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INVALID WAIVERS OF COUNSEL AS HARMLESS ERRORS: JUDICIAL ECONOMY OR A RETURN TO *BETTS v. BRADY*?

INTRODUCTION

In 1963 the United States Supreme Court held that the sixth amendment¹ requires state and federal courts to provide counsel for all indigent criminal defendants charged with felonies.² Such a defendant, however, may waive his right to counsel.³ Twelve years later, the Court established that a criminal defendant possesses a constitutional right to represent himself at trial.⁴ A defendant who exercises his right of self-representation necessarily must waive his sixth amendment right to counsel.⁵ These two rights often place the trial judge in a difficult position.⁶ A judge who refuses to allow a defendant to proceed pro se risks having his decision reversed on appeal on the ground that he denied the defendant his right of self-representation.⁷ If, however, a judge allows a defendant to represent himself without establishing a valid waiver of

1. U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The Supreme Court previously had held that the sixth amendment requires federal courts to appoint an attorney for indigent defendants in felony prosecutions. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). The Court in *Gideon* held that the sixth amendment was made applicable to the states through the fourteenth amendment, thereby requiring the states to provide counsel for indigent defendants charged with felonies. See *Gideon*, 372 U.S. at 342. The Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) and *Scott v. Illinois*, 440 U.S. 367, 369, 373-74 (1979), further extended the indigent's right to counsel to cases involving misdemeanors. See *infra* note 27 and accompanying text. For a more thorough discussion of the development of the right to appointed counsel, see *infra* notes 16-27 and accompanying text.

3. See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942); see also *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (defining waiver as an intentional relinquishment of a known right); *infra* notes 30-39 and accompanying text (discussing requirements for valid waiver of counsel).

4. See *Faretta v. California*, 422 U.S. 806, 819 (1975).

5. See *id.* at 835; *United States v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir. 1987); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977); *Meeks v. Craven*, 482 F.2d 465, 467-68 (9th Cir. 1973).

6. See *United States v. McDowell*, 814 F.2d 245, 248-49 (6th Cir.) (trial judge risks reversal either for denying right to proceed pro se or for granting it without appropriate inquiry), *cert. denied*, 108 S. Ct. 478 (1987); *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.) (*Faretta* decision put district court judges in "new, and unenviable, position" of focusing upon both right to counsel and right to proceed pro se), *cert. denied*, 459 U.S. 853 (1982).

7. See *United States v. McDowell*, 814 F.2d 245, 248-49 (6th Cir.), *cert. denied*, 108 S. Ct. 478 (1987); see also *Johnstone v. Kelly*, 808 F.2d 214, 218-19 (2d Cir. 1986) (granting writ of habeas corpus because state trial court denied defendant's right of self-representation), *cert. denied*, 107 S. Ct. 3212 (1987). *But see* *Tuitt v. Fair*, 822 F.2d 166, 179 (1st Cir.) (defendant who requested to proceed pro se but refused to waive right to counsel unsuccessfully alleged that trial judge denied right of self-representation), *cert. denied*, 108 S. Ct. 333 (1987).

counsel⁸ on the record, the defendant may claim successfully on appeal that the trial court denied him his right to counsel.⁹ This latter situation has proved particularly troublesome for the federal courts of appeals.¹⁰

Whenever a convicted defendant who represented himself at trial claims on appeal that the trial court denied his right to counsel, the appellate court must examine the record to ascertain whether the defendant validly waived that right.¹¹ If the court finds a valid waiver, it rejects the claim.¹² The federal courts of appeals, however, disagree on the consequences of an invalid waiver of the right to counsel. Courts in the Third and the Ninth Circuits have held that a trial court's failure to elicit a valid waiver of counsel in this situation requires automatic reversal of the conviction.¹³ The Courts of Appeals for the Fifth and the Tenth Circuits have applied a harmless error rule,¹⁴ holding that an appellate court may affirm a conviction, despite the absence of a valid waiver of counsel, if the court concludes that the lack of representation did not prejudice the defendant.¹⁵

This Note argues that courts should not subject invalid waivers of counsel to a harmless error analysis. Part I of this Note examines the development of the right to appointed counsel and the requirements for a valid waiver of that right. Part II discusses the evolution of the harmless

8. A defendant makes a valid waiver of his sixth amendment right to counsel at trial if he waives his right "knowingly and intelligently." See *Faretta v. California*, 422 U.S. 806, 835 (1975) (citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)); see also *infra* notes 30-39 and accompanying text (discussing waiver of the right to counsel).

9. See, e.g., *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987); *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987); *United States v. Welty*, 674 F.2d 185, 192, 194 (3d Cir. 1982).

10. For examples of cases in which the courts of appeals have addressed the tension between the right to counsel and the right of self-representation, see *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.) (requiring district courts to make clear on the record defendant's awareness of dangers and disadvantages of self-representation), *cert. denied*, 459 U.S. 853 (1982); *Brown v. Wainwright*, 665 F.2d 607, 610-12 (Former 5th Cir. 1982) (en banc) (discussing relationship between right to counsel and right of self-representation).

11. For a discussion of the majority and minority approaches to determining the presence or absence of a valid waiver of counsel, see *infra* notes 33-39 and accompanying text.

12. See, e.g., *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Weninger*, 624 F.2d 163, 167, 168 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980); *United States v. McCaskill*, 585 F.2d 189, 189-90 (6th Cir. 1978) (per curiam).

13. See *McMahon v. Fulcomer*, 821 F.2d 934, 946 & n.12 (3d Cir. 1987); *United States v. Balough*, 820 F.2d 1485, 1490 (9th Cir. 1987); *United States v. Welty*, 674 F.2d 185, 194 & n.6 (3d Cir. 1982).

14. The harmless error doctrine allows an appellate court to uphold a lower court's judgment or conviction despite a trial error if the error did not affect the outcome of the trial. See *Kotteakos v. United States*, 328 U.S. 750, 757 (1946); 1 J. Wigmore, *Evidence* § 21, at 898 (Tillers rev. ed. 1983); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 Minn. L. Rev. 519, 519 (1969). For a discussion of the harmless error doctrine, see *infra* notes 42-75 and accompanying text.

15. See *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984); *United States v. Gipson*, 693 F.2d 109, 112 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983); see also *United States v. Gallop*, 838 F.2d 105, 110-11 (4th Cir. 1988) (absence of knowing and intelligent waiver not reversible error where defendant rejected counsel to delay trial).

error doctrine and its application to constitutional errors. Part III examines the arguments for and against applying a harmless error test to cases in which no valid waiver of counsel has occurred. This Note concludes that both the rationales underlying the traditional application of the harmless error doctrine and the inability of appellate courts to determine the amount of prejudice to a defendant resulting from the absence of counsel dictate that invalid waivers of counsel at trial never be treated as harmless error.

I. THE INDIGENT'S RIGHT TO COUNSEL AND THE REQUIREMENTS FOR A VALID WAIVER

A. *The Development of the Right to Appointed Counsel*

The United States Supreme Court first recognized an indigent criminal defendant's right to appointed counsel in its review of a state court conviction.¹⁶ The Court held that the due process clause of the fourteenth amendment¹⁷ requires states to provide counsel to indigent defendants in capital cases when a lawyer's assistance is necessary for a fair hearing.¹⁸

The Court next addressed the issue of a defendant's right to counsel in federal court proceedings, holding that the sixth amendment requires federal courts to appoint counsel for all indigent defendants charged with felonies, even in non-capital cases.¹⁹ This expansion of the right to counsel seemingly ended, however, when the Court held in *Betts v. Brady*²⁰ that the fourteenth amendment did not incorporate the sixth amendment.²¹ Thus, according to *Betts*, the Constitution does not require state

16. See *Powell v. Alabama*, 287 U.S. 45, 46 (1932) (rape conviction).

17. The fourteenth amendment provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.

18. See *Powell*, 287 U.S. at 71. The *Powell* Court carefully limited its holding to require appointment of counsel only when a defendant charged with a capital crime cannot defend himself. See *id.* The opinion, however, contained broad dicta regarding the importance of the assistance of counsel that "in effect placed all but a few rare laymen in the same category as the defendants [in *Powell*]." W. Beaney, *The Right to Counsel in American Courts* 155 (1955).

19. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938); see also *infra* note 27 (discussing the Court's subsequent extension of the right to counsel to misdemeanor cases).

20. 316 U.S. 455 (1942). In *Betts*, a Maryland state court had refused to provide the petitioner with counsel for his trial on charges of robbery because the practice of the courts in that county was to appoint counsel for indigent defendants only in prosecutions for murder or rape. *Id.* at 456-57. The petitioner represented himself at the trial and was convicted. *Id.* at 457. After exhausting his state court remedies, he sought a writ of certiorari, alleging that the trial court had deprived him of his right to counsel under the fourteenth amendment. *Id.* The Court found that the absence of counsel had not seriously disadvantaged the petitioner, *id.* at 472-73, and therefore affirmed the conviction. *Id.* at 473.

21. See *id.* at 461-62. Incorporation is the application of certain provisions of the Bill of Rights of the United States Constitution to the states through the due process clause of the fourteenth amendment. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 315 (3d ed. 1986). The fourteenth amendment, however, incorporates only those provisions of the first ten amendments that secure fundamental rights. *Id.*

courts to appoint counsel for indigent defendants in all felony cases.²² Rather, under *Betts*, a defendant's right to due process of law obligates state courts to provide him with legal representation only when the specific circumstances of a case warrant appointment of counsel to ensure a fair trial.²³ The rule enunciated in *Betts* drew strong criticism from commentators who argued that it is impossible for appellate courts to determine the amount of prejudice to a defendant that resulted from proceeding without an attorney.²⁴

These different standards for the appointment of counsel in state and federal courts merged in 1963 under the Supreme Court's decision in *Gideon v. Wainwright*.²⁵ The Court in *Gideon* held that the sixth amendment was made applicable to the states through the fourteenth amendment, explicitly overruling *Betts v. Brady*.²⁶ Today, states must provide counsel to indigent defendants in all cases in which the court sentences the defendant to a term of imprisonment.²⁷

22. See *Betts v. Brady*, 316 U.S. 455, 471 (1942).

23. See *id.* at 461-62. The *Betts* Court stated that due process was "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights". *Id.* at 462. To determine whether a trial court's denial of counsel amounted to a denial of due process of law under the rule enunciated in *Betts*, appellate courts examined such factors as the defendant's age, the complexity of the charges, and the effectiveness of the trial judge in protecting the defendant's rights. See *Buchanan v. O'Brien*, 181 F.2d 601, 603 (1st Cir. 1950) (collecting cases); see also *Gibbs v. Burke*, 337 U.S. 773, 781 (1949) (whether defendant received fair trial depends largely on wisdom and understanding of trial judge); *Uveges v. Pennsylvania*, 335 U.S. 437, 442 (1948) (seventeen-year-old defendant facing maximum sentence of eighty years on burglary charges entitled to counsel); *Wade v. Mayo*, 334 U.S. 672, 684 (1948) ("There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature.").

24. See *W. Beaney*, *supra* note 18, at 160-88 (1955); *Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of the Accused*, 30 U. Chi. L. Rev. 1, 53-67 (1962); *infra* notes 95-102 and accompanying text (discussing inability of appellate courts to determine from the trial record prejudice to a defendant caused by denial of counsel).

25. 372 U.S. 335 (1963).

26. See *id.* at 345. The Court disagreed with the reasoning in *Betts* that the right to counsel guaranteed by the sixth amendment was not a fundamental right applicable to the states through the fourteenth amendment. *Id.* at 342.

Although courts no longer use the *Betts* due process analysis for denial of counsel claims in criminal trials, this analysis survives in other contexts where no sixth amendment right to counsel exists, such as parole revocation hearings. See *Gagnon v. Scarpelli*, 411 U.S. 778, 783-91 (1973); Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053, 1055 & n.22 (1980).

Gideon firmly established an indigent defendant's right to counsel in both state and federal court. It is also well settled, however, that a defendant has no absolute right to a particular appointed counsel. See, e.g., *United States v. Freeman*, 816 F.2d 558, 564 (10th Cir. 1987); *Carey v. Minnesota*, 767 F.2d 440, 441-42 (8th Cir.) (per curiam), *cert. denied*, 474 U.S. 1010 (1985); *United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980) (per curiam); *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976).

27. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Because *Gideon* and its predecessors involved felony offenses, courts initially assumed that indigent defendants were not entitled to appointed counsel in cases involving misdemeanors. See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *In re Gault*, 387

B. Waiver of the Right to Counsel

A defendant's sixth amendment right to appointed counsel at trial²⁸ remains in effect until it is waived.²⁹ To effect a valid waiver of counsel, a defendant must waive his right "knowingly and intelligently."³⁰ This requirement exists to ensure that the defendant understands the ramifications of his waiver.³¹ A decision to proceed pro se necessarily requires a valid waiver of the right to counsel.³² Therefore, a defendant who chooses to represent himself must waive his right to counsel knowingly and intelligently.

The Supreme Court has suggested that the trial judge should question the defendant extensively regarding his decision to proceed pro se in order to establish a valid waiver of counsel.³³ The Court has recommended

U.S. 1, 29 (1967). The Supreme Court later extended the right to counsel to misdemeanor cases, holding that courts must provide defendants with counsel if the defendant is sentenced to a term of imprisonment, regardless of the charged offense's classification as misdemeanor or felony. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Congress codified the constitutional right to counsel in the Criminal Justice Act: "Unless [a criminal defendant] waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the [defendant] is financially unable to obtain counsel, shall appoint counsel to represent him." 18 U.S.C. § 3006A(b) (1982 & Supp. IV 1987).

The mere appointment of counsel, however, does not necessarily fulfill a defendant's sixth amendment right. A defendant also is entitled to the effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970). Courts measure the effectiveness of an attorney's performance by an objective standard of reasonableness. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

28. A defendant's sixth amendment right to counsel attaches "after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); see also 3A C. Wright, *Federal Practice and Procedure: Criminal* § 736 (2d ed. 1982) (discussing various stages of prosecution at which defendant is entitled to counsel). A defendant's right to representation by counsel during custodial interrogation prior to the initiation of a criminal proceeding arises from the defendant's fifth amendment privilege against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436, 439-45 (1966).

29. See *Carnley v. Cochran*, 369 U.S. 506, 512-13 (1962); *Tuitt v. Fair*, 822 F.2d 166, 174 (1st Cir.), cert. denied, 108 S. Ct. 333 (1987); *Moreno v. Estelle*, 717 F.2d 171, 174 (5th Cir. 1987), cert. denied, 466 U.S. 975 (1984).

30. *Faretta v. California*, 422 U.S. 806, 835 (1975); see also *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (requiring that waiver be "intelligent and competent"). The trial judge is responsible for ensuring that the defendant has made a knowing and intelligent waiver. See *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948) (plurality opinion); *Johnson*, 304 U.S. at 465; *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982). The validity of the defendant's waiver depends on the facts and circumstances of each case. See *Johnson*, 304 U.S. at 464.

31. See, e.g., *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942); *United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982).

32. See *Faretta v. California*, 422 U.S. 806, 835 (1975); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977); *Meeks v. Craven*, 482 F.2d 465, 467 (9th Cir. 1973).

33. See *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion). In *Von Moltke*, the Court granted a defendant's petition for a writ of habeas corpus and remanded the case to the district court for a determination of whether the defendant had competently and intelligently waived her right to counsel. *Id.* at 727. The defendant had

such an inquiry to apprise the defendant of the dangers and disadvantages of self-representation and the possible consequences of the charged offenses.³⁴ The Court has not, however, prescribed any particular line of questioning that trial courts must pursue in order to ensure a knowing and intelligent waiver of counsel.³⁵

Consistent with the Supreme Court's suggestion, the federal courts of appeals generally recommend that the trial judge engage the defendant in some sort of on-the-record colloquy to establish that he has knowingly and intelligently waived counsel.³⁶ An explicit dialogue³⁷ on the record demonstrating a knowing and intelligent waiver satisfies all of the courts of appeals.³⁸ Absent an explicit dialogue, the majority of the circuits

signed a written waiver of counsel and pleaded guilty to charges of espionage, *id.* at 709, without any real questioning by the trial judge as to whether she comprehended the gravity of her decision, *id.* at 724-25. Writing for a plurality, Justice Black stated:

The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Id. at 724.

