLIED IN *MATHIS V. STATE*

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I. INTRODUCTION

The right to the assistance of counsel, the "bulwark of the American judicial system,"[1] has a "rich historical heritage" in Anglo-American law.[2] This right has evolved "[f]rom humble historical origins in England and relatively modest beginnings in this country" over several centuries "into the most vital of all the protections guaranteed to criminal defendants by the United States Constitution."[3] Having the right to counsel gives the defendant a "legal champion" and "makes it possible to achieve the two fundamental objectives of the adversary system of criminal justice—truthful, just outcomes and fair methods of adjudication."[4]

Part II of this Comment outlines the history of the right to counsel and self-representation in criminal trials. Part III examines the Supreme Court's limitations on the right to counsel through waiver and presents

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1. Frederic Paul Gallun, Note, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under* Faretta, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559, 560 (1997).

2. United States v. Ash, 413 U.S. 300, 306 (1973).

3. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 45 (2002).

4. *Id.* at 49–50.

some problems[5] and numerous questions the Court has failed to answer. Part IV discusses how Oklahoma was able to overcome the problems left by the Supreme Court's standard and shows how Oklahoma has applied the standard by looking at the recent case of *Mathis v. State*.[6]

II. HISTORY

A. Common Law Beginnings

Under the Common Law, courts viewed the assistance of counsel as "an impediment to efficient and successful prosecution and punishment."[7] Having counsel would undermine the state's "self-protective efforts" and "hinder successful pursuit of the state's enemies," two results that "posed a threat to the survival of the state."[8]

At that time, the state lacked a formal police force that could "gather the information and evidence necessary to sustain criminal charges" and did not have a public prosecutor.[9] Instead, a victim's families would bring charges against the defendant and present the evidence of the case.[10] In common law trials, judges were thought to be neutral and able to safeguard the defendant's interests because someone without legal experience was bringing the charges.[11] While the judge had a duty to protect the defendant's interests by examining witnesses for the defense

5. Hampton L. Carson, *The Right to Counsel in a Criminal Case*, 30 AM. L. REG. 625, 636 (1882).

> The limitations put upon the rights of advocates, and, by parity of reasoning, upon those who claim to act as their own advocates, are such as grow out of the powers of a court to so superintend the proceedings as to prevent a waste of time or breach of decorum. But while insisting upon the existence of these powers, judges have universally displayed the utmost reluctance to exercise them. The right to "try men by the hour-glass" is declared dangerous in the extreme . . . .

Id.

6. *See* Mathis v. State, 2012 OK CR 1, 271 P.3d 67.

7. TOMKOVICZ, *supra* note 3, at 4.

8. *Id.*

9. *Id.* at 4–5; *see also* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 65 (1955).

10. *See* TOMKOVICZ, *supra* note 3, at 4–5.

11. *Id.* at 5; *see also* THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 330–38 (1868) (giving reasons to doubt the judge's ability to protect a defendant's rights and interests).

and giving advice to the defendant, this duty was typically ignored in practice.[12]

Because of the simplicity of the charges brought, the defense was more than capable of handling the case without the help of counsel.[13] Judges did not have to be concerned with an inequality of skill and legal training as "[t]here was no great likelihood that a highly skilled prosecutor would take advantage of a less skilled defendant."[14] To bring forth a proper defense, the defendant

> require[d] no manner of skill to make a plain and honest defence, which in cases of this kind is always the best, the simplicity and innocence, artless and ingenuous behavior of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own.[15]

Therefore, when a defendant was convicted, it was because the opposing evidence was "so very evident, and so plain, that all the counsel in the world should not be able to answer it."[16]

B. Transition Away from the Common Law

An exception to the common law practice of not having a prosecutor developed when trained lawyers, representing the Crown, prosecuted charges of treason, thus putting defendants at a severe disadvantage in a trial that could cost them their lives.[17] In response to decades of false allegations of treason against Whigs, and in spite of much opposition,[18] the Whigs adopted the Treason Act of 1695[19] after gaining control of Parliament.[20] The Act stated "that every such Person soe accused and indicted arraigned or tryed for any such Treason . . . or for Misprision of

12. Carson, *supra* note 5, at 628.
13. TOMKOVICZ, *supra* note 3, at 4.
14. *Id.* at 5. "The fact that the common law rule denying counsel's aid was later discarded at approximately the same time that trained, professional prosecutors became more prevalent in criminal trials furnishes some support for this explanation." *Id.*
15. Carson, *supra* note 5, at 630 (internal quotation marks omitted) (citation omitted).
16. *Id.* (citation omitted).
17. TOMKOVICZ, *supra* note 3, at 6.
18. Carson, *supra* note 5, at 630.
19. Treason Act 1695, 7 & 8 Will. 3, c. 3 (Eng.).
20. TOMKOVICZ, *supra* note 3, at 6.

such Treason . . . shall bee received and admitted to make his and their full Defence by Counsel learned in the law."[21] Given the precedent the Treason Act established, judges began to allow defendants to retain counsel for all felony cases.[22] Yet, counselors for the defense were afraid to "defend their clients with spirit" because of poor reception from judges.[23] In spite of this fear, Counselor Erskine advocated for the independence of counsel in court:

> "I will for ever—at all hazards—assert the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he *will* or will *not* stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment, the liberties of England are at an end."[24]

Even with the trend toward tolerance of counsel in court, the defendant had to ask for counsel before the court would consider whether to allow it.[25] Then, the court would decide if the defendant had a point of law that counsel could debate before the court.[26] However, the lack of

21. Treason Act 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.).

> [N]othing is more just and reasonable than that Persons prosecuted for High Treason and Misprision of Treason whereby the Libties Lives Honour Estates Bloud and Posterity of the Subjects may bee lost and destroyed should bee justly and equally tried and . . . should not bee debarred of all just and equal Means for Defence of their Innocencies in such Cases . . . .

Id.

22. TOMKOVICZ, *supra* note 3, at 6–7.

> An additional reason that the courts were willing to depart from the restrictive common law rule was that the government had grown much more stable in the late seventeenth century. The increased security of the state diminished the concern with self-preservation. Efficient and successful prosecutions were not thought to be as critical to the survival of society as they once were.

Id.

23. Carson, *supra* note 5, at 631.

24. *Id.*

25. *Id.* at 626.

