Boston College Law Review

Volume 62
Issue 9 *Electronic Supplement*

Article 24

4-28-2021

Pro Se Perils: The Eighth Circuit's Approach to Sixth Amendment Challenges After Guilty Pleas

Rachael A. Minassian
Boston College Law School, rachael.minassian@bc.edu

PRO SE PERILS: THE EIGHTH CIRCUIT'S APPROACH TO SIXTH AMENDMENT CHALLENGES AFTER GUILTY PLEAS

Abstract: On August 27, 2019, in *United States v. Dewberry*, the U.S. Court of Appeals for the Eighth Circuit held that defendants who have pleaded guilty waive their right to challenge a lower court's decision precluding them from exercising their Sixth Amendment right to self-representation. In doing so, the Eighth Circuit joined the circuit split about whether the constitutional requirements for a valid guilty plea are met when defendants are denied these pro se rights. The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits had previously addressed this issue, with only the Ninth Circuit holding that a defendant may challenge the lower court's denial of his Sixth Amendment right after pleading guilty. This Comment argues that the Ninth Circuit's approach is preferable to that of the other circuits because it expands Sixth Amendment rights.

INTRODUCTION

The American legal system has long prided itself on providing criminal defendants with every opportunity possible to prove their innocence.[1] After all, the hallmark of the American criminal justice system is that a defendant is "innocent until proven guilty."[2] For that reason, some courts, such as the U.S. Court of Appeals for the Ninth Circuit, have expanded the rights of criminal defendants, particularly those proceeding pro se.[3] The American onlooker has

[1] *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 724 (2011) (stating that the American criminal justice system's presumption of innocence is among the most well-known principles in the field of criminal law); François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMPAR. L. 107, 108 (2010) (arguing that there is widespread agreement about the importance of the presumption of innocence in Anglo-American courts).

[2] *See* Eric M. Kubilus, *Innocent Until Proven (Hypothetically) Guilty: The Third Circuit Condones the Use of Guilt-Assuming Hypotheticals in* United States v. Kellogg, 53 VILL. L. REV. 665, 665–66 (2008) (stating that the presumption of innocence is one of the most recognizable standards of the American criminal justice system). The presumption of innocence is a concept that has its roots in the biblical book of Deuteronomy. *Id.* (citing Coffin v. United States, 156 U.S. 432, 454 (1895) (noting scholars' work identifying a presumption of innocence in biblical texts)). As a result of its consistent use over hundreds of years, the presumption is "unquestioned" as a bedrock principle of the American criminal justice system. *See Coffin*, 156 U.S. at 453–54 (describing the presumption of innocence as imbedded in the foundation of American criminal law).

[3] *See* United States v. Hernandez, 203 F.3d 614, 627 (9th Cir. 2000) (holding that criminal defendants who pleaded guilty after the court denied their pro se rights during pre-trial proceedings did not waive their ability to appeal that denial), *overruled on other grounds by* Indiana v. Edwards, 554 U.S. 164 (2008).

long viewed the ability of criminal defendants to represent themselves with skepticism.[4] In spite of this, there are a multitude of reasons why a defendant may elect to do so.[5]

Part I of this Comment describes the state of the governing law at the time the U.S. Court of Appeals for the Eighth Circuit decided *United States v. Dewberry*, including the requirements for a valid guilty plea, and the factual and procedural background of *Dewberry*.[6] Part II explains the disparate positions that the Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits took.[7] Finally, Part III argues that the Ninth Circuit's approach is more favorable than that of the other circuits because it provides defendants with more protections and places a stronger emphasis on the right to challenge constitutional deprivations that occurred during trial.[8]

I. The Legal and Factual Backdrop of *United States v. Dewberry*

In 2019, in *United States v. Dewberry*, the U.S. Court of Appeals for the Eighth Circuit became the most recent circuit court to decide whether criminal defendants who pleaded guilty may challenge the constitutionality of the lower court's denial of their Sixth Amendment right.[9] Section A of this Part reviews

---

[4] *See* 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, 485 (1996) (referencing the truism that "he who represents himself has a fool for a client"); Ron Ostroff, *The Pitfalls of Being Your Own Lawyer*, N.Y. Times (Feb. 17, 1980), https://www.nytimes.com/1980/02/17/archives/new-jersey-weekly-the-pitfalls-of-being-your-own-laywer.html?searchResultPosition=5 [https://perma.cc/5QVJ-FUWJ] (providing a lawyer's assessment, based on personal experience, that it is ill-advised to represent oneself without experience doing so); Somini Sengupta, *Amateur Lawyers' Poor Record; History Is Discouraging for Suspect in a Capital Case*, N.Y. Times (Sept. 29, 1998), https://www.nytimes.com/1998/09/29/nyregion/amateur-lawyers-poor-record-history-discouraging-for-suspect-capital-case.html?searchResultPosition=4 [https://perma.cc/Q9QB-DFPA] (remarking that juries are prone to viewing defendants that represent themselves in a negative light).

[5] *See* Decker, *supra* note 4, at 485–87 (providing examples of possible motivations for deciding to represent oneself). For example, defendants may decide to proceed pro se because they wish to communicate their disregard for authority; they are frustrated as a result of adverse proceedings and wish to represent themselves to convey their insubordination; they have resigned themselves to a severe and potentially life threatening penalty; they are trying to abuse the court system for personal gain; they seek to draw attention to a political message, or they genuinely believe that they can represent themselves as adequately as a trained attorney. *Id.*

[6] *See infra* notes 9–46 and accompanying text.

[7] *See infra* notes 47–92 and accompanying text.

[8] *See infra* notes 93–107 and accompanying text.

[9] *See* United States v. Dewberry, 936 F.3d 803, 807 (8th Cir. 2019) (holding that a criminal defendant waives the right to appeal the denial of his pro se right after he has pleaded guilty), *reh'g denied en banc*, No: 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020); *see also* Werth v. Bell, 692 F.3d 486, 488 (6th Cir. 2012) (stating that, by entering a plea of guilty, a criminal defendant's ability to challenge the denial of his pro se right is foreclosed), *reh'g denied en banc*, No. 10-2183, 2012 U.S. App. LEXIS 23965 (6th Cir. 2012); United States v. Moussaoui, 591 F.3d 263, 266–68 (4th Cir. 2010) (articulating the idea that a defendant's plea is voluntary, and thus

the state of the governing law when the Eighth Circuit decided the case, as well as the standards of a valid guilty plea.[10] Section B discusses the factual background of *Dewberry*.[11]

A. Supreme Court Jurisprudence Regarding Guilty Pleas and Pro Se Rights

The Sixth Amendment protects criminal defendants against unwarranted intrusions into their life and liberty by instituting procedural safeguards that ensure that defendants receive a fair adjudication.[12] The right to represent oneself is not explicitly guaranteed in the text of the Sixth Amendment, but, in 1975, the Supreme Court read that requirement into the amendment in the landmark case of *Faretta v. California*.[13] There, the Court held that implicit in the Sixth Amendment's guarantees is the elementary right to self-representation in criminal proceedings.[14]

In addition to the mandate that criminal defendants be allowed to represent themselves, the Constitution also sets forth several requirements for a guilty plea to be valid.[15] Specifically, a guilty plea must be voluntary, knowing, and intelligent and made with adequate awareness of the circumstances and likely results.[16] The U.S. Supreme Court has emphasized the importance of

---

valid, so long as the defendant had the option of proceeding to trial to rectify any improper denial of rights); Gomez v. Berge, 434 F.3d 940, 941 (7th Cir. 2006) (holding that a defendant who pleads nolo contendere relinquishes his right to later claim that the lower court improperly denied his pro se right); United States v. Montgomery, 529 F.2d 1404, 1407 (10th Cir. 1976) (discussing the notion that a defendant who pleads guilty to secure a more favorable sentence does so in a voluntary manner, and, as a result, the defendant cannot later challenge the denial of his right to self-representation).