34. See *Faretta v. California*, 422 U.S. 806, 835 (1975); *Von Moltke*, 332 U.S. at 724.

35. No court has interpreted Justice Black's opinion in *Von Moltke* as setting forth a mandatory list of statements similar to a *Miranda* warning that the trial judge must make. See *United States v. Bailey*, 675 F.2d 1292, 1299 (D.C. Cir.) (citing *Hsu v. United States*, 392 A.2d 972, 983 (D.C. 1978)), *cert. denied*, 459 U.S. 853 (1982).

36. See, e.g., *United States v. Balough*, 820 F.2d 1485, 1490 n.1 (9th Cir. 1987); *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.), *cert. denied*, 459 U.S. 853 (1982); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977); see also *United States v. Hafen*, 726 F.2d 21, 25 (1st Cir.) (statement on record by district court as to reasons for finding valid waiver would simplify appellate review), *cert. denied*, 466 U.S. 962 (1984).

37. These dialogues typically conform to the sort of inquiry specified in *Von Moltke*. The trial judge informs the defendant of the charges against him, the range of potential punishments if convicted, and possible defenses and mitigating circumstances. See, e.g., *Piankhy v. Cuyler*, 703 F.2d 728, 730-31 (3d Cir. 1983) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion)). In addition, the trial court tells the defendant that he must conduct his defense in accordance with the Federal Rules of Evidence and Criminal Procedure and that it is in his best interest to accept the assistance of appointed counsel. See, e.g., *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); see also *McQueen v. Blackburn*, 755 F.2d 1174, 1177 (5th Cir.) (outlining factors that trial court should consider in ascertaining whether defendant's waiver is knowing and intelligent), *cert. denied*, 474 U.S. 852 (1985); *infra* notes 113-19 and accompanying text (discussing model inquiry for district court judges). The emphasis in the trial court's inquiry, however, is not on reciting particular warnings to the defendant, but on ensuring that he possesses the requisite information to make a knowing and intelligent waiver of counsel. See *supra* notes 33-34 and accompanying text.

38. For examples of cases in which the courts of appeals have expressed their willingness to accept an explicit dialogue on the record, see *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988); *Tuitt v. Fair*, 822 F.2d 166, 176 n.3 (1st Cir.), *cert. denied*, 108

nonetheless will infer a waiver of counsel if a review of the record as a whole reveals that the defendant validly waived this right.³⁹ Upon find-

S. Ct. 333 (1987); *McMahon v. Fulcomer*, 821 F.2d 934, 945 (3d Cir. 1987); *United States v. Williamson*, 806 F.2d 216, 220 (10th Cir. 1986); *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986); *United States v. Martin*, 790 F.2d 1215, 1218 (5th Cir.), *cert. denied*, 107 S. Ct. 231 (1986); *Carey v. Minnesota*, 767 F.2d 440, 442 (8th Cir.) (per curiam), *cert. denied*, 474 U.S. 1010 (1985); *United States v. Rylander*, 714 F.2d 996, 1005 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984); *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.), *cert. denied*, 459 U.S. 853 (1982); *United States v. McCaskill*, 585 F.2d 189, 190 (6th Cir. 1978) (per curiam); *United States ex rel. Smith v. Pavich*, 568 F.2d 33, 38 (7th Cir. 1978); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976).

39. *See United States v. Kelm*, 827 F.2d 1319, 1321 n.1 (9th Cir. 1987); *United States v. McDowell*, 814 F.2d 245, 249 (6th Cir.), *cert. denied*, 108 S. Ct. 478 (1987); *see, e.g., Richardson v. Lucas*, 741 F.2d 753, 756-57 (5th Cir. 1984); *United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir.), *cert. denied*, 466 U.S. 962 (1984); *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Pilla*, 550 F.2d 1085, 1093 (8th Cir.), *cert. denied*, 432 U.S. 907 (1977).

The courts willing to infer a waiver of counsel from the record as a whole examine such factors as (1) the defendant's awareness of his right to counsel and the technical nature of a trial, *see Trapnell*, 638 F.2d at 1029; (2) the defendant's background, including his education, *see Hafen*, 726 F.2d at 25-26 (two years of law school), and any previous experience in defending himself, *see Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985) (defendant previously had been convicted of the same offense after representing himself); and (3) whether the defendant unreasonably refused to accept the assistance of appointed counsel, *see Johnstone v. Kelly*, 808 F.2d 214, 216 (2d Cir. 1986) (persistent request to proceed pro se despite trial judge's stern warning constituted waiver), *cert. denied*, 107 S. Ct. 3212 (1987); *United States v. Schmitt*, 784 F.2d 880, 882 (8th Cir. 1986) (defendants waived counsel by refusing any assistance of standby counsel); *see also Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-67 (11th Cir. 1986) (discussing factors from which courts infer waivers). At least one circuit has stated that a court should infer a waiver of counsel only in rare circumstances. *See United States v. Balough*, 820 F.2d 1485, 1488 (9th Cir. 1987) (citing *United States v. Harris*, 683 F.2d 322, 324 (9th Cir. 1982)); *United States v. Rylander*, 714 F.2d 996, 1005 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984).

In addition, some courts take into account whether a defendant is represented by an attorney when he elects to proceed pro se, because the attorney may have discussed the disadvantages of self-representation with his client. *See Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986); *Fowler v. United States*, 411 A.2d 618, 623 (D.C.), *cert. denied*, 446 U.S. 985 (1980). Courts do not frequently mention this factor, however, possibly because it is unlikely that a defendant will heed the advice of an attorney he is attempting to discharge. In addition, forcing an attorney to disclose such communications with his client raises issues concerning the attorney-client privilege. *See Evans*, 800 F.2d at 887 n.4 (concluding that attorney-client privilege was not violated under applicable state law).

At least two courts of appeals actually have reversed convictions because of the absence of an explicit dialogue on the record between the trial judge and the defendant. *See United States v. Padilla*, 819 F.2d 952, 958-59 (10th Cir. 1987) (citing *United States v. Gipson*, 693 F.2d 109, 112 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983)); *United States v. Welty*, 674 F.2d 185, 192 (3d Cir. 1982); *see also Tuit v. Fair*, 822 F.2d 166, 174-77 (1st Cir.) (surveying cases), *cert. denied*, 108 S. Ct. 333 (1987).

Two other courts of appeals have invoked their supervisory power to require the district courts of those circuits to conduct a colloquy with the defendant on the record establishing the defendant's awareness of the dangers and disadvantages of self-representation prior to allowing him to proceed pro se. *See United States v. McDowell*, 814 F.2d 245, 249-50 (6th Cir.) (requiring district courts to follow model inquiry in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986)), *cert. denied*, 108 S. Ct. 478 (1987); *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.) (district court shall make

ing that the record does not reveal a knowing and intelligent waiver of counsel, some courts require automatic reversal of the conviction,⁴⁰ while others have applied a harmless error analysis to ascertain whether reversal is necessary.⁴¹

II. THE HARMLESS ERROR DOCTRINE

During the nineteenth century, appellate courts frequently reversed lower court judgments for trivial errors.⁴² Commentators sharply criticized these reversals as a waste of judicial resources,⁴³ and Congress responded by enacting the first federal harmless error statute.⁴⁴ The current federal statute⁴⁵ provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties."⁴⁶ Many states subsequently enacted similar statutes,⁴⁷ and today all fifty states have harmless error

clear on the record the defendant's awareness of the dangers and disadvantages of self-representation), *cert. denied*, 459 U.S. 853 (1982); *see also infra* text accompanying notes 115-17 (discussing the model inquiry required by the sixth circuit).

40. *See supra* note 13 and accompanying text.

41. *See supra* note 15 and accompanying text.

42. *See, e.g.*, *Carver v. United States*, 160 U.S. 553, 555-56 (1896) (improper admission of hearsay testimony that decedent's dying declaration, which had been admitted, was true); *People v. Vice*, 21 Cal. 344, 345 (1863) (failure to specify in indictment for robbery that property did not belong to defendant); *Commonwealth v. White*, 162 Mass. 403, 405, 38 N.E. 707, 708 (1894) (wrongful admission of letters that did not show criminal intent and that were unconnected with charges of blackmail).