26. *Id. See also* 12 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 662 (T.B. Howell et al. comp., 1816). Chief Baron Atkyns at the trial of Lord Preston stated, "[I]t's not the doubt of the

"uniform rules that dictated the scope of counsel's involvement in each case"[27] and judicial discretion in determining protection of a defendant's rights—as seen through the degree of participation by counsel—led to variances among courts.[28] By 1836, England gave all defendants the right to full assistance of counsel,[29] and by 1903 indigents received the right to appointed counsel.[30]

C. How the Transition away from Common Law Manifested in the Colonies

At the beginning of the British colonization of America, the colonies followed the British common law "adversarial model of adjudication" by having simple trials prosecuted by private citizens without counsel for the defense.[31] Choosing an adversarial judicial system[32] "made the parties important players in the adjudicatory process and ensured that lawyers would play critical roles in the operation of that process."[33] However, by the beginning of the eighteenth century the colonies employed public prosecutors, "an institution that was part of the inquisitorial criminal justice systems of continental Europe,"[34] with all of the colonies having "professionally trained and state-funded lawyers to pursue criminal charges" by the start of the American Revolution.[35] In response to the addition of public prosecutors, "nearly every colony veered sharply away from the British common law rule" by providing defendants the right to assistance of counsel in an effort "to ensure fundamental fairness in the adjudicatory process."[36]

The colonies believed there could not possibly be a fair trial if there

prisoner, but the doubt of the court, that will occasion the assigning of counsel." *Id.*

27. TOMKOVICZ, *supra* note 3, at 7.

28. *Id.* at 8.

29. *Id.*; Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114 (U.K.) (repealed 1986).

30. TOMKOVICZ, *supra* note 3, at 9; Poor Prisoners' Defence Act, 1903, 3 Edw. 7, c. 38 (Eng).

31. TOMKOVICZ, *supra* note 3, at 48.

32. *Id.* at 46. "From that point in the process forward, the two sides—the government, as the representative of society, and the individual accused of crime—engage in a contest, a battle, a competition." *Id.*

33. *Id.* at 48.

34. *Id.* at 9; *see generally* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951).

35. TOMKOVICZ, *supra* note 3, at 9.

36. *Id.* at 10.

was "a substantial disparity in skill and knowledge between the opposing parties."[37] Therefore, the colonies allowed the assistance of counsel because defendants conducting their own defense are not equal in strength and ability to the state as "[t]hey are presumptively incapable of coping with the skillful maneuvers of the legally trained, professional, and experienced prosecutors who are charged with furthering the government's interest in securing a conviction."[38] In spite of the colonies' tendencies to allow assistance of counsel, "the ordinary practice in the American colonies in serious criminal cases was self-representation, not representation by counsel."[39]

Self-representation remained the norm despite the fact that, at the time of the Constitution's ratification, most states "had dramatically departed from the restrictive English common law rule regarding retention of counsel in serious criminal prosecutions" by allowing for the assistance of counsel.[40] Many new states ensured the continuation of the right to self-representation by including it in their constitutions after the American Revolution.[41] Although some states did not express it in their constitutions or through legislative statutes, "not a single one of those provisions denied the opportunity to conduct one's own defense."[42]

D. Appearance in the Constitution

Although the United States lacked practice in democracy at the writing of the Constitution, the colonies had applied the "ideas, practices, and political culture necessary to sustain a republican government" for 150 years.[43] However, the United States did not have a constitutional model to follow because at that time no country had a "representative government on the scale the United States had already attained, not to

37. *Id.* at 48.
38. *Id.* at 48–49.
39. *Id.* at 13.
40. *Id.* at 14.
41. Michael J. Kelly, Note, *Making* Faretta v. California *Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN'S J. LEGAL COMMENT. 245, 252–53 (2005); *see* Faretta v. California, 422 U.S. 806, 829 (1975); *see also* Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 138 (1985).
42. TOMKOVICZ, *supra* note 3, at 14; Rieder, *supra* note 41, at 138.
43. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 21 (2d ed. 2003).

mention the scale it would reach in the years to come."[44]

During the writing of the Constitution, some states that "favored a more democratic system than their colleagues could then accept"[45] were hesitant to ratify the document because it initially did not contain some fundamental rights that those states insisted needed to be included.[46] However, the delegates agreed that if the colonies ratified the initial document, a Bill of Rights including the "veritable cornucopia of expanding rights necessary to a democratic order" would soon follow.[47] Satisfied with this compromise, each state sent in a list of desired amendments.[48]

The right to representation by counsel was included in the list of desired amendments by New York,[49] Virginia,[50] North Carolina,[51] and Rhode Island.[52] Based on these lists, James Madison proposed a draft of amendments to Congress on June 17, 1789, consisting of nine propositions, one of which provided the right to counsel, as well as other protections in the criminal process.[53] Although the Federal Constitution is very difficult to amend, more so than the constitution or charter of any state or country,[54] this provision became the Sixth Amendment to the

44. *Id.* at 9.

45. *Id.* at 27.

46. *See* TOMKOVICZ, *supra* note 3, at 18.

47. DAHL, *supra* note 43, at 27.

48. TOMKOVICZ, *supra* note 3, at 19.

49. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 328 (Jonathan Elliot ed., 2d ed. 1891).

50. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 658 (Jonathan Elliot ed., 2d ed. 1891).

51. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 243 (Jonathan Elliot ed., 2d ed. 1891).

52. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, *supra* note 49, at 334.

53. *See* 28 U.S.C. § 1654 (2006); Kelly, *supra* note 41, at 252–53.

> The Judiciary Act of 1789 provided that defendants be able to conduct their own defense or use an attorney. Only one day after the Act of 1789 was passed, the Sixth Amendment was proposed, evidencing that lawmakers still had the Act and the right of self-representation on their minds.

Id. (footnotes omitted). *See also* Rieder, *supra* note 41, at 138.

54. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 160 (2006).