[10] *See infra* notes 12–25 and accompanying text.

[11] *See infra* notes 26–46 and accompanying text.

[12] Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 488 (2009).

[13] *See* Faretta v. California, 422 U.S. 806, 832 (1975) (stating that it is apparent from the wording of the Sixth Amendment that the Framers of the Constitution intended to imply a right to represent oneself); Decker, *supra* note 4, at 492.

[14] *Faretta*, 422 U.S. at 818.

[15] *See* Bousley v. United States, 523 U.S. 614, 618 (1998) (holding that a guilty plea is unconstitutional if it is not "voluntary" and "intelligent"); Hill v. Lockhart, 474 U.S. 52, 56 (1985) (stating that the validity of a guilty plea turns on whether it was a voluntary and intelligent choice), *habeas proceeding at* 877 F.2d 698 (8th Cir. 1989), *vacated by, en banc sub nom.*, United States v. Unit No. 7 & Unit No. 8 of Shop in Grove Condo., 883 F.2d 53 (8th Cir. 1989), *aff'd*, Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990); McMann v. Richardson, 397 U.S. 759, 766 (1970) (articulating that a guilty plea must be made with enough awareness of the pertinent circumstances and probable results to be valid); Brady v. United States, 397 U.S. 742, 748 (1970) (stating that a defendant's waiver of constitutional rights cannot be valid unless it is knowing and made with sufficient consciousness of the likely result).

[16] *Bousley*, 523 U.S. at 618; *Hill*, 474 U.S. at 56; *McMann*, 397 U.S. at 766; *Brady*, 397 U.S. at 748. The Supreme Court has not articulated all of these factors within a single case. *See supra* note 15 and accompanying text (outlining Supreme Court cases relevant to the constitutionality of plea requirements). Rather, the Supreme Court has laid down these factors in a multitude of cases throughout the past several decades. *Supra* note 15 and accompanying text. Conversely, many circuit courts have articulated these factors in a single, comprehensive test. *See* Hanson v. Phillips, 442 F.3d 789, 798 (2d

treating a guilty plea with care due to the forfeiture of rights that it entails.[17] For example, in 2018, in *Class v. United States*, the Court held that a guilty plea does not on its own preclude a defendant from alleging that the statute under which the defendant was convicted is unconstitutional.[18] Because the defendant in *Class* made constitutional claims that did not directly negate the provisions of his plea agreement, his appeal could stand.[19] This holding is consistent with the Court's 1983 holding in *Haring v. Prosise* that, although a guilty plea deprives the defendant of the ability to later contest the admittance of unlawfully acquired evidence in the proceedings, the plea does not preclude

---

Cir. 2006) (stating that a guilty plea may stand "only if done voluntarily, knowingly, intelligently, with sufficient awareness of the relevant circumstances and likely consequences"); Burket v. Angelone, 208 F.3d 172, 190 (4th Cir. 2000) (holding that a constitutionally valid guilty plea must be "voluntary and intelligent," with consideration given to all of the circumstances surrounding the plea); Matthew v. Johnson, 201 F.3d 353, 365 (5th Cir. 2000) (holding that, in addition to voluntary and intelligent, a valid plea must also ensure that the defendant understands its effect); Ivy v. Caspari, 173 F.3d 1136, 1141 (8th Cir. 1999) (holding that a guilty plea has to be "knowing, intelligent, and voluntary," as well as reflective of the defendant's awareness of all of the options at his disposal because in pleading guilty, the defendant relinquishes many rights), *abrogated in part by* Cloyd v. State, 302 S.W.3d 804 (Mo. Ct. App. 2010). *But see* United States v. Leyland, 277 F.3d 628, 632 (2d Cir. 2002) (holding that "conscious relinquishment" of a defendant's right to later contest double jeopardy is unnecessary due to the fact that a guilty plea represents enough ownership of the crime to prove that the defendant actually partook in it). Additionally, the Federal Rules of Criminal Procedure explicitly require that a plea of guilty or nolo contendere be voluntary. FED. R. CRIM. P. 11(b)(2); *see Nolo Contendere*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining nolo contendere as a plea that does not technically admit guilt but also does not contest the charge). The judge is required to directly engage the defendant to ensure that the defendant was not coerced into making a guilty plea by force, intimidation, or illicit promises apart from those made in the plea agreement prior to allowing a guilty plea. FED. R. CRIM. P. 11(b)(2).

[17] *See* Von Moltke v. Gillies, 332 U.S. 708, 719 n.5 (1948) (stating that courts have traditionally treated guilty pleas with significant care). The Court emphasized the responsibility of all courts to ensure that the defendant comprehends the circumstances and that the defendant voluntarily entered into the terms of the plea. *See id.* (quoting LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 300 (1947)). The Court also stated that courts should not allow defendants' confessions that are unsupported by evidence to decide their guilt because there are instances in which innocent people might falsely incriminate themselves. *See Von Moltke*, 332 U.S. at 719 n.5 (citing SIR GEORGE BOWYER, COMMENTARIES ON THE CONSTITUTIONAL LAW OF ENGLAND 355 (Owen Richards ed., 2d ed.) (1846)) (emphasizing that defendants should never be found guilty based on a confession alone)).

[18] Class v. United States, 138 S. Ct. 798, 803 (2018). In *Class v. United States*, which the Supreme Court decided in 2018, the government charged the defendant with possessing firearms that the authorities found inside of his vehicle parked on the premises of the U.S. Capitol. *Id.* at 802. Though the defendant pleaded guilty and signed a plea agreement acknowledging his waiver of numerous constitutional rights, the agreement did not specify whether the defendant could later challenge the constitutionality of the statute under which he was convicted. *Id.* The Court stated that, because the defendant did not relinquish any constitutional claims, he should be allowed to pursue them on appeal. *Id.* at 807.