43. *See* Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925); Wigmore, *Criminal Procedure: "Good" Reversals and "Bad" Reversals*, 4 Ill. L. Rev. 352, 353-54 (1909); *see also* R. Traynor, *The Riddle of Harmless Error* 14 n.35 (1970) (collecting articles).

44. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. It provides:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

Id.

The harmless error doctrine has its roots in the English Exchequer Rule. *See* *Crease v. Barrett*, 149 Eng. Rep. 1353 (Ex. 1835). In theory, this rule was one of harmless error, but in practice it developed into a rule of per se reversal and grant of a new trial. *See* 1 J. Wigmore, *supra* note 14, § 21, at 887; *see also* R. Traynor, *supra* note 43, at 4-10 (tracing development of the Exchequer Rule). A primary motivation for the American adoption of the Exchequer Rule was the fear that appellate courts were usurping the function of weighing evidence, which was considered to be the exclusive province of the jury. *See* *Ellis v. Short*, 38 Mass. (21 Pick.) 142, 145 (1838).

45. 28 U.S.C. § 2111 (1982).

46. 28 U.S.C. § 2111 (1982). Federal Rule of Criminal Procedure 52(a), which applies to federal district courts, similarly provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a).

47. *See* Code of Criminal Procedure § 461, at 1302-04 (A.L.I. Official Draft 1930) (listing statutes).

rules of some kind.⁴⁸

A. *Development of the Harmless Error Rule*

American courts apply harmless error statutes in one of two ways, depending on the type of error involved.⁴⁹ One type of error, sometimes referred to as structural error,⁵⁰ prejudices or subverts the judicial process itself.⁵¹ Bias on the part of the trial judge⁵² and improper jury selection⁵³ illustrate this type of error. An appellate court that concludes that a structural error occurred at trial next must determine whether the error constitutes a technical violation or a substantive deprivation of the right in question.⁵⁴ A technical violation of a right results in harmless error and does not require reversal of the conviction.⁵⁵ Deprivation of the substantive protection of a right,⁵⁶ however, always prejudices the defendant. A court must reverse a conviction tainted by such a deprivation, regardless of the strength of the evidence supporting the conviction.⁵⁷

The second type of error concerns the improper admission or suppression of evidence.⁵⁸ Courts typically examine such an error in light of the

48. See *Chapman v. California*, 386 U.S. 18, 22 (1967); see, e.g., Cal. Const. art. 6, § 13; N.Y. Crim. Proc. Law § 470.05(1) (McKinney 1983); Tenn. R. App. P. 36(b); see generally 1 J. Wigmore, *supra* note 14, § 21, at 898 n.17 (listing statutes and decisions from several jurisdictions).

49. See 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.6, at 259-60 (1984).

50. See *id.* at 259.

51. See R. Traynor, *supra* note 43, at 64-73 (discussing errors prejudicial to the judicial system).

52. See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

53. See *Whitus v. Georgia*, 385 U.S. 545, 549-50 (1967).

54. See 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 259. Whether the error is a technical violation or a substantive deprivation depends on how the scope of the right involved is defined. *Id.* at 260.

55. See, e.g., *United States v. Martinez*, 749 F.2d 601, 607 (10th Cir. 1984) (any error in jury selection was technical and non-prejudicial); *United States v. Walborn*, 730 F.2d 192, 193-94 (5th Cir.) (technical violation of notice provisions of Speedy Trial Act did not require reversal), *cert. denied*, 469 U.S. 842 (1984). Compare *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (trial judge's failure in accepting guilty plea to inform defendant of mandatory parole term as required by Fed. R. Crim. Proc. 11 was a technical violation of the rule) with *United States v. Gonzalez*, 820 F.2d 575, 579 (2d Cir. 1987) (trial court's failure to inquire whether defendant's guilty plea was a result of promises apart from a plea agreement, as required by Rule 11, was a substantive, rather than a technical violation).

56. See, e.g., *United States v. Darwin*, 742 F.2d 1325, 1328 (11th Cir. 1984) (trial judge's violation of special offender statute by accidentally viewing document indicating prosecution's intention to specify defendant as dangerous special offender required remand for resentencing); *United States v. Dellinger*, 472 F.2d 340, 366-77 (7th Cir. 1972) (court's severe restriction of voir dire examination and failure to inquire sufficiently into juror's exposure to pretrial publicity was error requiring new trial), *cert. denied*, 410 U.S. 970 (1973).

57. See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

58. See, e.g., *United States v. Mahar*, 801 F.2d 1477, 1503 (6th Cir. 1986) (erroneous admission of testimony outside scope of indictments); *United States v. Laughlin*, 772 F.2d 1382, 1393 (7th Cir. 1985) (erroneous admission of drug paraphernalia not relevant to

untainted evidence in the case and assess its impact upon the jury.⁵⁹ Federal courts generally use the "effect on the judgment" test to determine whether an evidentiary error is harmless.⁶⁰ This test focuses on the possibility that the error in question affected the jury's verdict.⁶¹ If the court determines that an evidentiary error might have influenced the jury's verdict, the error is not harmless and the court must reverse the conviction.⁶²

B. Constitutional Errors

Both structural and evidentiary errors may implicate constitutional

any factual issue in dispute); see also 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 260 (discussing evidentiary errors).

59. See, e.g., *United States v. Smith*, 551 F.2d 348, 356-57 (D.C. Cir. 1976) (admission of evidence of defendant's prior conviction in violation of Fed. R. Evid. 609(a) not harmless error); *United States v. Russo*, 527 F.2d 1051, 1057-58 (10th Cir. 1975) (improper admission of wiretap evidence harmless because it "played only a minor role in the trial and did not in any real sense prejudice Russo"), *cert. denied*, 426 U.S. 906 (1976).

60. See *United States v. Tussa*, 816 F.2d 58, 66-67 (2d Cir. 1987); *United States v. Bernal*, 814 F.2d 175, 184-85 (5th Cir. 1987). The Supreme Court originally adopted the "effect on the judgment" test in construing the predecessor to the current federal harmless error statute. See *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

61. In *Kotteakos v. United States*, 328 U.S. at 764-65, the Court described the test as follows:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. (footnote and citation omitted); see also 3A C. Wright, *supra* note 28, § 854, at 301-02 (2d ed. 1982) (collecting federal cases applying the *Kotteakos* rule); cases cited *supra* note 60.

Prior to the adoption of the effect on the judgment rule, courts commonly used the "correct result" test to determine the harmlessness of an error. Under this test, appellate courts independently examined the result in the case in light of the admissible evidence. See 1 J. Wigmore, *supra* note 14, § 21, at 930-31. If the court determined that the verdict was "correct," in that it was supported by the untainted evidence, it affirmed the conviction. See, e.g., *United States v. Gutterman*, 147 F.2d 540, 542 (2d Cir. 1945) ("the evidence against [the defendant] proved his guilt beyond peradventure"); *United States v. Liss*, 137 F.2d 995, 999 (2d Cir.) ("a remote chance of prejudice should not balance the extreme probability that the jury came to the right result"), *cert. denied*, 320 U.S. 773 (1943). Courts and commentators criticized this test because it assumes that, as long as the jury reached the correct result, justice has been done, no matter how egregious the error, see R. Traynor, *supra* note 43, at 18, and because it allows the appellate court in a sense to usurp the function of the jury. See *United States v. Rubenstein*, 151 F.2d 915, 922 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 326 U.S. 766 (1945); R. Traynor, *supra* note 43, at 21.