United States Constitution in 1791.[55] Yet, in 1833, the Supreme Court expressed in *Barron v. Baltimore*[56] that the Bill of Rights, including the right to assistance of counsel as outlined in the Sixth Amendment, was a limitation "upon the power of only the federal government and had no application to state authorities."[57]

During Reconstruction in 1868 after the Civil War, the Constitution was amended "at the point of a gun" to include the Fourteenth Amendment.[58] After the inclusion of this amendment, dispute arose as to whether the Due Process Clause, which states, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,"[59] allows defendants the same rights in state court as in federal court under the Sixth Amendment.[60] The Court answered this question as applied to state death penalty cases in *Powell v. Alabama* by giving defendants the same right to counsel under the Fourteenth Amendment as contained in the Sixth Amendment.[61] Under the Warren Court, the Supreme Court began to apply the Bill of Rights to the states using the Due Process Clause, making it "so solidly imbedded in American public law that no future Supreme Court will alter that concept."[62]

55. TOMKOVICZ, *supra* note 3, at 20.

> While many other rights were the subjects of considerable discussion during the congressional formulation of and the states' ratifications of the Bill of Rights, there was very little mention of the right to counsel. The record contains no real insights into the particular intentions of those who framed, proposed, and approved the Sixth Amendment right to counsel. Thus, historical guidance regarding the original meaning of the constitutional entitlement to representation is quite limited.

Id.

56. Barron v. Baltimore, 32 U.S. 243 (1833).

57. TOMKOVICZ, *supra* note 3, at 20; *see Barron*, 32 U.S. at 247–48.

58. LEVINSON, *supra* note 54, at 160 ("Congress had made it absolutely clear that the elected representatives and senators of the former Confederate states would not be seated in the House or Senate unless and until each respective state ratified the Fourteenth Amendment.").

59. U.S. CONST. amend. XIV, § 1; *see generally* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

60. TOMKOVICZ, *supra* note 3, at 22.

61. Powell v. Alabama, 287 U.S. 45, 71 (1932).

62. Robert J. Steamer, *Contemporary Supreme Court Directions in Civil Liberti*es, 92 POL. SCI. Q. 425, 430 (1977).

III. APPLICATION IN THE SUPREME COURT

Writing an opinion for the Supreme Court is a delicate task because "changes in judicial norms have affected trends in opinion writing, the value of judicial opinions, and the Court's contributions to public law and policy."[63] When constructing the perfect opinion for the decision, justices have to balance "changing institutional norms"[64] and the inevitable effect on the public.[65] In addition to these outside pressures, justices must keep in mind the opinions of all the individual members of the Court[66] while forming an opinion that a lower court can apply "to allow such divergent results without making it so broad that evasion is encouraged."[67]

A. Right to Counsel

The Court now reads the Sixth and Fourteenth Amendments to include the right to appointed counsel when a defendant "qualifies as indigent."[68] *Powell v. Alabama* expands on the constitutional right to the assistance of counsel by requiring the state to furnish legal counsel because "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel."[69] Under *Powell*, the state is required to provide counsel in a "capital case" in which "the defendant . . . is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the

63. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 287 (8th ed. 2008).

64. *Id.*

65. *Id.* at 309.

> Because the Court's decisions are not self-executing, public reactions inevitably weigh on the minds of the justices. Justice Stone, for one, was furious at Chief Justice Hughes's rush to hand down *Powell v. Alabama* (1932). Picketers protested the Scottsboro boys' conviction and death sentence. Stone attributed the Court's rush to judgment to Hughes's wish to put a stop to the [public] demonstrations around the Court.

Id. (alteration in original) (footnotes omitted) (internal quotation marks omitted).

66. *See id.* at 287 ("Published opinions for the Court are the residue of conflicts and compromises among the justices.").

67. *Id.* at 319 (footnote omitted) (internal quotation marks omitted).

68. TOMKOVICZ, *supra* note 3, at 63; *see generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS (1974).

69. Powell v. Alabama, 287 U.S. 45, 72 (1932); *see also* TOMKOVICZ, *supra* note 3, at 25.

like."[70] The Court went further in *Gideon v. Wainwright* by giving all indigent defendants in state court the same right to appointed counsel under the Fourteenth Amendment as given in federal court under the Sixth Amendment.[71] While the Court has given all indigent defendants the right to appointed counsel in criminal cases, the constitutional standard of "indigence" as determined by the Sixth and Fourteenth Amendments has never been determined by the Court and is still uncertain.

States are free to choose a standard of indigence that fits the goals of that state. In Oklahoma courts, an indigent criminal defendant must have counsel appointed if the defendant desires counsel and "has been unable to obtain legal counsel."[72] If the defendant pays bail, a rebuttable presumption exists "that said defendant has funds to employ his own attorney and the [c]ourt shall then inquire into the financial status of the defendant prior to appointing an attorney."[73]

B. The Right to Self-Representation

Although it has been said, "[a] man who is his own LAWYER has a fool for his client,"[74] the Constitution does not force a defendant to exercise the right to assistance of counsel.[75] As the Court has shown through decades of evolving case law, a defendant can waive the right to assistance of counsel.[76] *Johnson v. Zerbst* defines waiver as "an intentional relinquishment or abandonment of a known right or privilege."[77]

The landmark case on the issue of waiver is *Faretta v. California*.[78] A court must go through a series of procedural steps, a minimum standard the Court in *Faretta* established through dicta, before that court

70. *Powell*, 287 U.S. at 71.

71. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

72. OKLA. STAT. tit. 22, § 1355A (OSCN through 2012 Leg. Sess.).

73. OKLA. STAT. tit. 20, § 55 (OSCN through 2012 Leg. Sess.).

74. JOHN SIMPSON, THE CONCISE OXFORD DICTIONARY OF PROVERBS 146 (2d ed. 1992).

75. TOMKOVICZ, *supra* note 3, at 64 ("Thus, while the Sixth Amendment provides counsel as an essential guarantee of fundamental fairness in the adversarial criminal process, 'the Constitution does not force a lawyer upon a defendant.'" (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942))).

76. Johnson v. Zerbst, 304 U.S. 458 (1938).

77. *Id.* at 464.

78. Faretta v. California, 422 U.S. 806 (1975).

will allow a defendant to waive the right to counsel and exert his right to self-representation.[79] This effectively gives "a rubber stamp approval of the right to bury oneself."[80] The trial judge must decide that the defendant is "literate, competent, and understanding," and that he sufficiently "'knowingly and intelligently'" relinquished the right to counsel.[81] Under the *Faretta* standard, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[82] This warning to the defendant of the disadvantages of waiving counsel "should not be so harsh as to scare away a defendant from the forum of self-representation."[83]

The right to self-representation, however, is not absolute.[84] It does not require the judge or prosecutor to help conduct the defense or show lenience toward the defendant because of the defendant's lack of skill, nor does it give "a license not to comply with relevant rules of procedural and substantive law."[85] The judge can stop the defendant's self-representation if the defendant fails to follow courtroom procedures.