[19] *See id.* at 807 (holding that the waiver the defendant signed at trial did not explicitly or implicitly prevent him from pursuing constitutional claims).

defendants from bringing other Fourth Amendment complaints separate from the original prosecution.[20]

On the other hand, the Supreme Court has also held that the entrance of a guilty plea weighs in favor of limiting a defendant's right to later challenge the validity of the lower court proceedings.[21] For example, in 1973, in *Tollett v. Henderson*, the Supreme Court held that the relevant question for a court to consider in determining whether a defendant can challenge the constitutionality of the proceedings leading up to a guilty plea is whether the advice counsel gave the defendant and the voluntariness of the defendant's plea were sufficient.[22] In doing so, the Court declined to examine whether a latent constitutional defect in the proceedings existed.[23] The Court stated that a guilty plea that was "voluntarily and intelligently entered" cannot be undone simply because of the defendant's lack of awareness of all possible arguments available to him.[24] Similarly, in 1970, in *Brady v. United States*, the Court held that a guilty plea is voluntary even if it is made as a result of the fear that a jury trial might lead to a death sentence.[25]

---

[20] Haring v. Prosise, 462 U.S. 306, 320 (1983). In *Haring v. Prosise*, which the Supreme Court decided in 1983, the government charged the defendant with unlawfully "manufacturing a controlled substance." *Id.* at 308. After pleading guilty, the defendant sought to challenge the constitutionality of the search of his apartment that led to the discovery of the components typically used to create the illegal substance. *Id.*

[21] *See, e.g.*, Tollett v. Henderson, 411 U.S. 258, 266 (1973) (holding that defendants who have pleaded guilty cannot appeal their convictions even if evidence later surfaces demonstrating that the grand jury involved in the defendant's indictment was not constitutionally selected). In 1973, the Supreme Court decided *Tollett v. Henderson*, in which a defendant pleaded guilty to murder at his attorney's urging. *Id.* at 259. The court sentenced the defendant to ninety-nine years in prison, but the defendant sought an appeal several years later, claiming that his plea was the result of undue pressure and that his counsel had not aided him effectively. *Id.* The defendant also claimed that his constitutional rights had been eroded because African Americans were kept from serving on the grand jury that indicted him. *Id.* During the proceedings in question, the defendant was only twenty years old and had received only minimal education. *Id.* at 261. The defendant was also unrepresented by counsel when he signed his confession. *Id.* Nevertheless, the Court decided that a showing of unconstitutional bias in a grand jury's assembly does not necessarily allow a defendant who pleaded guilty the benefit of an appellate remedy. *Id.* at 266.

[22] *Id.* at 266.

[23] *Id.* The Court stated that allegations of constitutional infirmity in the lower court proceedings can be taken into consideration when assessing the advice given to the defendant by his attorney, but the allegations alone do not justify providing an appellate remedy. *Id.* at 267.

[24] *Id.* at 267. The Court emphasized that a defendant who has taken ownership for his role in a crime in front of a judge cannot later challenge the constitutionality of the events leading up to his guilty plea. *Id.*

[25] Brady v. United States, 397 U.S. 742, 749–50 (1970). The Court held that a plea may not be coerced by threats of physical danger, but it is acceptable for the defendant to make a strategic choice to forego the possibility of a death sentence by pleading guilty. *Id*. The Court highlighted the fact that, in this case, there was no evidence to suggest that the defendant was so fearful of a possible death sentence that he could not logically assess the circumstances. *Id.* The Court quoted Judge Elbert Tuttle's majority opinion, stating that a guilty plea should be upheld unless it is made as a result of intim-

B. The Facts of United States v. Dewberry

Kansas City police officers pulled over Andre Dewberry in January 2015.[26] After he stepped out of the vehicle, officers witnessed Dewberry place a gun underneath it.[27] Shortly thereafter, prosecutors charged Dewberry with one count of being a "felon in possession of a firearm."[28]

Although the magistrate judge in the U.S. District Court for the Western District of Missouri provided Dewberry with a public defender, Dewberry asked to represent himself.[29] The magistrate judge eventually allowed Dewberry's entreaty and assigned Dewberry's public defender as standby counsel instead.[30] Dewberry then requested that the judge provide another attorney.[31] The magistrate judge denied the motion and ordered Dewberry to choose to either (1) proceed pro se; (2) retain new counsel himself; or (3) move for his court-

---

idation, deceit, or illicit promises on the part of the prosecutor. *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

[26] United States v. Dewberry, 935 F.3d 803, 804 (8th Cir. 2019), *reh'g denied en banc*, No. 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020).

[27] *Id.* The officers subsequently discovered and confiscated the gun. *Id.*

[28] *Id.* Dewberry's possession of a firearm constituted an infraction of two relevant sections of the U.S. Code: 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). *Id.*; *see* 18 U.S.C. §§ 922(g)(1), 924(a)(2) (stating that it is illegal for an individual who has been convicted of a crime severe enough to warrant a prison sentence of a year or longer to possess or transport a firearm).

[29] *Dewberry*, 936 F.3d at 804; *see Pro se*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining pro se as "[f]or oneself; on one's own behalf; without a lawyer"). Dewberry sent the judge a written note requesting the removal of his public defender. Appellant's Supplemental Brief at 3, United States v. Dewberry, 935 F.3d 803 (8th Cir. 2019), *reh'g denied en banc*, No. 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020) (No. 17-1649). The judge did not allow this change. *Id.* at 4. Dewberry's public defender filed a Motion for Competency Determination to assess Dewberry's mental acuity and, accordingly, his ability to undergo a trial. *Id.* Though medical professionals deemed Dewberry mentally sound and fit to stand trial, the psychologist conducting the examination noted that Dewberry was concerned about his disagreement with defense counsel's appraisal of the sentencing guideline ranges that pertained to his charge. *Id.*

[30] *Dewberry*, 936 F.3d at 804; *see Counsel*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining standby counsel as "[a] lawyer appointed by the court to be prepared to represent a defendant who waives the right to counsel, so as to ensure both that the defendant receives a fair trial and that undue delays are avoided"). This change was brought about by Dewberry's public defender, who submitted a motion to withdraw after Dewberry asked her to do so. Appellant's Supplemental Brief, *supra* note 29, at 5. The attorney told the court that she felt as though her relationship with Dewberry had been eroded so severely that it could not be mended. *Id.* Specifically, the attorney felt that Dewberry's refusal to engage in serious discussions with her about his case reflected a lack of trust in her. *Id.* Dewberry told the court that he could not afford to hire a new attorney but that he also could not continue to be represented by an attorney who would not respect his wishes. *Id.* As a result, Dewberry felt obliged to represent himself. *Id.* The judge then allowed Dewberry to proceed pro se and designated the public defender as Dewberry's standby counsel should the case reach the trial stage. *Id.* at 7.

[31] *Dewberry*, 936 F.3d at 804. Dewberry submitted a pro se motion to the court objecting to his own role as pro se head counsel. Appellant's Supplemental Brief, *supra* note 29, at 9. In this motion, Dewberry complained that ineffective counsel combined with the judge's refusal to provide him with a new attorney had given him no choice but to represent himself. *Id.* As a result, Dewberry was forced to conduct his own defense with no understanding of the rules. *Id.*

provided public defender to return as his representative.[32] Dewberry selected the first option, moving forward as his own representative.[33] A few days prior to the agreed-upon trial date, the involved parties attended a pretrial conference during which the magistrate judge replaced Dewberry's pro se representation with that of a public defender.[34] Dewberry communicated his disagreement with this adjustment.[35]

Just prior to the trial's slated commencement date, Dewberry decided to formally admit his guilt.[36] The plea agreement that Dewberry signed included an appeal waiver stating that Dewberry relinquished his right to appeal a judgment of guilt.[37] Dewberry's public defender accompanied him to a hearing called to change Dewberry's plea.[38] After conducting a plea colloquy, the judge allowed Dewberry to plead guilty.[39] Before doing so, however, the magistrate

---

[32] *Dewberry*, 936 F.3d at 804. The court denied Dewberry's motion on the grounds that his rejection of his initial counsel was without good cause. Appellant's Supplemental Brief, *supra* note 29, at 9.