62. See, e.g., *United States v. Arroyo*, 805 F.2d 589, 597-99 (5th Cir. 1986); *United States v. Murray*, 784 F.2d 188, 189 (6th Cir. 1986).

rights.⁶³ Prior to 1967, courts and commentators generally assumed that a trial error that deprived a defendant of a constitutionally protected right (a "constitutional error") always resulted in harm.⁶⁴ The Supreme Court consistently reversed convictions when a constitutional error had occurred, without considering whether the error was harmless.⁶⁵

In its 1967 decision in *Chapman v. California*,⁶⁶ however, the Supreme Court held that some constitutional errors indeed could be harmless and, as such, do not require reversal of an otherwise valid conviction.⁶⁷ The proper test for determining whether a constitutional error is harmless is the "effect on the judgment" test.⁶⁸ The standard of review for constitu-

63. See, e.g., *Whiteley v. Warden*, 401 U.S. 560, 568-69 (1971) (evidence secured as a result of arrest that violated defendant's fourth and fourteenth amendment rights should have been excluded); *Coleman v. Kemp*, 778 F.2d 1487, 1538 (11th Cir. 1985) (denial of motion for change of venue because of pretrial publicity amounted to denial of trial before impartial jury), *cert. denied*, 476 U.S. 1164 (1986); *Johnson v. Nix*, 763 F.2d 344, 346-47 (8th Cir. 1985) (admission of defendant's statements obtained in violation of fifth and sixth amendment right to counsel harmless beyond a reasonable doubt).

64. See *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (stating in dictum that conviction should stand if error did not influence the jury "except perhaps where the departure is from a constitutional norm"); *Williams v. United States*, 263 F.2d 487, 490 (D.C. Cir. 1959) (despite fact that evidence had slight effect on outcome of trial, conviction reversed because evidence police had seized in violation of fourth amendment was admitted at trial), *cert. denied*, 365 U.S. 836 (1961); Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 Vill. L. Rev. 48, 67 (1957) (evidentiary errors that infringe constitutional rights result in automatic reversal); Manwaring, *California and the Fourth Amendment*, 16 Stan. L. Rev. 318, 326 (1964) (same); Note, *Harmless Error: The Need for a Uniform Standard*, 53 St. John's L. Rev. 541, 544 (1979) (most commentators believed violation of a constitutional right required automatic reversal).

65. See, e.g., *Douglas v. Alabama*, 380 U.S. 415 (1965) (denial of right to cross-examine prosecution's witness); *Haynes v. Washington*, 373 U.S. 503 (1963) (admission into evidence of coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel at trial); see also Note, *supra* note 64, at 545 n.19 (collecting cases). But see *Motes v. United States*, 178 U.S. 458, 476 (1900) (holding error in admitting statement at trial that violated defendant's sixth amendment right of confrontation harmless because defendant had admitted guilt under oath).

66. 386 U.S. 18 (1967).

67. See *id.* at 22. In *Chapman*, a prosecution for robbery, kidnapping and murder, the prosecutor had commented extensively on the defendants' failure to testify at trial, a right given to the prosecutor by the California Constitution. *Id.* at 19. The defendants were convicted. *Id.* Pending appeal to the California Supreme Court, the United States Supreme Court held, in an unrelated case, that California's constitutional provision and practice violated a defendant's fifth amendment right not to be compelled to testify against himself. See *id.* at 19-20 (discussing *Griffin v. California*, 380 U.S. 609 (1965)). The California Supreme Court then concluded that, although the defendants in *Chapman* had been denied their fifth amendment right, the error was harmless under California's harmless error provision. See *id.* at 20.

The Supreme Court in *Chapman* granted certiorari, and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. The Court concluded that the error before it was subject to a harmless error analysis but that the error had not been harmless. *Id.* at 24.

68. See *Chapman*, 386 U.S. at 23 ("[t]he question is whether there is a reasonable

tional errors, however, is a strict one: the reviewing court must conclude that the error was harmless beyond a reasonable doubt.⁶⁹ Thus, for a constitutional error to be harmless, the court must determine beyond a reasonable doubt that the error complained of did not contribute to the conviction.⁷⁰

The *Chapman* Court stated in dictum that certain constitutional privileges form such a basic part of a fair trial that their denial is an error that never can be harmless.⁷¹ Substantive violations of the rights listed in *Chapman* give rise to structural errors.⁷² Such violations undermine the integrity of the judicial process and require automatic reversal without regard to the amount of evidence against the defendant.⁷³ The denial of

possibility that the evidence complained of might have contributed to the conviction' " (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

The Supreme Court's subsequent applications of the harmless constitutional error rule have been criticized as improperly shifting the focus from an assessment of the error's impact on the jury to an evaluation of the amount of untainted evidence against the defendant. See *Harrington v. California*, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting); Note, *supra* note 64, at 547-51.

69. See *Chapman*, 386 U.S. at 24; *accord* *United States v. Stitzer*, 785 F.2d 1506, 1517 (11th Cir.), *cert. denied*, 107 S. Ct. 93 (1986); *Johnson v. Nix*, 763 F.2d 344, 347 (8th Cir. 1985).

70. The determination of whether a constitutional error is harmless is a matter of federal, rather than state, law. See *Chapman*, 386 U.S. at 21. There is some confusion as to the relationship between the harmless error rule announced in *Chapman* and the federal harmless error statute. The Supreme Court stated that it was "fashioning the necessary rule" in the absence of appropriate congressional action. *Chapman*, 386 U.S. at 21. Former Chief Justice Traynor of the California Supreme Court stated that the *Chapman* decision involved an interpretation and application of the federal harmless error statute. See R. Traynor, *supra* note 43, at 41-42. Professors LaFave and Israel suggest that the Court "was establishing a constitutional standard, . . . [and] merely acknowledging congressional authority to go beyond Supreme Court rulings in protecting constitutional rights under Section 5 of the Fourteenth Amendment." 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 271 n.88; see also *Chapman*, 386 U.S. at 46-47 (Harlan, J., dissenting) (majority opinion indicates that Congress could impose a different constitutional harmless error formulation). Despite this ambiguity, the Court consistently has applied a "beyond a reasonable doubt" standard to constitutional errors. See, e.g., *Rose v. Clark*, 106 S. Ct. 3101, 3105 (1986); *Milton v. Wainwright*, 407 U.S. 371, 372 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969).

71. See *Chapman*, 386 U.S. at 23 & n.8. The Court reaffirmed this statement in *Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986). In *Rose*, the Court applied the harmless error doctrine to jury instructions that shifted to the defendant the burden of proving intent in violation of the rule that such instructions are a denial of due process. See *Rose*, 106 S. Ct. at 3107 (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)). The Court noted that some errors, including violations of the right to counsel, render a trial fundamentally unfair. See *Rose*, 106 S. Ct. at 3106 (citing *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967)). It then recognized that states are required to provide a criminal defendant with counsel at trial. See *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The Court concluded that "[h]armless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (footnote omitted). Thus, the Court in *Rose v. Clark* adhered to the dictum in *Chapman* that a criminal defendant has a right to counsel, the denial of which cannot be a harmless error.

72. See *supra* notes 50-57 and accompanying text.

73. See *Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986); see also Mause, *supra* note 14, at

the right to counsel numbers among the errors that the *Chapman* court recognized as requiring automatic reversal.⁷⁴

Thus, *Chapman* requires a two-step analysis for constitutional errors: (1) whether the error is one subject to harmless error analysis, and if so, (2) whether the error was harmless beyond a reasonable doubt.⁷⁵ If the constitutional error in question is structural, it is not subject to the *Chapman* harmless error standard of review, and the court need not reach the second step of the analysis.

III. INVALID WAIVERS OF COUNSEL ARE NEVER HARMLESS

When a trial court permits a defendant to proceed pro se without first establishing a knowing and intelligent waiver by the defendant of his sixth amendment right to counsel, the court effectively denies the defendant this right.⁷⁶ The court deprives the defendant of the benefits of representation just as if it explicitly had refused to appoint counsel. Although the Supreme Court has not directly addressed this issue, the *Chapman* dictum indicates that an appellate court should automatically reverse the defendant's conviction in this situation.⁷⁷ The right to counsel constitutes such a basic part of a fair trial that the deprivation of this right results in a constitutional error that never can be harmless.⁷⁸

A defendant who asserts on appeal that his waiver of counsel was ineffective may have requested to proceed pro se, but an appellate court should rule no differently in this situation than it does when the trial court denies a defendant's express request for an attorney. The require-

540-56 (attempting to define categories of constitutional errors that require automatic reversal); Note, *Harmless Constitutional Error*, 20 Stan. L. Rev. 83, 89 (1967) (all errors listed in *Chapman* as requiring automatic reversal undermine reliability of guilt determination process).