Once the defendant waives his right to counsel, the court holds the defendant to the standard of an attorney when in the courtroom.[86] While a fair trial is essentially impossible after a defendant chooses to represent himself,[87] a defendant that ineffectively represents himself cannot use this ineffectiveness as a reason to appeal[88] because the defendant does not need to have the skill of an attorney to waive counsel effectively.[89] Thus, courts sometimes utilize standby counsel because "most pro se

79. *See id.* at 835; *see also* Gallun, *supra* note 1, at 561. "[This] leaves lower court judges in the untenable position of having their decisions appealed no matter how they rule on a defendant's request to proceed pro se." Brian H. White, Comment, *The Formal Inquiry Approach: Balancing a Defendant's Right to Pro Se with a Defendant's Right to Assistance of Counsel*, 76 MARQ. L. REV. 785, 785 (1993).

80. John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 498 (1996).

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

82. *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

83. Kelly, *supra* note 41, at 286.

84. *Right to Counsel*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 477, 494 (2008).

85. *Faretta*, 422 U.S. at 834 n.46.

86. Gallun, *supra* note 1, at 572; *see, e.g.*, Commonwealth v. Jackson, 647 N.E.2d 401, 404 (Mass. 1995).

87. *See* Gallun, *supra* note 1, at 600.

88. *Right to Counsel*, *supra* note 84, at 496–97; *Faretta*, 422 U.S. at 834 n.46.

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

defendant cases disrupt the criminal justice system to some degree."[90] The right to counsel or self-representation does not guarantee the right to appointed counsel; however, courts may appoint standby counsel in case the defendant needs assistance.[91]

Courts also require that the defendant be competent,[92] in the same way a court requires competency to "*assist* his lawyer in making his defense" in order to stand trial.[93] The types of decisions required to adequately fill the two defense roles of counsel-represented defendants and self-represented defendants are quite different. A defendant represented by counsel usually makes calm, thought-out decisions before the trial begins, allowing counsel to "anticipate decisions concerning whether to plead guilty, testify, or request a jury trial."[94] By contrast, a self-represented defendant "will need to make hundreds of decisions during the course of trial, often while an impatient decisionmaker (the judge or jury) is waiting."[95] A self-represented defendant will need to be able to "challenge the prosecution and to function, to some minimal degree, as its adversary."[96]

Aware of the significant differences in mental function performed in these roles, the Supreme Court implied, in early decisions, that there might be a higher standard of competency for defendants who wish to self-represent.[97] However, *Faretta* seems to imply that the competency standard is the same for standing trial as it is for waiving assistance of counsel; a single standard for both circumstances ensures "'simplicity and expediency.'"[98] The Supreme Court's failure to give a consistent answer to whether waiver of counsel requires a defendant to demonstrate

90. Decker, *supra* note 80, at 487.

91. *Right to Counsel*, *supra* note 84, at 495–96.

92. Gallun, *supra* note 1, at 559–60; *see* Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

93. Jennifer W. Corinis, Note, *A Reasoned Standard for Competency to Waive Counsel After* Godinez v. Moran, 80 B.U. L. REV. 265, 268 (2000).

94. E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605, 1632 (2010).

95. *Id.*

96. *Id.* at 1628.

97. Corinis, *supra* note 93, at 268. *See also* Massey v. Moore, 348 U.S. 105, 108 (1954) (stating that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel").

98. *See* Gallun, *supra* note 1, at 577 (quoting Alan R. Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 105, 109 (1994)).

a heightened level of competency resulted in differing results from lower courts when dealing with the issue.[99]

To clear up the confusion, the Supreme Court ruled in *Godinez v. Moran* in 1993 that although a defendant was not required to exhibit a higher degree of competency to waive his right to counsel, states could expand on this minimum standard by requiring a higher degree of competency than that needed to stand trial.[100] In addition to allowing for "distinctions . . . made on a case-by-case basis to take into account other factors,"[101] the *Godinez* constitutional standard mirrors the standard outlined in *Dusky v. United States*.[102] *Dusky* requires that a defendant have "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and] a rational as well as factual understanding of the proceedings against him.'"[103] This standard "allows the layperson who wishes to proceed pro se to do so despite a lack of technical legal knowledge, at best, and regardless of mental illness, at worst."[104]

A later case, *Indiana v. Edwards*,[105] would confirm that the Constitution allows states to have higher standards for competency than that of the constitutional minimum for defendants "who meet *Dusky*'s standard for competence to stand trial but 'still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'"[106] The Court reasoned that the many facets of mental illness could require different standards of competency[107] "tailored to the demands" of the "particular situation in which [the defendant] must function."[108] Thus, the Court shifted from a focus on defendant autonomy in *Faretta* to a focus on "accuracy, judicial efficiency, and dignity" in *Edwards*.[109] When applying *Edwards*, a state

99. *See* Corinis, *supra* note 93, at 268, 276 n.65 (noting the division between the lower courts regarding the correct standard for determining competency).

100. Godinez v. Moran, 509 U.S. 389, 399–402 (1993).

101. Kelly, *supra* note 41, at 286.

102. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *Godinez*, 509 U.S. at 398–400.

103. *Dusky*, 362 U.S. at 402.

104. Decker, *supra* note 80, at 519.

105. Indiana v. Edwards, 554 U.S. 164, 178 (2008).

106. *Id.*; *see The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 320 (2008) (quoting *Edwards*, 554 U.S. at 178).