[33] *See Dewberry*, 936 F.3d at 804 (implying that Dewberry decided to represent himself because the court refused to replace his standby counsel with another).

[34] *Id.* The court stated that its reasoning for reappointing the public defender was its worry that Dewberry would not, without guidance from counsel, be able to comprehend the plea agreement proposed to him or any pre-trial preparations. Appellant's Supplemental Brief, *supra* note 29, at 14.

[35] *Dewberry*, 936 F.3d at 804. Dewberry claimed that the public defender had asked him to lie about details of the crime, but the court did not believe those assertions to be true. Appellant's Supplemental Brief, *supra* note 29, at 12. Dewberry stated that he "didn't want (his appointed counsel) from the beginning" and that he "can't even defend (himself) now." *Id.* The court replied: "you haven't done any good at it yet, Mr. Dewberry." *Id.*

[36] *Dewberry*, 936 F.3d at 804. Dewberry pleaded to sixty months in prison. *Id.* The procedure for pleading guilty is traditionally begun by asking the defendant: "how do you plead: guilty or not guilty?" LESTER B. ORFIELD, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 11:27 (2020). The defendant must respond with either "guilty" or "not guilty," or the defendant may choose to say nothing at all. *Id.* The prosecution and the defense must present the plea on the record in court. FED. R. CRIM. P. 11(c)(2).

[37] *Dewberry*, 936 F.3d at 804–05. The appeal waiver stated that Dewberry waived his right to appeal the guilty plea at any point in the future. *Id.* According to Rule 11(b)(N) of the Federal Rules of Criminal Procedure, it is the responsibility of the court to ensure that the defendant comprehends and assents to the terms of any plea agreement that waives future rights of appeal. FED. R. CRIM. P. 11.

[38] *Dewberry*, 936 F.3d at 805. This hearing resulted from Dewberry's agreement during pre-trial proceedings to change his plea from "not guilty" to "guilty." *See id.* at 804 (stating that Dewberry agreed to formally plead guilty after undergoing pre-trial proceedings).

[39] *Id.* at 805. The plea colloquy was made pursuant to Rule 11 of the Federal Rules of Criminal Procedure. *Id.* During the plea colloquy, the magistrate judge questioned Dewberry three times as to whether he had been pressured into accepting his plea, and he responded that he had not. *Id.* A plea colloquy is a discussion occurring in open court that is typically initiated immediately prior to the defendant formally pleading guilty, where the judge speaks with the defendant to ensure that the defendant comprehends the effect of the plea. *Plea colloquy*, BLACK'S LAW DICTIONARY, *supra* note 16. Rule 11 of the Federal Rules of Criminal Procedure mandates that the court hold a colloquy to engage the defendant. ORFIELD, *supra* note 36, § 11:27. Rule 11 states that a judge is required to speak directly with the defendant prior to the defendant accepting any guilt-admitting or acquiescing plea. FED. R. CRIM. P. 11. In doing so, the judge is required to ascertain the defendant's comprehen-

judge recited the appeal waiver aloud and asked Dewberry whether he comprehended it.[40] Dewberry replied that he did.[41]

Dewberry appealed his conviction to the U.S. Court of Appeals for the Eighth Circuit.[42] Shortly thereafter, the public defender who had previously worked on Dewberry's case submitted an *Anders* brief, arguing that the plea agreement to which Dewberry assented foreclosed the appeal.[43] The public defender also claimed that Dewberry was deprived of his pro se right during the lower court proceedings.[44]

The Eighth Circuit provided Dewberry with representation and requested that each side prepare arguments regarding (1) whether Dewberry's guilty plea relinquished his right to challenge the denial of his right to proceed pro se, and (2) whether the lower court was justified in denying Dewberry's request to proceed pro se.[45] Ultimately, the Eighth Circuit held that Dewberry did waive his right to appeal the lower court's denial of his pro se right and, therefore, even if

---

sion of the various aspects of his plea. *Id.* These factors include the right of the government, in a perjury action, to use the defendants' previous assertions under oath against them, the defendants' ability to plead not guilty or to continue denying their guilt, the defendants' right to be heard by a jury, the defendants' rights to legal counsel at all times during their proceedings, the defendants' trial rights to confront and question opposing witnesses, to be shielded from forced incrimination of themselves, to testify and admit evidence, and to produce witnesses, defendants' relinquishment of all trial rights once the court accepts their guilty or nolo contendere pleas, the character of every charge that defendants acquiesce to, and all maximum potential penalties. *Id.*

[40] *Dewberry*, 936 F.3d at 805.

[41] *Id.* Dewberry received a sixty-month prison sentence under the plea agreement. *Id.* According to the U.S. Sentencing Commission Guidelines Manual, Dewberry's actions made him eligible for forty-six to fifty-seven months in prison. *Id.* When a plea agreement is made such that the parties agree to a sentence of specified duration, as was the case in *United States v. Dewberry*, the court has the choice to allow the agreed-upon terms, disallow them, or suspend its judgment for reexamination after reading through the defendant's presentence report. FED. R. CRIM. P. 11(c)(3)(A); *see* 936 F.3d at 805 (specifying that Dewberry and the government agreed that Dewberry would serve a sixty-month sentence); *Presentence Report*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining "presentence report" as a comprehensive description of the defendant's personal history meant to assist the court in determining a sentence). Before the court may accept a proposed plea agreement, it is required to apprise the defendant that the agreed upon sentence will be a part of the judgment. FED. R. CRIM. P. 11(c)(4). The defendant is not able to rescind a guilty plea once the court has accepted the proposed plea agreement and executed the defendant's sentence. FED. R. CRIM. P. 11(e). A plea of guilt can only be rescinded "on direct appeal or collateral attack" once the court has accepted it. *Id.*; *see Collateral Attack*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining "collateral attack" as a challenge to a judgment that is not made on direct appeal).

[42] *Dewberry*, 936 F.3d at 805.

[43] *Id.*; *see Anders brief*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining an "Anders brief" as a brief that a court-designated public defender submits requesting to be removed from the case's appeal because of her opinion that the appeal is without merit).

[44] *Dewberry*, 936 F.3d at 805.

[45] *Id.* The government acknowledged that Dewberry's behavior did not justify the lower court's denial of his pro se right but contended that Dewberry's failure to unambiguously demand his pro se right upon the court's questioning necessitated the court's reassignment of representation. *Id.* Alternatively, the government argued that Dewberry waived his right to appeal when he pleaded guilty. *Id.*

the lower court was not justified in denying that right, Dewberry could not challenge the decision now.[46]

II. The Circuit Split Regarding Defendants' Waiver of Sixth Amendment Rights

In 1976, in *United States v. Montgomery*, the U.S. Court of Appeals for the Tenth Circuit was the first federal circuit court to take up the issue of whether a criminal defendant who was denied his Sixth Amendment right to proceed pro se at trial and then pleaded guilty could later challenge that denial on appeal.[47] In the following years, the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits also addressed the issue.[48] Section A of this Part discusses the position that the majority of circuits took.[49] Section B discusses the Ninth Circuit's differing approach.[50] Section C explains the Eighth Circuit's holding in *United States v. Dewberry*, which adhered to the reasoning of the majority of circuit courts.[51]

A. The U.S. Court of Appeals Majority View

Most circuit courts to consider the issue of a defendant's ability to challenge the denial of his pro se right after he has already pleaded guilty have held that such a defendant has waived the ability to later claim that the denial resulted in an invalid guilty plea.[52]

---

[46] *Id.* at 807.