74. See *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

75. See 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 272; *supra* notes 67-70 and accompanying text.

76. See *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987). This conclusion also follows from the fact that the right to counsel is in effect until it is waived, see *Tuitt v. Fair*, 822 F.2d 166, 174 (1st Cir.) (citing *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982)), *cert. denied*, 108 S. Ct. 333 (1987); *Moreno v. Estelle*, 717 F.2d 171, 174 (5th Cir. 1983) (same), *cert. denied*, 466 U.S. 975 (1984); see also *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("the right to be furnished counsel does not depend on a request"), and that the trial judge is responsible for ensuring that a defendant's waiver of counsel is knowing and intelligent, see *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948) (plurality opinion); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982).

77. See *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967); *supra* notes 71-74 and accompanying text.

78. See *Chapman*, 386 U.S. at 23 & n.8; accord *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978); *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979); cf. *Wood v. United States*, 389 U.S. 20, 20-21 (1967) (per curiam) (rejecting argument that trial court's failure to inquire sufficiently into defendant's financial ability to retain private counsel did not require reversal because error did not prejudice defendant).

ment of a knowing and intelligent waiver exists precisely for the defendant's protection—it ensures that he understands the ramifications of his choice to proceed pro se.⁷⁹ Though the defendant may have “gotten what he asked for,” his decision to proceed without counsel was uninformed. An appellate court that attempts to ascertain the outcome of the trial had the defendant chosen differently engages in the same speculation as it would had the trial court simply refused the defendant's request for counsel.⁸⁰

Further, the typical facts of a waiver-of-counsel case demonstrate that the absence of a valid waiver of counsel amounts to a denial of counsel. The defendant most often requests that the trial court provide him with a different attorney,⁸¹ or grant a continuance to allow him to retain his own lawyer.⁸² The trial judge refuses the request, giving the defendant the choice of proceeding with existing counsel or appearing pro se.⁸³ Thus, the usual case is not one in which the defendant truly desires to represent himself, but rather one in which the court forces the defendant into a decision to proceed pro se despite his express request for an attorney.

Courts refusing to apply a harmless error test to invalid waivers of counsel rely on the Supreme Court's dictum in *Chapman v. California* that denial of the right to counsel at trial is never harmless.⁸⁴ Courts

79. See *supra* notes 33-34 and accompanying text.

80. See *infra* notes 95-102 and accompanying text.

81. See, e.g., *United States v. Mitchell*, 788 F.2d 1232, 1234-35 (7th Cir. 1986); *United States v. Gipson*, 693 F.2d 109, 110 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983).

82. See, e.g., *United States v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir. 1987); *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982).

83. See, e.g., *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987); *United States v. Padilla*, 819 F.2d 952, 955 (10th Cir. 1987).

Once the court determines that substitution of counsel is not warranted, it properly may give the defendant this choice. See *Tuitt v. Fair*, 822 F.2d 166, 173 n.1 (1st Cir.), *cert. denied*, 108 S. Ct. 333 (1987). When the defendant elects to represent himself, however, the trial judge then must ensure that the defendant makes his choice knowingly and intelligently. See *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *supra* note 30 and accompanying text.

84. See *McMahon v. Fulcomer*, 821 F.2d 934, 946 n.12 (3d Cir. 1987); *Welty*, 674 F.2d at 194 n.6; see also *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987) (citing *Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986)).

The Court of Appeals for the Third Circuit advocated this view in *United States v. Welty*, 674 F.2d 185 (3d Cir. 1982). In *Welty*, a prosecution for bank robbery, the district court appointed counsel to represent the defendant. *Id.* at 186. Just prior to jury selection, however, the defendant requested the court's permission to obtain his own counsel. *Id.* at 187. The trial judge viewed the defendant's request as merely a delaying tactic, and gave Welty the choice of continuing with appointed counsel or proceeding pro se. *Id.*; see also *id.* at 189-90 (quoting exchange between trial judge and defendant). The defendant responded that he would represent himself and subsequently was convicted. *Id.* Welty claimed on appeal that he had been denied his right to counsel because he did not waive his right. *Id.* at 186. The court of appeals held that Welty had not validly waived his right to counsel because the trial court had failed to conduct a dialogue with him on the record regarding the consequences of his choice to proceed pro se. *Id.* at 191-92. The

invoking the harmless constitutional error rule in this situation fail to address this strong statement.⁸⁵ Failure to elicit a valid waiver of counsel at trial constitutes a structural error because it undermines the integrity of the judicial process.⁸⁶ According to *Chapman*, such an error is not properly subject to the harmless evidentiary error analysis.⁸⁷ Therefore,

court reversed the conviction, concluding that the defendant had been denied his right to counsel. *See id.* at 194. Therefore, a harmless error analysis was inappropriate. *See id.* at 194 n.6 (citing dictum in *Chapman v. California*, 386 U.S. 18 (1967)).

In *United States v. Balough*, the Court of Appeals for the Ninth Circuit relied on the Supreme Court's decision in *Rose v. Clark*, 106 S. Ct. 3101 (1986), to support its rejection of the harmless error approach to invalid waivers:

Rose v. Clark makes it clear that [the harmless error doctrine is not applicable].

In *Rose*, the Court recognized that the harmless error doctrine does not apply in all contexts. The Court noted that the doctrine presupposes that a defendant is represented by counsel. . . . In this case, Balough was denied his right to counsel. . . . Therefore, harmless error analysis is inappropriate.

Balough, 820 F.2d at 1490 (citations omitted); *see also supra* note 71.

85. The courts of appeals in *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984), and *United States v. Gipson*, 693 F.2d 109 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983), cited *Chapman v. California* for the proposition that a constitutional error may be harmless, but each neglected to mention the *Chapman* Court's admonition that denial of the right to counsel always prejudices the defendant. *See Richardson*, 741 F.2d at 757; *Gipson*, 693 F.2d at 112; *see also* *People v. Cervantes*, 87 Cal. App. 3d 281, 293-94, 150 Cal. Rptr. 819, 827-28 (1978) (applying *Chapman* harmless error test without mentioning *Chapman* dictum); *State v. Dickson*, 4 Haw. App. 614, 673 P.2d 1036, 1043 (1983) (following *People v. Cervantes*, 87 Cal. App. 3d 281, 150 Cal. Rptr. 819 (1978)).

86. *See supra* notes 72-74 and accompanying text. To the extent that the requirement of a knowing and intelligent waiver of counsel preserves the defendant's right to make an informed decision regarding representation by counsel, its absence would seem to require automatic reversal. *Cf. Flanagan v. United States*, 465 U.S. 259, 267-68 (1984) (violation of right to retain counsel of one's choice requires automatic reversal because "the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding"); *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 219 (1977) (discussing defendant's interest in conscious self-determination).

Although the courts in *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984), and *United States v. Gipson*, 693 F.2d 109 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983), do not elaborate on their reasoning, it is possible that they concluded that the failure of the trial court to elicit a knowing and intelligent waiver was a "technical" violation of the right to counsel and, thus, was a harmless structural error. *See supra* notes 49-55 and accompanying text. Such an argument, however, does not recognize that the effect of allowing a defendant to proceed pro se without a valid waiver of counsel is tantamount to denying a defendant his sixth amendment right to an attorney. *See supra* notes 76-83 and accompanying text.

87. *See Chapman*, 386 U.S. at 23 & n.8; *see also* *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (errors such as denial of counsel are so fundamental and pervasive that they require reversal without regard to the facts of the case); *Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986) ("*Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case."); *supra* notes 71-74 and accompanying text.