107. Johnston, *supra* note 94, at 1619; *Edwards*, 554 U.S. at 165.

108. Corinis, *supra* note 93, at 268.

109. *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 106, at 316–17.

court can refuse to expand the standard outlined in *Godinez*, which uses *Dusky* as "both a constitutional minimum and a maximum standard for self-representation competence"; expand the standard, leaving the "functional test of mental competence" just as vague as that in *Edwards*; or expand the standard by creating its own test.[110]

While *Edwards* addresses the concerns of fairness raised in *Faretta* by giving judges the ability to establish a higher standard of competency for waiver, having more than one standard of competency leads to confusion and "creates a new cluster of problems" for courts and defendants[111] while risking "weakening the self-representation right."[112] Therefore, the Court should revisit the issue of the competency standard for waiver of counsel in order to establish a single, unambiguous standard and stop "trial courts from relying on a patchwork of vague justifications to support denial of the self-representation right."[113] As it stands, state courts run the risk of applying too-high a standard by erroneously denying a waiver or applying too-low a standard by erroneously granting a waiver.[114] State courts can hardly establish a satisfactory standard on their own[115] without having to worry about violating the defendant's rights as outlined in *Faretta* because an erroneous ruling on the validity of waiver is a reversible error.[116]

In *Johnson v. Zerbst*, the Supreme Court determined that a court should look at the "particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused."[117] In addition to Sixth Amendment issues, this type of totality of the circumstances test has been used to resolve other constitutional issues.[118] The flexibility of a totality of the circumstances standard allows a judge to determine waiver validity in a less "mechanistic" or rigid

110. Jason R. Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts After* Indiana v. Edwards, 44 U.S.F. L. REV. 825, 836–37 (2010).

111. *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 106, at 323–24.

112. Conor P. Cleary, Note, *Flouting* Faretta*: The Supreme Court's Failure to Adopt a Coherent Communication Standard of Competency and the Threat to Self-Representation After* Indiana v. Edwards, 63 OKLA. L. REV. 145, 165 (2010).

113. *Id.* at 158.

114. Marks, *supra* note 110, at 836.

115. *See id.* at 831–36.

116. *See id.* at 826–28.

117. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

118. Kelly, *supra* note 41, at 267; *see, e.g.*, Moran v. Burbine, 475 U.S. 412, 421 (1986).

way.[119]

IV. WAIVER OF COUNSEL AS APPLIED IN OKLAHOMA STATE COURT

State courts often have discretion in implementing and applying Supreme Court decisions because of ambiguities and unclear language in those opinions.[120] Thus, some Supreme Court opinions receive uneven application in lower courts.[121] Sometimes lower courts reason that their role is similar to an "independent actor[], who will not follow the lead of higher courts unless conditions are favorable for their doing so."[122] These conditions are often dictated by a judge's "own policy preferences and the political currents of the time."[123] States use several methods of avoiding compliance with the Court's decisions, from treating "[c]rucial language" as dicta—intentionally limiting state decisions in hopes that a later ruling will change the impact of the current opinion[124]—to distinguishing cases based on small factual differences in actual cases instead of in the abstract.[125] Avoidance may also be accidental in nature as judges and lawyers must sometimes obtain hard or electronic copies of an opinion because the Supreme Court is under no obligation to make the opinion available to all individual lower courts.[126]

One instance of state discretion granted by the Supreme Court is the right to waive counsel in a criminal trial. In *Von Moltke v. Gillies*, four members of the Court wrote that a valid waiver should contain "an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."[127] However, a majority of the Supreme Court has never outlined which procedural steps must be taken by a trial court to find a valid waiver.[128] Instead, the Court left unanswered the question of whether the judge is

119. Kelly, *supra* note 41, at 265.
120. *See* ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 364–65 (6th ed. 2004).
121. *See* O'BRIEN, *supra* note 63, at 351–53.
122. Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86, 91 (1976).
123. O'BRIEN, *supra* note 63, at 351.
124. *Id.* at 349.
125. *See* CARP ET AL., *supra note* 120, at 366.
126. *See id.* at 365.
127. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).
128. *See* TOMKOVICZ, *supra* note 3, at 65.

required to tell the defendant the disadvantages of self-representation and the advantages of standby counsel.[129] Without an established guideline, lower courts have failed to form "a universal standard"[130] that ensures "the accused has made a constitutionally acceptable choice to forgo assistance."[131] Instead, courts are left with the difficult job of determining "whether to accept the federal invitation to change state procedures and standards and, if so, in what manner." [132]

A. Oklahoma's Application of the Supreme Court Standard for Waiver

In Oklahoma, courts determine the validity of waiver through a two-step process.[133] First, the court determines whether the accused is competent to waive the right to counsel.[134] Although it is accepted that "[t]he Constitution provides a floor of rights below which a state may not reside" and that the states have the right to expand on the standard of competency beyond the constitutional minimum,[135] Oklahoma courts declined the invitation to expand such rights.[136] The trial court in *Maynard v. Boone* used the same standard for competency as established in *Dusky* and *Godinez*, stating that the defendant needs "'a rational as well as factual understanding of the proceedings against him.'"[137]

If the defendant is competent to waive the right to counsel, then the judge, an impartial "'referee or umpire of a contest between two opposing sides,'"[138] must "determine whether the waiver is voluntary, knowing and intelligent."[139] The judge must also notify the defendant of the disadvantages of waiving counsel, "'including a lack of knowledge

129. *See* Kelly, *supra* note 41, at 247.
130. Gallun, *supra* note 1, at 565.
131. TOMKOVICZ, *supra* note 3, at 66.
132. Marks, *supra* note 110, at 825–26.
133. Braun v. State, 1995 OK CR 42, 909 P.2d 783, 788 (citing Swanegan v. State, 1987 OK CR 180, 743 P.2d 131, 132).
134. *Id.*
135. Gallun, *supra* note 1, at 582.
136. *See* Cooper v. Oklahoma, 517 U.S. 348, 355–56 (1996) (holding that Oklahoma's presumption that defendant is competent to stand trial unless disproven by clear and convincing evidence is a violation of defendant's due process rights).
137. Maynard v. Boone, 468 F.3d 665, 676 (10th Cir. 2006) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)).
138. Hattensty v. State, 1962 OK CR 22, 369 P.2d 466, 470 (quoting Reed v. State, 1958 OK CR 115, 335 P.2d 932, 936).
139. *Braun*, 909 P.2d at 788.

and skill as to rules of evidence, procedure and criminal law.'"[140] The judge must try "to preside with the utmost fairness and constant precaution as not to abridge the defendant's constitutional right to a fair and impartial trial."[141] However, the Oklahoma Court of Criminal Appeals has stated:

> When an accused elects to proceed without counsel, he chooses a course through unfamiliar waters, where the likelihood of legal error is substantial. The right to self-representation, however, will continue to be exercised. Accordingly, both the judiciary and the bar must fully appreciate the ramifications of this constitutional right and must endeavor, in every case, to carefully advise the accused of the hazards. Once explained, the legal field's conscience should be relieved since the accused alone suffers the consequences of his decision.[142]

An intelligent waiver does not require that the defendant's decision must be a smart choice or the best choice. "'The test whether a defendant has intelligently elected to proceed *pro se* is not the wisdom of the decision or its effect upon the expeditious administration of justice. It is only necessary that a defendant be made aware of the problems of self-representation . . . .'"[143] Valid waiver does not occur unless the record reflects that "the defendant rejected the offer of counsel with knowledge and understanding of the perils of self-representation."[144] If the waiver is clearly established in the record, Oklahoma courts remove the presumption against a waiver of the right to counsel because "[t]he defendant is no longer waiving fundamental rights when he represents himself but is merely electing between mutually exclusive fundamental rights."[145]

The two methods of determining the validity of waiver are the record

140. Swanegan v. State, 1987 OK CR 180, 743 P.2d 131, 132 (quoting Coleman v. State, 1980 OK CR 75, 617 P.2d 243, 246).

141. Dollie v. Oklahoma, 1957 OK CR 77, 316 P.2d 208, 210.

142. *Coleman*, 617 P.2d at 246.

143. *Braun*, 909 P.2d at 789 (quoting Johnson v. State, 1976 OK CR 292, 556 P.2d 1285, 1294).

144. *Id.* at 787; *see also Swanegan*, 743 P.2d at 132; Stevenson v. State, 1985 OK CR 74, 702 P.2d 371, 374–75; Lineberry v. State, 1983 OK CR 115, 668 P.2d 1144, 1145–46; Dunnum v. State, 1982 OK CR 87, 646 P.2d 613, 614.

145. Parker v. State, 1976 OK CR 293, 556 P.2d 1298, 1301.

approach and the formal inquiry approach.[146] The record approach, mentioned in *Johnson v. Zerbst*,[147] merely requires that the judge be able to look at the record as a whole and determine whether the defendant waived the right to counsel knowingly and intelligently and does not require an in-depth "inquiry into the defendant's qualifications for asserting a waiver of counsel."[148] The formal inquiry approach requires that the judge inquire into both the defendant's understanding of waiving the right to counsel and the defendant's awareness of the disadvantages involved in self-representation.[149] Unlike the record approach, the formal inquiry approach gives the judge the opportunity to warn the defendant of the downfalls of waiving the right to counsel.[150] While the language in Oklahoma case law speaks of the record reflecting the defendant's waiver, Oklahoma probably uses the formal inquiry approach because judges are required to tell the defendant about the disadvantages of waiving counsel.[151] While "using the formal inquiry approach introduces a standard that is too 'rigorous' for a constitutionally protected right,"[152] having a formal inquiry makes appellate review "black or white; either the trial judge warned the defendant of the dangers of appearing pro se, or the trial judge did not."[153]

Another protection Oklahoma provides to a defendant who chooses self-representation is standby counsel.[154] "[M]ost *pro se* defendants are

146. Kelly, *supra* note 41, at 277 & n.208.

147. Johnson v. Zerbst, 304 U.S. 458, 465–66 (1938).

148. Kelly, *supra* note 41, at 277–78; *see also* United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988).

149. *Right to Counsel*, *supra* note 84, at 489–91.

150. Kelly, *supra* note 41, at 280–81.

151. *See, e.g.*, Braun v. State, 1995 OK CR 42, 909 P.2d 783, 787.

152. Kelly, *supra* note 41, at 280.

153. Gallun, *supra* note 1, at 568.

154. *See* John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 713 (1984).

> Counsel may literally stand by to take over in case the defendant loses the right to self-representation, in which case the attorney need only be present in the courtroom. Alternatively, counsel may serve as a resource, consulting with the client outside of the courtroom or seated at the client's side, available for assistance. The most extreme form of advisory council is known as co-counsel or hybrid representation, where both defendant and counsel participate in jury selection, statements and questioning.

Id.

'ill equipped' to handle their own cases,"[155] and standby counsel helps defendants present their defense by assisting with "'procedural matters, legal issues, and trial strategy and tactics'"[156] by providing "a conduit through which the pro se defendant may gain access to otherwise unobtainable materials."[157]

While standby counsel promotes efficiency by avoiding delays at trial and keeping self-representing defendants from burdening the judge,[158] there are several downfalls to using standby counsel:

> An appointment as standby counsel casts an attorney into an uncomfortable twilight zone of the law. The attorney may be unsure of her duties and the extent of her obligation. She functions in a context where the usual professional and ethical guides to attorney conduct appear not to fit, and she is constrained from assuming the normal role of an attorney.[159]

Using standby counsel is not just difficult on the attorney involved. Appointing standby counsel leaves the court open to "clever defendants who could seek to play one constitutional right against another, claiming that the trial judge either failed to restrict or overly restricted the role of standby counsel."[160] Even with standby counsel present, the defendant maintains control over the defense, suggesting that standby counsel "must defer to the wishes of the defendant, no matter how bad they might be."[161] In addition, standby counsel can also step in to finish a trial if the defendant decides to represent himself no longer.[162]

Faretta does not require that a court appoint counsel but instead says that the court *may* appoint standby counsel.[163] Oklahoma courts follow the example the Supreme Court set in *Faretta*, appointing standby counsel regardless of objection by the defendant.[164] Although *Johnson v.*

155. Kelly, *supra* note 41, at 261.
156. *Id.* (quoting Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 72 (2003)).
157. Decker, *supra* note 80, at 535.
158. Kelly, *supra* note 41, at 261.
159. Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 676 (2000).
160. Molino v. Dubois, 848 F. Supp. 11, 14 (D. Mass. 1994).
161. *See* Kelly, *supra* note 41, at 261–62.
162. *Id.* at 260.
163. Faretta v. California, 422 U.S. 806, at 834 n.46 (1975).
164. Parker v. State, 1976 OK CR 293, 556 P.2d 1298, 1302 (citing Stiner v. State,

State leaves appointing counsel to the discretion of the court,[165] it is clear that "the preferable choice for the trial court is that standby counsel be appointed."[166] In spite of the problems posed by appointment of standby counsel, the benefits to both the defendant and the court show that standby counsel is not only preferable but is also a logical choice.