[47] *See* United States v. Montgomery, 529 F.2d 1404, 1405 (10th Cir. 1976) (holding that a defendant who had pleaded guilty could not challenge the denial of his pro se right).

[48] *See* Werth v. Bell, 692 F.3d 486, 488 (6th Cir. 2012) (holding that a criminal defendant is precluded from challenging the denial of his pro se right after pleading guilty), *reh'g denied en banc*, No. 10-2183, 2012 U.S. App. LEXIS 23965 (6th Cir. 2012); United States v. Moussaoui, 591 F.3d 263, 266–68 (4th Cir. 2010) (stating that the essential factor in resolving whether a defendant's guilty plea was voluntary is the defendant's ability to seek a remedy for any constitutional deficiencies on appeal); Gomez v. Berge, 434 F.3d 940, 941 (7th Cir. 2006) (stating that a defendant who pleads nolo contendere gives up his right to later claim that the lower court improperly denied his right to self-representation); *Montgomery*, 529 F.2d at 1407 (articulating the notion that a defendant's guilty plea, which he made to avoid a particularly severe sentence, is voluntary and precludes the defendant from challenging the denial of his pro se right).

[49] *See infra* notes 52–77 and accompanying text (explaining the position of the majority of the circuit courts of appeals).

[50] *See infra* notes 78–86 and accompanying text (explaining the Ninth Circuit's position, which contradicted the holdings of the majority of circuit courts that had previously addressed the issue).

[51] *See infra* notes 87–92 and accompanying text (explaining the Eighth Circuit's rationale in holding that defendants who pleaded guilty may not challenge the constitutionality of the deprivation of their pro se rights).

[52] *See Werth*, 692 F.3d at 488 (stating that a defendant cannot appeal the lower court's denial of his Sixth Amendment right if he has already entered a guilty plea); *Moussaoui*, 591 F.3d at 266–68 (holding that the voluntariness of a defendant's plea turns on whether the defendant had the ability to appeal constitutional deprivations at trial); *Gomez*, 434 F.3d at 941 (stating that a plea of nolo contendere acts

For example, in 2010, in *United States v. Moussaoui*, the U.S. Court of Appeals for the Fourth Circuit considered a case in which the defendant pleaded guilty to several counts of criminal conspiracy after asserting his right to proceed pro se.[53] Although the defendant in that case had standby counsel and a trusted Muslim attorney for guidance, he affirmed that he would represent himself in all court proceedings.[54] The defendant's standby counsel made attempts to speak with and provide assistance to him, but the defendant was vehement in his refusal of aid.[55] At one point, the court annulled the defendant's right to proceed pro se, and he entered an unconditional guilty plea shortly thereafter.[56]

In challenging his guilty plea on appeal, the defendant claimed that he did not enter the plea voluntarily.[57] The Fourth Circuit disagreed, holding that ad-

---

to foreclose a defendant from claiming that his Sixth Amendment right was unconstitutionally infringed); *Montgomery*, 529 F.2d at 1407 (stating that a guilty plea is voluntary if it is motivated by a desire to avoid harsh penalties).

[53] *Moussaoui*, 591 F.3d at 266–68. The defendant was a French citizen who pleaded guilty to six criminal conspiracy counts connected to the al Qaeda terrorist attacks carried out on September 11, 2001. *Id.* at 266. Officials had apprehended the defendant the month prior as a result of staying in the country past the expiration of his visa. *Id.* As a result, the government was holding the defendant in captivity at the time of the attacks. *Id.* In his request to proceed pro se, the defendant cited his appointed attorneys' lack of comprehension of terrorism or Islam. *Id.* at 268. The defendant also accused the government of preventing him from having a Muslim attorney as his counsel, per his request. *Id.* The defendant was explicit about the fact that he did not want anyone to serve as his representative—the Muslim attorney would only help him with "witnesses and material necessary for his defense." *Id.*

[54] *Id*. at 268. After an examination of the defendant's competency, the judge determined that the defendant had effectively relinquished his right to an attorney. *Id.* In spite of this, due to the complicated nature of the case and the presence of classified information in discovery, the lower court demanded that the defendant retain standby counsel to assist him. *Id.*; *see Counsel*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining "standby counsel"). The defendant informed the court that he had met with a Muslim attorney who offered to represent him pro bono, but he continued to insist that he would represent himself. *Moussaoui*, 591 F.3d at 268; *see Pro bono*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining pro bono as "uncompensated"). As such, the defendant made it clear that his Muslim attorney would act as his representative outside of the proceedings, rather than his official representative. *Moussaoui*, 591 F.3d at 268.

[55] *Moussaoui*, 591 F.3d at 269–70. The court was forced to replace the defendant's standby counsel with another attorney after issues between the defendant and his original standby counsel could not be resolved. *Id.* at 269. The defendant pushed back against this change and tried to identify another Muslim attorney as his designated counsel. *Id.* The defendant asked that the judge release his court-appointed attorney so that his Muslim attorney could enter the proceedings in the capacity of "legal consultant" or "advisor." *Id.* The court did not allow this because the defendant's requested attorney was not a member of the Virginia bar, among other reasons. *Id.* The defendant continued to resist the efforts of his court-appointed attorney to aid him, prompting the judge to inform the defendant that his resistance would only impair his outcome. *Id.* at 270. The defendant continued to berate the court for not providing him with the assistance he requested, stating that the court did not provide him with an adequate means of defending himself. *Id.*

[56] *Id.* at 271. The court rescinded the defendant's pro se status as a result of his submission of over twenty filings containing threats against members of the government and other foreign governments. *Id.* The defendant later admitted that he intended to spread propaganda about al Qaeda's mission against the United States through these filings. *Id.*

[57] *Id.* at 279. The defendant stated that his plea was involuntary because the district court denied him the right to select his own counsel, receive pretrial exposure to exculpatory evidence, confer with his

verse lower court evidentiary rulings did not make the defendant's plea involuntary because he had the option of going to trial and rectifying these errors on appeal.[58] The defendant additionally asserted that his plea was "unknowing and uncounseled" because the court prevented him from discussing exculpatory evidence with defense counsel prior to its entrance, and the court also prevented him from viewing the materials.[59] The court rejected this claim as well, stating that these restrictions were not so burdensome as to constructively deny counsel during the entrance of his guilty plea, which is the standard for succeeding under this claim.[60]

Similarly, in 2012, in the U.S. Court of Appeals for the Sixth Circuit case *Werth v. Bell*, the defendant challenged his guilty plea on the grounds that it was entered into as a result of duress because the district court did not allow

---

attorney about the evidence, represent himself sufficiently, attend crucial parts of the trial process, and present certain witnesses during the proceedings. *Id.* The defendant claimed that, like the defendant in the Ninth Circuit's 2000 decision in *United States v. Hernandez*, his only choices were to plead guilty or submit to a constitutionally invalid trial. *Id.* at 280; *see* United States v. Hernandez, 203 F.3d 614, 627 (9th Cir. 2000) (stating that a defendant who has been denied his pro se right is forced to either plead guilty or subject himself to a trial in which he would not have the benefit of all his constitutional rights), *overruled on other grounds by* Indiana v. Edwards, 554 U.S. 164 (2008).