Denial of the right to counsel at trial is a structural error that requires automatic reversal of a defendant's conviction. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 275 (denial of counsel at trial calls for automatic reversal). Violations of the right to counsel prior to trial, however, are subject to the traditional, harmless evidentiary error analysis. *See*

the amount of evidence against the defendant is irrelevant.⁸⁸

The courts that apply a harmless error analysis mistakenly apply the harmless evidentiary error test to a structural error, focusing on the evidence against the defendant rather than on the deprivation of the defendant's constitutional right.⁸⁹ For example, the court in *United States v. Gipson*⁹⁰ determined that the trial court had failed to elicit a knowing and intelligent waiver of counsel from the defendant, who was charged with bank robbery.⁹¹ The court concluded beyond a reasonable doubt that the error was harmless because the trial record indicated that no reasonable possibility existed that the defendant would have been acquitted had he been represented by counsel.⁹² This balancing of the error against the untainted evidence in the case is the harmless error analysis

Coleman v. Alabama, 399 U.S. 1, 11 (1970) (denial of counsel at preliminary hearing subject to harmless error analysis); *United States v. Wade*, 388 U.S. 218, 242 (1967) (remand for determination of whether admission of lineup identification obtained in violation of right to counsel was harmless error). This treatment of the right to counsel prior to trial is reconcilable with the view that denial of the right to counsel at trial may not be a harmless error. Before trial, the right to counsel protects the defendant's rights with respect to the acquisition of evidence by the prosecution. Thus, an appellate court can measure the effect of the denial of counsel prior to trial by the possible impact of the evidence admitted at trial. See *United States v. Decoster*, 624 F.2d 196, 255-58 (D.C. Cir. 1979) (en banc); 3 W. LaFave & J. Israel, *supra* note 49, § 26.6, at 276. In contrast, the effect of the denial of the right to counsel at trial is inherently indeterminable. See *Williams v. Kaiser*, 323 U.S. 471, 475 (1945); *infra* notes 95-102 and accompanying text.

A similar rationale supports the requirement that a defendant who, on appeal, raises a claim of ineffective assistance of counsel at trial must show actual prejudice to obtain reversal of his conviction. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Such a defendant must identify the particular acts or omissions of his attorney that give rise to the claim. See *id.* at 690. Thus, an appellate court can assess the effect of these errors on the judgment. See *id.* at 691; see also *United States v. Harlan*, 696 F.2d 5, 8 (1st Cir. 1982) ("Whatever might be the inquiry when a defendant's counsel's ability or diligence is questioned as to particular matters, we would not make that inquiry when representation is completely lacking." (citation omitted)).

88. See *supra* note 73 and accompanying text.

89. See *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984); *United States v. Gipson*, 693 F.2d 109, 112-13 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983).

90. 693 F.2d 109 (10th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983).

91. *Id.* at 112.

92. See *id.* The *Gipson* court referred to the identification of the defendant by three bank employees who were eyewitnesses to the robbery and a participant in the robbery who testified as a prosecution witness. *Id.* at 113; see also *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984) (court concluded any error in not establishing a valid waiver was harmless based on examination of the record); *United States v. Welty*, 674 F.2d 185, 186 (3d Cir. 1982) (court concluded that harmless error analysis was inappropriate, but stated "[t]he waiver-of-counsel issue . . . is a troubling one, particularly in light of the overwhelming evidence of Welty's guilt").

The Court of Appeals for the Tenth Circuit recently refused to apply a harmless error rule in an analogous situation. In *United States v. Barcelon*, 833 F.2d 894 (10th Cir. 1987), the government argued that the trial court's failure to conduct an appropriate inquiry into the defendant's financial ability to retain private counsel was a harmless error because the evidence of *Barcelon's* guilt was so overwhelming that appointment of an attorney would not have affected the outcome of the trial. *Id.* at 899. The court tersely rejected the argument, stating that, when a trial court denies appointment of counsel altogether, "[n]o showing of prejudice need be made to obtain reversal . . . because

traditionally used for evidentiary errors.⁹³ The court failed to recognize that the trial court deprived the defendant of his right to counsel, a structural error not subject to the harmless evidentiary error test. Thus, the court ignored the first step of the *Chapman* harmless error analysis—a determination that the error is subject to the harmless error rule.⁹⁴

Moreover, the harmless error test proves remarkably ill-suited to cases in which the defendant alleges that he did not waive his right to counsel at trial, because it is impossible to determine the amount of prejudice to a defendant caused by the lack of representation.⁹⁵ Attempting to ascertain the prejudice to a defendant that results from proceeding without an attorney amounts to the type of inquiry conducted by appellate courts under the Supreme Court's decision in *Betts v. Brady*,⁹⁶ which the Court expressly overruled in *Gideon v. Wainwright*.⁹⁷ Even if a pro se defendant appears to have conducted an adequate defense, the trial record does not reveal the many benefits that an attorney might have provided.⁹⁸ A defendant who represents himself cannot gather facts effectively or procure expert witnesses.⁹⁹ Further, an attorney assists a defendant in making important decisions such as whether to waive the right to a trial by jury, which witnesses to put on the stand and how to prepare them, and whether to move for sequestration of prosecution witnesses.¹⁰⁰ Thus, a

prejudice to the defense is presumed.'" *Id.* (quoting *Flanagan v. United States*, 465 U.S. 259, 268 (1984)).

93. See *supra* notes 58-62 and accompanying text.

94. See *supra* note 75 and accompanying text.

95. See *Williams v. Kaiser*, 323 U.S. 471, 475 (1945); *United States v. Balough*, 820 F.2d 1485, 1490 (9th Cir. 1987) (quoting *Glasser v. United States*, 315 U.S. 60, 76 (1942)); *United States v. Decoster*, 624 F.2d 196, 256 (D.C. Cir. 1979) (en banc); *Mause*, *supra* note 14, at 541.

96. 316 U.S. 455 (1942); see *supra* notes 20-24 and accompanying text. Though the *Gideon* Court did not state expressly that an appellate court cannot ascertain the prejudice to a defendant that results from proceeding without an attorney, commentators did criticize the *Betts* decision on this ground. See *supra* note 24 and accompanying text.

97. 372 U.S. 335 (1963); see *supra* notes 25-26 and accompanying text.

98. As one commentator stated:

What do you mean "establish that the defendant was not disadvantaged by the absence of counsel?" A record can "establish" no such thing. It can only *fail* to establish on its face that the defendant was disadvantaged. What does it prove that the record reads well? How would it have read if the defendant had had counsel? What defenses would have been raised then which are not suggested now? We don't know and we never will.

Kamisar, *supra* note 24, at 53 (emphasis in original).

The fact that a defendant represents himself well at the trial also is irrelevant to the issue of whether he knowingly and intelligently waived his right to counsel. See *United States v. Balough*, 820 F.2d 1485, 1489 (9th Cir. 1987) (quality of defendant's pro se defense does not show he understood dangers and disadvantages of self-representation when he sought to waive right to counsel).

99. See *Kamisar*, *supra* note 24, at 60-65. As a practical matter, a defendant often will be incarcerated while awaiting trial with limited access to the resources available to an attorney. See, e.g., *United States v. Pina*, 844 F.2d 1, 5 n.1 (1st Cir. 1988) (defendant who refuses appointed counsel has no right of unqualified access to prison law library).

100. See *Kamisar*, *supra* note 24, at 53-54.

court cannot ascertain with any degree of accuracy the prejudice to a defendant caused by the denial of his right to counsel.¹⁰¹ This return to *Betts v. Brady* denigrates the Supreme Court's decision in *Gideon v. Wainwright* that all indigent defendants require the assistance of counsel to obtain a fair trial.¹⁰²

Reluctance to reverse a conviction when the evidence of the defendant's guilt is substantial may motivate courts to conclude that the absence of a knowing and intelligent waiver of counsel can constitute a harmless error.¹⁰³ These courts overlook the inability to ascertain the amount of prejudice caused by denial of counsel and the possibility that the jury's verdict would have been different absent the error in question.¹⁰⁴ Whatever their motivation, application of the harmless error rule to invalid waivers of counsel violates the clear mandate of the Supreme Court that, without a knowing and intelligent waiver, no person may be imprisoned unless he was represented by counsel.¹⁰⁵

Some judges use concern about judicial economy to justify their application of the harmless error rule to invalid waivers of counsel. The Court of Appeals for the Tenth Circuit has stated that it balances the right to counsel against the need for effective administration of justice,¹⁰⁶ but it is the California Court of Appeals that has most clearly advocated the judicial economy rationale for the harmless error approach.¹⁰⁷ This court applied a harmless error standard of review to an invalid waiver of counsel to discourage defendants from attempting to inject error into the trial by repeatedly dismissing appointed counsel and demanding to pro-

101. See cases cited *supra* note 95.

102. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *supra* notes 25-26 and accompanying text.

103. See Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 Iowa L. Rev. 311, 332 (1985) (belief in appellant's guilt is a factor common to cases affirming convictions on harmless error grounds).