B. Mathis v. State

1. Case Facts

During the execution of a search warrant at the home of Reginald Orlando Mathis on March 26, 2007, the Oklahoma City Police Department's Springlake "IMPACT" unit found marijuana roaches, marijuana in a plastic baggie, and a digital scale that Mr. Mathis admitted he used to "weigh his marijuana."[167] According to the later testimony of Officer Jimmie Cortez, who searched the bedroom, Mr. Mathis made several statements and pointed to things located in the room, seemingly drawing attention away from other items in the room.[168] The police also found Wendy's fast food gift cards in Mr. Mathis' dresser drawer and a Texas vehicle tag under the dresser.[169] The vehicle tag matched the tag to the truck for which Mr. Mathis had the key in his pocket; the truck was missing the front tag.[170]

Later computer searches would show the unlocked truck was stolen on March 22, 2007 from a department store parking lot in Garland, Texas.[171] Mr. Mathis admitted in a post-arrest interview that he removed

1975 OK CR 156, 539 P.2d 750, 753).

165. *See* Johnson v. State, 1976 OK CR 292, 556 P.2d 1285, 1292.

166. Coleman v. State, 1980 OK CR 75, 617 P.2d 243, 246.

167. Mathis v. State, 2012 OK CR 1, ¶¶ 2–3, 271 P.3d 67, 70–71.

168. *Id.* ¶ 3 n.6.

> While the room was being searched, Mathis made numerous statements, including acknowledging that it was his bedroom, pointing out his "weed box" in the corner of the room, and stating that he used the digital scale to weigh his marijuana. The "weed box" did not contain any marijuana, but rather contained sandwich baggies, rubber bands, and Swisher Sweets cigars—the brown wrappings of which were consistent with the wrappings of the roaches found in the ashtray on the dresser.

Id. ¶ 3 (footnote omitted).

169. *Id.* ¶ 4.

170. *Id.*

171. *Id.* ¶¶ 4–5.

the tag because he believed the truck might be stolen, but he claimed that he borrowed the truck from "a guy in the duplex next door, whose name might be 'Jerome.'"[172] A search of the truck revealed Wendy's uniform hats belonging to Diana Richardson, the owner of the truck, and a Ruger Hi-Point 9mm handgun in the center console for which bullets were found in Mr. Mathis' apartment; Ms. Richardson "testified that the gun was not hers and that it was not in the truck when it was stolen."[173]

2. Procedural History

Mr. Mathis was arrested and charged with a number of crimes.[174] In August of 2007, Mr. Mathis first appeared at his preliminary hearing represented by court-appointed counsel who requested that the court evaluate Mr. Mathis' competency.[175] On July 17, 2009, Mr. Mathis requested to represent himself, and the court set a hearing date, although there is no record of the hearing's occurrence.[176] Mr. Mathis again requested to represent himself on November 16, 2009, during a motion

> Mathis cross-examined Cortez regarding the fact that his report listed a different tag, "33DM3T," for the recovered tag, which Cortez stated was simply a "clerical error" in his report. Cortez noted that a separate search of the Dodge truck's VIN number confirmed that the truck parked outside the duplex was indeed the same truck stolen out of Texas. In addition, two identical garage-door remote controls were found in the trash at the searched residence.

Id. ¶ 4 n.8.

172. *Id.* at ¶ 6.

173. *Id.* ¶ 5.

174. *Id.* ¶ 1 n.1.

> Mathis was also originally charged with Count I, Possession of CDS (cocaine base), and Count V, Knowingly Concealing Stolen Property. These charges were dismissed after Mathis' preliminary hearing. Counts VI and VIII in the Information involved only Mathis' co-defendant, Garnett Stoner, and were not mentioned or addressed at Mathis' trial.

Id. (Editor's note: though the 271 P.2d reporter reads "Counts VI and VIM," the official state court website lists these as "Counts VI and VIII." The latter has been retained here.).

175. *Id.* ¶ 9.

> The competency evaluation was filed in the trial court in April of 2008 and concluded that there was no evidence that Mathis was incompetent, unable to appreciate the nature of the charges against him, a danger to himself or others, or that he suffered from "mental illness or cognitive deficits that would impair his ability to rationally consult with a lawyer and prepare his defense." Mathis was found competent by the court on April 16, 2008.

Id. (footnotes omitted).

176. *Id.* ¶ 10.

hearing because he felt he could present a better defense than his appointed counsel could.[177] At that time, both the trial judge and prosecutor attempted to advise Mr. Mathis that his decision to conduct his own defense was "a mistake" and that he "should not underestimate the difficulty of representing himself."[178] The court appointed David Bedford as standby counsel for Mr. Mathis to "answer Mathis' questions, help him file motions (including a motion to have his bond reduced), and communicate with the prosecutor's office for Mathis."[179]

Mr. Mathis first represented himself at a motion hearing on January 21, 2010.[180] Although Mr. Mathis had not filed any new motions, he did have to address the motions his previous counsel had filed.[181] After "struggling mightily" through the hearing, Mr. Mathis allowed Mr. Bedford "to take over and be his 'lead counsel'"; Bedford won on several of the motions.[182] The court used this hearing as another chance to tell Mr. Mathis that continuing to self-represent was a bad idea.[183] Bedford also stated that he would represent Mr. Mathis at trial regardless of the time constraints.[184] However, Bedford was unable to do so and asked the court for a continuance the next day.[185] Mr. Mathis "clearly and unequivocally informed the court that he did *not* want a continuance, that he would rather represent himself and was prepared to do so, and that he would like Bedford to remain as his standby counsel."[186] The court yet again warned Mr. Mathis that he was making a mistake and that he would be unhappy with the results of his trial if he continued to represent

177. *Id.*

178. *Id.* ¶¶ 10–11.

> [The trial court] noted that it took the attorneys and the court "years to familiarize ourselves" with the law that would apply to his case. The prosecutor likewise noted that Mathis needed to understand that he would be held to the same standards and rules as any attorney, even though he "doesn't know the rules" and "doesn't even know the different areas or stages of trial."

Id. ¶ 11.

179. *Id.*

180. *Id.* ¶ 12.