[58] *See Moussaoui*, 591 F.3d at 280. The Fourth Circuit expressed its disagreement with the Ninth Circuit's holding in *Hernandez*, stating that it was based on the misguided belief that the defendant's only other option would have been to undergo an unconstitutional trial. *Id.* The Fourth Circuit pointed out that the Ninth Circuit did not consider the fact that the defendant could have sought an appeal had he underwent trial and been convicted. *Id.* As such, the Fourth Circuit ruled that the defendant's guilty plea had the effect of relinquishing the ability to challenge all deficiencies not pertaining to jurisdiction prior to his conviction, aside from those deficiencies that touch on the sufficiency of the defendant's plea. *Id.*

[59] *Id.* at 281; *see Exculpatory Evidence*, BLACK'S LAW DICTIONARY, *supra* note 16 (defining "exculpatory evidence" as evidence that supports a defendant's guiltlessness). The defendant complained that a protective order issued under the Classified Information Procedures Act gave the prosecution the ability to prevent him from viewing exculpatory material. *Moussaoui*, 591 F.3d at 285; *see* 18 U.S.C. §§ 1–16 (limiting the unwarranted disclosure of classified information). The defendant claimed that there were several people whose statements would have proven that he had not been set to take part in the attacks of September 11th but rather that he was set to take part in a second group of attacks that were never realized. *Moussaoui*, 591 F.3d at 285. The defendant believed that this information would have proved his innocence because it would have demonstrated that he did not take part in the September 11th terrorist attacks that served as the basis of the charge against him. *Id.* The defendant claimed that the source of his right to view the material was the U.S. Supreme Court's 1963 holding in *Brady v. Maryland*. *Id.*; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that a defendant has a constitutional right to view pertinent evidence beneficial to his defense), *habeas proceeding sub nom. at* Brady v. Superintendent, Anne Arundel Cnty. Det. Ctr., 314 F. Supp. 799 (D. Md. 1970), *aff'd*, 443 F.2d 1307 (4th Cir. 1971).

[60] *Moussaoui*, 591 F.3d at 289. The court rejected the defendant's *Brady* claim because the court classified the right to exculpatory evidence as a trial right. *Id.* at 285. The *Brady* right was designed to ensure justice in trial verdicts and to reduce the likelihood of wrongful convictions. *Id.* This risk of error is not concerning when defendants plead guilty because they have admitted, of their own volition and in open court, that they committed the crime. *Id.*

him to represent himself.[61] The defendant argued that the court's interference with his pro se right immediately affected his choice to enter a guilty plea, and, thus, it was not made "voluntarily and intelligently."[62] Although the court admitted that reasonable minds could differ on this question, it ultimately disagreed with the defendant and declined to address whether a Sixth Amendment denial can render a guilty plea involuntary.[63]

Additionally, in 2006, in *Gomez v. Berge*, the U.S. Court of Appeals for the Seventh Circuit held that the defendant relinquished the ability to challenge constitutional defects that took place during his trial when he pleaded nolo contendere.[64] The defendant claimed that the district court had erred in deny-

---

[61] Werth v. Bell, 692 F.3d 486, 488 (6th Cir. 2012), *reh'g denied en banc*, No. 10-2183, 2012 U.S. App. LEXIS 23965 (6th Cir. 2012). After robbing a convenience store, the defendant pleaded guilty to "breaking and entering with intent to commit larceny," as well as "possession of burglar's tools." *Id.* The defendant demanded that the court respect his pro se right at least seven times prior to pleading guilty. *Id.* The court denied the first six demands in succession. *Id.* Upon the defendant's seventh request for self-representation, the district court judge explained to the defendant the charges that had been brought against him, informed him that the court would provide him with no additional guidance regarding the proceedings against him, and rejected his entreaty before allowing him to respond. *Id.* Prior to the entrance of his guilty plea, the defendant participated in a plea colloquy during which the judge told the defendant that a guilty plea serves to relinquish many constitutional rights. *Id.* at 490. The judge also informed the defendant that he could not later assert that the plea resulted from coercion not in the record at the time. *Id.* The judge later disallowed the defendant's attempt to revoke his plea, which the defendant asserted had resulted from duress due to the court's denial of his pro se right. *Id.* at 488. On appeal, the defendant first argued that the waiver analysis set forth in the Supreme Court's 1973 decision in *Tollett v. Henderson* had no bearing on his case because the violation of his rights was continuous. *Id.* at 496. The U.S. Supreme Court in *Tollett* stated that a plea of guilty acts as an interruption in the sequence of events that came before it. 411 U.S. 258, 266 (1973); *see Werth*, 692 F.3d at 495. As such, a criminal defendant who has accepted responsibility for the crime may not later bring independent claims pertaining to any constitutional defects that took place before making the guilty plea. *Werth*, 692 F.3d at 495. Ultimately, the Sixth Circuit did not accept this argument because it found no Supreme Court precedent to support such an exception. *Id.* at 496. The court opined that, even if the defendant had been able to point to Supreme Court precedent establishing an exception to the rule in *Tollett*, he nonetheless would not have prevailed due to the facts of his case. *Id.* at 496–97. Specifically, the lower court had disallowed the defendant's motion to proceed pro se a full two days prior to the defendant's plea, so the alleged violation of his pro se right had already taken place when he entered this plea. *Id.* at 497. The court stated that, even if the Sixth Amendment denial were continuous, such that the constitutional violation outlasted the plea's entrance, the issue of the plea's finality would be rendered moot. *See id.* (stating that the effect of the Sixth Amendment violation, rather than the violation itself, was continuous, foreclosing the defendant's argument that the violation had precluded the finality of the guilty plea).

[62] *Werth*, 692 F.3d at 497. The defendant asserted that these circumstances could not result in a valid relinquishment of his rights according to *Tollett*. *Id.*

[63] *Id.* The court stated that it did not need to enter the debate about whether a plea can be voluntary and intelligent if the denial of a defendant's right to represent himself contributed to his decision to plead guilty. *Id.* The court cited the Supreme Court's 2011 decision in *Harrington v. Richter* for the proposition that a state court's judgment that a claim forecloses a defendant from federal habeas relief if "fairminded jurists could disagree" about the propriety of the decision. *Id.* at 495; *see* Harrington v. Richter, 562 U.S. 86, 101 (2011) (stating that federal habeas relief is not available to litigants in state court where judges may differ in their views of the appropriateness of the state court's actions).