104. See *id.*

105. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

106. See *United States v. Gipson*, 693 F.2d 109, 112 (10th Cir. 1982) (citing *United States v. Weninger*, 624 F.2d 163, 166 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980)), *cert. denied*, 459 U.S. 1216 (1983); see also *supra* notes 89-94 and accompanying text (discussing the *Gipson* decision).

It is likely that the Supreme Court would accept this balancing in light of its recent emphasis on the importance of law enforcement and judicial administration. Cf. *Richardson v. Marsh*, 107 S. Ct. 1702, 1708 (1987) (despite potential confrontation clause problems, joint trials serve important purpose because separate proceedings "would impair both the efficiency and the fairness of the criminal justice system"); *United States v. Inadi*, 475 U.S. 387, 396-400 (1986) (rule requiring co-conspirators to be unavailable for prosecution to introduce hearsay statements under Fed. R. Evid. 801(d)(2)(E) would bring slight benefits and would impose significant burdens on prosecution). At the same time, the Court repeatedly has reaffirmed its position that complete denial of counsel never can be harmless. See cases cited *supra* note 78. Application of a harmless error test to ineffective waivers of counsel, however, crosses the line between efficient judicial administration and denial of counsel. See *supra* notes 76-83 and accompanying text.

107. See *People v. Cervantes*, 87 Cal. App. 3d 281, 293, 150 Cal. Rptr. 819, 827 (1978).

ceed pro se.¹⁰⁸ Judicial economy, however, is not a proper basis for denying a defendant the right to counsel because concern about judicial resources does not outweigh the importance of a fundamental constitutional right.¹⁰⁹

In addition, considerations of judicial economy call for automatic reversal of convictions tainted by inherently prejudicial¹¹⁰ errors such as denial of the right to counsel. Because it is almost always impossible to conclude that an inherently prejudicial error was harmless under the *Chapman* test,¹¹¹ an automatic reversal of a conviction tainted by such an error without conducting a harmless error analysis would offer a more efficient use of judicial resources.¹¹² Thus, judicial economy concerns do not justify the application of the harmless error rule to a constitutional, structural error such as an ineffective waiver of counsel.

Rather than affirm tainted convictions to preserve judicial economy and deter defendants from injecting error into a trial,¹¹³ federal courts of appeals should establish specific procedures that district courts must follow to procure valid waivers of counsel.¹¹⁴ One such procedure, adopted

108. The *Cervantes* court adopted a harmless error approach "in order to inject more fairness into the defendant's game of 'waive the lawyer.' . . . '[R]etrial is time-consuming, expensive, traumatic to the personnel involved and a matter of considerable concern to the public.'" *Id.* (quoting *People v. Lopez*, 71 Cal. App. 3d 568, 571-72, 138 Cal. Rptr. 36, 38 (1977)).

109. *See Johnstone v. Kelly*, 808 F.2d 214, 217-18 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3212 (1987); *R. Traynor*, *supra* note 43, at 22.

110. *See supra* note 87.

111. *See Mause*, *supra* note 14, at 543 (to the extent such an evaluation is possible, result will inevitably be that such errors were not harmless beyond a reasonable doubt).

112. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Mause*, *supra* note 14, at 543.

113. *Harding v. Lewis*, 834 F.2d 853 (9th Cir. 1987), provides a striking example of this practice. The defendant's attorney advised him that his only chance was to represent himself at trial in hopes of injecting reversible error into the proceedings. *Id.* at 855. The court concluded, however, that the defendant had knowingly and intelligently waived his right to counsel and affirmed the district court's denial of a writ of habeas corpus. *Id.* at 860.

114. This is not to suggest that a model inquiry by itself completely will solve such problems as the obstinate defendant who insists that a particular attorney, other than his present one, represent him. The proper course of action for the trial court in such a situation is to determine whether a continuance for substitution of counsel is warranted. *See supra* notes 81-83 and accompanying text. If the court finds that no basis exists for a continuance, it then may give the defendant the option of proceeding with appointed counsel or appearing pro se. *See supra* note 83. If the defendant refuses to waive his right to counsel, the court may require, without infringing the defendant's right of self-representation, that the present attorney represent the defendant. *See Tuitt v. Fair*, 822 F.2d 166, 173-79 (1st Cir.), *cert. denied*, 108 S. Ct. 333 (1987). Any ineffectiveness of the attorney due to the defendant's lack of cooperation then would be entirely of the defendant's own making.

The adoption of a model inquiry by a federal court of appeals gives rise to the issue of the effect of such an adoption on state courts within that circuit. If a federal court of appeals holds that no constitutionally valid waiver may occur without a dialogue on the record, this decision is binding on state courts because a defendant convicted after a state trial in which the judge made little or no inquiry as to the defendant's understanding

by the Court of Appeals for the Sixth Circuit,¹¹⁵ is specified in the Bench Book for United States District Judges.¹¹⁶ This procedure requires that the trial judge question the defendant regarding any prior experience in the study of law or the conduct of a trial, to inform him of such things as the charged offenses and possible punishments, and to apprise the defendant of the requirement that he conduct his defense in accordance with the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.¹¹⁷ Such an inquiry imposes but a slight burden on a trial judge, particularly when a constitutional right is at risk.¹¹⁸ A bright line rule would protect the defendant's constitutional right to counsel by forcing trial courts to obtain a valid waiver or face reversal.¹¹⁹ It would also preserve judicial economy by facilitating appellate determination of the presence or absence of a knowing and intelligent waiver of counsel.

CONCLUSION

Invalid waivers of counsel should not be subject to a harmless error analysis. An appellate court that determines that a criminal defendant represented himself at trial without having knowingly and intelligently waived the right to counsel automatically should reverse the conviction. Failure to elicit a valid waiver of counsel prior to allowing a defendant to proceed pro se amounts to denying the defendant his right to counsel. Supreme Court dictum and the inability to determine what effect the lack of representation had on the outcome of the trial dictate that denial of the right to counsel cannot be a harmless error.

could obtain a new trial by seeking a writ of habeas corpus in the local federal court. See, e.g., *McMahon v. Fulcomer*, 821 F.2d 934, 946 (3d Cir. 1987).

115. See *United States v. McDowell*, 814 F.2d 245, 249-50 (6th Cir.), cert. denied, 108 S. Ct. 478 (1987); *supra* note 39.

116. See 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986).

117. See *id.*

118. See *United States v. Welty*, 674 F.2d 185, 191 (3d Cir. 1982) (inquiries similar to that for a knowing and intelligent waiver of counsel are routinely made by district courts in other contexts).

119. A court of appeals faced with a record from which it cannot determine whether the defendant understood the dangers and disadvantages of self-representation might also remand the case for supplementation of the record by the district court. See *United States v. Kimmel*, 672 F.2d 720, 722-23 (9th Cir. 1982); *United States v. Tompkins*, 623 F.2d 824, 828-29 (2d Cir. 1980); see also *Evans v. Raines*, 705 F.2d 1479, 1481 (9th Cir. 1983) (remanding habeas corpus petition for determination by state court whether petitioner knowingly and intelligently had waived right to counsel). Courts have used this procedure sparingly, however, and its efficiency is questionable. In both *Kimmel* and *Tompkins* (apparently the only cases in which courts of appeals have employed this procedure), the courts of appeals retained jurisdiction, see *Kimmel*, 672 F.2d at 723; *Tompkins*, 623 F.2d at 829, and granted new trials in the appeals from the remands, see *Kimmel*, 672 F.2d at 732; *Tompkins, on remand*, 541 F. Supp. 799, 800 (W.D.N.Y. 1982), *aff'd*, 729 F.2d 1440 (2d Cir. 1983). The adoption of specific procedures that district courts must follow in accepting waivers of counsel would help eliminate this extra step in the appeal process by establishing an adequate record from which a court of appeals could ascertain the presence or absence of a knowing and intelligent waiver of counsel.

Many defendants, hoping to obtain a new trial in the event of conviction, may attempt to inject some error into the trial through unjustified dismissals of appointed counsel and demands to proceed pro se. To facilitate appellate determination of whether the defendant validly waived his right to counsel, district courts should adhere to an inquiry similar to that specified in the Bench Book for United States District Judges for establishing a valid waiver of counsel. This practice would help trial judges ascertain which right the defendant is asserting and would eliminate the need for appellate courts to resort to a harmless error standard of review.

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