181. *Id.*

182. *Id.*

183. *Id.* ¶ 12. "The court noted during this process that Mathis' confusion about how to proceed was why 'it's bad for you to go pro se,' how it was like 'doing brain surgery' and 'not knowing what you're doing,' and that this was why defendants are advised 'not to go represent themselves.'" *Id.*

184. *Id.*

185. *Id.* ¶ 13.

186. *Id.*

himself.[187]

The jury convicted Mr. Mathis of four charges: possession of a weapon after a felony conviction, drug possession, possession of paraphernalia, and possession of a stolen vehicle.[188] The trial court judge sentenced Mr. Mathis, respectively, to twenty-five years in prison, fifteen years, five years, and a fine of $500, with all of the prison time to run concurrently.[189] Mr. Mathis appealed his conviction on several grounds, one of which included the claim that "the trial court erred in allowing him to represent himself and that this error was 'detrimental' to him."[190]

3. Analysis

In response to an appeal such as Mathis', an appellate court should systematically look at whether there was a valid waiver. The court in *Mathis* started by referencing the defendant's constitutional right to self-representation as established in *Faretta*, utilizing the two-step process established previously in Oklahoma courts.[191] Next, the court focused on whether the trial judge gave a warning to Mr. Mathis about the dangers of self-representation, noting that instead of having a "'laundry list'"[192] of "specific warnings that must be checked off by the trial court," the court will look at all the circumstances of the case to determine the defendant's awareness of the dangers.[193] Therefore, Mr. Mathis' proposition—that his waiver was not sufficient because the court did not use "'the *Coleman* procedure'" for determining waiver validity—was incorrect.[194]

187. *Id.*

> And the court agreed to proceed this way. Prior to the start of trial on the following Monday, the trial court reminded Mathis that he had no experience trying a case, that he was "going to be held to the same standards as a lawyer," and that he probably wasn't "going to like the results" of representing himself. Mathis then represented himself at trial, with substantial assistance from his standby counsel, whom Mathis consulted with regularly and once referred to as his "assistant."

Id. (footnote omitted).

188. *Id.* ¶ 1.

189. *Id.*

190. *Id.* ¶¶ 1, 7.

191. *Id.* ¶ 7 n.10, ¶ 8.

192. *Id.* ¶ 15 (quoting Edwards v. State, 1991 OK CR 71, 815 P.2d 670, 673).

193. *Id.* ¶ 15 (citing Fitzgerald v. State, 1998 OK CR 68, ¶ 6, 972 P.2d 1157, 1162).

194. *Id.* ¶ 14 (citing Coleman v. State, 1980 OK CR 75, 617 P.2d 243, 245–46).

The court correctly concluded that "Mathis was adequately advised of the charges against him, the range of punishments at issue, the role that standby counsel would play if he chose to proceed *pro se*, [and] that he did not know the rules and procedures by which the trial would be conducted."[195] The court warned Mr. Mathis several times that he was "making a mistake," even comparing self-representation to "doing 'brain surgery' without knowing how to do so."[196] Mr. Mathis clearly knew the dangers of self-representation and that he lacked the necessary skills to represent himself.[197] By attempting to represent himself in the motion hearing, Mr. Mathis "actually experienced how challenging and frustrating it could be to try to function as a lawyer—without ever going to law school or studying the law."[198] Although the court did not consider the defendant's actual performance at trial when determining waiver validity,[199] Mr. Mathis should have realized that he was unable to present a successful defense when he had his standby counsel finish the hearing. Continuing his self-representation showed that Mr. Mathis was aware of

> Mathis argues on appeal that the trial court did not properly comply with "the *Coleman* procedure" for evaluating a defendant's request to represent himself, *i.e.*, the procedure described in *Coleman v. State*. In particular, Mathis complains that he was not specifically warned that by representing himself, he would "waive any argument of incompetent counsel as a basis for appeal." Mathis also complains, citing *Coleman*, that "Judge Watson did not specifically explain that his 'lack of knowledge and skill as to rules of evidence, procedure and criminal law' would put him at an extreme disadvantage" (quoting *Coleman*). Mathis fails to recognize that the law in this area has evolved in a number of ways since *Coleman*.

Id. (citations omitted).

195. *Id.* ¶ 16.

196. *Id.*

197. *Id.* "Although Mathis was not specifically told that by representing himself, he was giving up the right to claim ineffective assistance of counsel on appeal, this specific warning is not required by current law, nor did the failure to give this warning undermine the legitimacy of Mathis' decision." *Id.*

198. *Id.*

199. *Id.* ¶ 18.

> This Court does not address Mathis' Proposition I assertions regarding ways in which he failed to do a good job of representing himself, nor do we address the State's counter-assertion that "it cannot be overlooked that Defendant did a very good job representing himself at trial." A defendant's actual performance as his own counsel is irrelevant to the determination of whether the trial court abused its discretion in allowing that defendant to exercise his constitutional right to represent himself.

Id.

the repercussions of his decision.

The court did not deny Mr. Mathis access to counsel even though he waived his right.[200] Mr. Mathis had access to counsel through the court's appointment of David Bedford.[201] Mr. Bedford provided "very significant, repeated, and helpful assistance" to Mr. Mathis.[202] As the court correctly pointed out, giving a specific list of dangers as outlined in *Coleman* "makes little sense" when considering the totality of the circumstances, including Mr. Mathis' failed attempt at handling a motion hearing.[203] The *Faretta* Court could not possibly think of any defendant being more aware of the dangers of self-representation than Mr. Mathis, who experienced the dangers first-hand at the motion hearing and still decided to represent himself at trial.

V. CONCLUSION

In spite of a history full of inconsistencies, Oklahoma has established a standard for waiver of the right to counsel that is effective, fair, and avoids most of the problems the Supreme Court has failed to deal with when providing a constitutional standard. Through a two-step waiver determination process, Oklahoma courts protect the interests of the defendant by requiring the court to disclose the dangers of self-representation and appoint standby counsel, while at the same time preserving judicial efficiency. *Mathis v. State* provides a good example of the steps courts take to determine whether the defendant has effectively chosen between his two constitutionally given rights: the right to counsel and the right to present his own defense.

200. *See id.* ¶ 17.
201. *Id.* ¶ 11.
202. *Id.* ¶ 17.
203. *Id.*