[64] Gomez v. Berge, 434 F.3d 940, 941 (7th Cir. 2006). In 2006, the Seventh Circuit in *Gomez v. Berge* followed the Sixth Circuit's 2012 approach in *Werth v. Bell* when it gave deference to the standard

ing his right to represent himself, and, as such, the plea entered on his behalf was not voluntary.[65] Like the other circuits to have considered the issue, the Seventh Circuit held that both a guilty plea and a no contest plea foreclose the defendant from later raising constitutional issues pertaining to the proceedings before the plea was made.[66] According to the Seventh Circuit, that foreclosure includes challenges regarding the lower court's judgment that the defendant was not properly suited to proceed pro se at trial.[67]

Finally, in 1976, in *Montgomery*, the Tenth Circuit reached a similar conclusion.[68] There, the defendant pleaded guilty to assault after requesting that the court appoint him another attorney who was not associated with the federal government.[69] The district court denied his request, and, shortly thereafter, the defendant asked to represent himself in the proceedings instead.[70] The court denied this request as well.[71] On appeal, the defendant argued that the lower court violated his right to proceed pro se, as affirmed in the Supreme Court's holding in *Faretta v. California*.[72] The Tenth Circuit rejected this claim, clari-

---

of review set forth in the Antiterrorism and Effective Death Penalty Act—only defendants who prove that the lower court proceedings allowed for a decision that was in opposition to federal law as the U.S. Supreme Court set forth are entitled to federal habeas relief. *Id.* at 942.

[65] *Id.* at 942.

[66] *Id.* at 942–43. The court cited to *Brady v. United States* for the proposition that a guilty plea relinquishes the defendant's right to later contest the validity of the statute that served as a basis for the indictment. *Id.* at 942; *see* Brady v. United States, 397 U.S. 742, 745 (1970) (affirming the lower court's decision to preclude relief because the defendant's plea was knowing and voluntary). The court stated unequivocally that an unconditional guilty plea acts as a forfeiture of all formal errors in the proceedings, including constitutional deficiencies that took place prior to the entrance of the plea. *Gomez*, 434 F.3d at 942. According to the Seventh Circuit, the waiver principle extends to pleas of no contest because they have the effect of impliedly admitting that all of the allegations made against the defendant are true. *Id.*

[67] *Gomez*, 434 F.3d at 942. Although the court conceded that guilty pleas do not automatically preclude constitutional challenges, such as double jeopardy claims, those regarding the constitutionality of the proceedings leading to the defendant's plea do. *Id.* at 943.

[68] *See* United States v. Montgomery, 529 F.2d 1404, 1407 (10th Cir. 1976) (holding that a guilty plea forecloses constitutional challenges that pertain to the sufficiency of the proceedings that occurred between a defendant's indictment and plea).

[69] *Id.* at 1405. Prosecutors charged the defendant with assault against a correctional officer and carrying a weapon at a federal penitentiary where the defendant was serving another sentence. *Id.* The court assigned the defendant a public defender to represent him in the proceedings. *Id.* The public defender was present at the defendant's arraignment, but the defendant informed the judge at that time that he wished to be assigned another, private attorney. *Id.*

[70] *Id.*

[71] *Id.* The defendant had a ten-day window after the court rejected his application for self-representation during which he was permitted to initiate motions necessary to his defense. *Id.* The defendant filed two pro se motions requesting a polygraph and any evidence that had the potential to strengthen his case. *Id.*

[72] *Id.* at 1406. In 1975, in *Faretta v. California*, the Supreme Court held that a criminal defendant has a constitutional right to proceed pro se so long as he requests to do so in a voluntary and intelligent manner. 422 U.S. 806, 807 (1975). Under these circumstances, a state cannot require a defendant to use appointed counsel when the defendant wants to represent himself. *Id.*

fying that only state courts can apply the *Faretta* Court's holding.[73] Nevertheless, the court acknowledged that the right to represent oneself in a federal court proceeding is firmly established and that a defendant is allowed to bring forth claims that the lower court infringed this right.[74] The court concluded, however, that the lower court had not violated this established right.[75] Additionally, the court concluded that because the defendant pleaded guilty to secure a less harsh penalty, his plea was voluntary.[76] This guilty plea, made of the defendant's own volition, served as a superseding force that closed the door on an examination of any constitutional defects in the preceding process.[77]

B. The Ninth Circuit's Departure from the U.S. Court of Appeals Homogeny

The U.S. Court of Appeals for the Ninth Circuit is the only federal court of appeals to depart from the holding that a criminal defendant who was denied his pro se right cannot later appeal an adverse decision.[78] In 2000, in *United States v. Hernandez*, the defendant pleaded guilty to "illegal reentry" and later challenged his conviction on the premise that the district court had improperly denied his request to represent himself, infringing upon his constitutional right to self-representation.[79] In particular, the defendant challenged the notion that

---

[73] *Montgomery*, 529 F.2d at 1406. The court stated that the *Faretta* ruling entitled defendants to self-representation inherent in state prosecutions. *Id.* That decision, the Tenth Circuit opined, does not extend to prosecutions in federal court. *See id.* (stating that the federal right to self-representation is already codified in federal law).

[74] *Id.* The right to represent oneself is based in the Judiciary Act of 1789, written into present-day federal law as 28 U.S.C. § 1654. 28 U.S.C. § 1654; *Montgomery*, 529 F.2d at 1406. The Tenth Circuit stated that, because federal courts have respected the right to represent oneself since the passage of the Judiciary Act, the defendant could assert it irrespective of the *Faretta* ruling's ability to apply retrospectively. *Montgomery*, 529 F.2d at 1406.

[75] *See Montgomery*, 529 F.2d at 1406 (explaining that the defendant approved his court-appointed counsel to engage in plea bargaining, which the court recognized as an acquiescence to the use of counsel and an abandonment of the defendant's attempt to represent himself).

[76] *Id.* at 1406–07. Additionally, the court noted that the defendant did not renew his assertions of the right to proceed pro se during the plea bargaining and plea colloquy phases of the proceedings. *Id.* at 1406. The court also noted that the lower court judge was painstaking in his dialogue with the defendant to ensure that he understood the consequences of his plea. *Id.*

[77] *Id.* at 1407. The court further opined that allowing the defendant to raise constitutional challenges later would invite future defendants to maneuver the judicial system in an underhanded manner, which the court sought to discourage. *Id.* The court appeared to endorse the view that the immoral craftsmanship it condemned had been at play in the case at hand. *See id.* (stating that dishonest maneuvering seemed to have played a part in the appeal).

[78] *See* United States v. Hernandez, 203 F.3d 614, 627 (9th Cir. 2000) (holding that a defendant who has requested to proceed pro se in a manner that is punctual, not made to stall the proceedings, and "unequivocal, as well as voluntary and intelligent" must be allowed to do so), *overruled on other grounds by* Indiana v. Edwards, 554 U.S. 164 (2008).

[79] *Id.* at 617–18. The defendant was removed from the United States in 1992 and in 1994 after being charged with "various drug-related felonies and assault with a deadly weapon." *Id.* at 617. Three years later, in 1997, authorities discovered and subsequently arrested the defendant in California. *Id.*

his plea was voluntarily entered, postulating that the court had essentially coerced him to plead guilty by rejecting his self-representation right.[80] The Ninth Circuit held that, so long as a defendant's invocation of the right to represent himself is (1) made in a well-timed manner, (2) not intended to stall the proceedings, and (3) "unequivocal, as well as voluntary and intelligent," the defendant must be allowed to represent himself.[81] The Ninth Circuit went on to conclude that the defendant's entreaty was punctual, not for the purpose of delaying the proceedings, unambiguous, voluntary, and intelligent.[82] As such, the court concluded that the lower court erroneously denied the defendant's request to represent himself.[83] The court reasoned that, if the improper denial of the defendant's Sixth Amendment right created excessive pressure on the defendant's ability to plead guilty, then it would have the effect of invalidating

---

Prosecutors charged the defendant with illegal reentry in transgression of 8 U.S.C. § 1326. *Id.* After a pretrial status conference, the defendant was displeased with his counsel's performance and asked for new representation. *Id.* The lower court judge refused to appoint new counsel. *Id.* As a result, the defendant informed the court that he wished to proceed pro se. *Id.* The judge warned that it was an ill-advised decision, given that the defendant was not fluent in English and was not a lawyer. *Id.* The judge also attempted to ascertain the defendant's capacity to represent himself. *Id.* at 617–18. As a result of an apparent deficiency in the defendant's ability to answer the judge's queries, such as "[w]hat does the government have to prove to convict you of this offense?," the court denied the defendant his pro se right. *Id.* at 618. Shortly thereafter, the defendant pleaded guilty. *Id.* Throughout the sentencing process, the defendant renewed his opposition to his counsel and continued to ask the judge to provide him with new representation. *Id.* He did not, however, repeat his earlier entreaty to proceed pro se. *Id.*

[80] *Id.* at 619–20. The defendant argued that his guilty plea was coerced because he was forced to plead guilty so that he could forego being put through a trial that would have deprived him of his constitutional rights and prevented him from representing himself. *Id.* The court stated that, for the defendant to prove that his plea was not made in a voluntary manner, he had to demonstrate that (1) the lower infringed on his Sixth Amendment right by denying his entreaty to proceed pro se, and (2) that the court made his plea involuntary by providing him with the option to either proceed with an unconstitutional trial or plead guilty. *Id.*

[81] *Id.* at 620.

[82] *Id.* at 621–26. The court noted that the defendant asked to represent himself well before the trial was set to begin, thereby making his requirement timely. *Id.* at 621. The court also determined that the defendant's assertion of his pro se right was unequivocal because it was genuine and made in a manner that reflected that the defendant was not undergoing an "emotional outburst." *Id.* The court was particularly moved by the defendant's statement to the judge that, if the judge could not assign him a new attorney, the defendant wanted to represent himself with the assistance of an interpreter. *Id.* Moreover, the court stated that a request for self-representation is voluntary and intelligent when it is informed by the content of the accusations raised against the defendant, the potential punishments, and the possible pitfalls of proceeding pro se. *Id.* at 623–24. The court concluded that the defendant's right to proceed pro se had been infringed due to the fact that the lower court judge did not try to educate the defendant about any of these factors. *Id.* at 625. Instead, the lower court judge tried to test the defendant's awareness of those elements and then declined to engage with the defendant based on his lack of knowledge about them. *Id.* at 625–26.

[83] *Id.* at 626.

that plea as involuntary.[84] Because the defendant was faced with a choice of pleading guilty or yielding to a trial in which the court had stripped him of his Sixth Amendment right, the court reasoned that this denial created excessive pressure on the defendant's choice.[85] Because the defendant's plea was not voluntarily entered, the Ninth Circuit vacated it.[86]

C. The Eighth Circuit's Adherence to the Majority Rule

In 2019, in *United States v. Dewberry*, the U.S. Court of Appeals for the Eighth Circuit sided with the majority of circuits, holding that a defendant who pleaded guilty during pre-trial proceedings is foreclosed from later challenging the constitutionality of the court's denial of his Sixth Amendment right.[87] After assessing the approach that each of the circuit courts to have already addressed the issue applied, the Eighth Circuit expressed agreement with the Fourth Circuit's determination that defendants may find recourse to address any pre-trial constitutional deprivations on appeal.[88] As a result, it is not true that defendants who have faced these deprivations are left with only two options: plead guilty or submit to a trial marred by constitutional defects. [89] The Eighth Circuit also pointed out that defendants seeking to maintain appellate remedies may enter conditional guilty pleas, a tool that Dewberry did not utilize.[90] The court stated that Dewberry needed to have alleged specific facts to demonstrate that his plea was involuntary.[91] Thus, the Eighth Circuit held that violations of pro se rights do not render guilty pleas involuntary per se.[92]

---

[84] *Id.* Because the Ninth Circuit concluded that the district court improperly denied the defendant his self-representation right, it automatically concluded that the defendant's plea was rendered involuntary. *Id.* at 626–27.

[85] *Id.* at 626–27. A defendant must be given the choice between pleading guilty and submitting to a trial that is consistent with the rights the Constitution guarantees criminal defendants. *Id.* The court analogized the facts of this case to a defendant being forced to plead guilty or undergo a trial without the advice of an attorney or under the leadership of a judge afflicted by prejudice. *Id.* In the case at bar, as in each of the examples provided, the judge did not offer the defendant the lawful alternatives to pleading guilty that the Constitution demands and, therefore, the defendant did not enter his plea voluntarily. *Id.*

[86] *Id.* at 627.

[87] United States v. Dewberry, 936 F.3d 803, 807 (8th Cir. 2019), *reh'g denied en banc*, No. 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020).

[88] *Id.* at 806. The Eighth Circuit stated its belief that the Ninth Circuit's reasoning in *Hernandez* was based on the misguided notion that defendants who are forced to choose between pleading guilty and undergoing a trial in which they are not afforded all of their constitutional rights renders the plea involuntary. *Id.* The Eighth Circuit explained that any constitutional deprivations would have the opportunity to be righted during appellate proceedings. *Id.* at 806–07.

[89] *Id.*

[90] *Id.* at 807. Prior to entering a conditional guilty plea, defendants have the option of stating in writing that they wish to preserve their right to appellate review of any pretrial rulings that they did not agree with. *Id.*

[91] *Id.*

[92] *Id.*

III. The Ninth Circuit's Approach Was Preferable to That of Its Sister Circuits Because It Expands the Rights of Criminal Defendants

The implicit concerns of the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits are that criminal defendants will attempt to use the appellate court system for improper or self-serving means.[93] Although these concerns are valid and not without cause, they have led these courts to overly restrict the rights of criminal defendants.[94] The Ninth Circuit's approach, on the other hand, has properly prioritized a defendant's constitutional right to self-representation.[95]

---

[93] *See* United States v. Dewberry, 936 F.3d 803, 805 (8th Cir. 2019) (holding that a criminal defendant who was denied his pro se right during pre-trial proceedings cannot challenge that denial after pleading guilty), *reh'g denied en banc*, No. 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020); Werth v. Bell, 692 F.3d 486, 488 (6th Cir. 2012) (holding that, by entering a plea of guilty, a criminal defendant's ability to challenge the denial of his pro se right is foreclosed), *reh'g denied en banc*, No. 10-2183, 2012 U.S. App. LEXIS 23965 (6th Cir. 2012); United States v. Moussaoui, 591 F.3d 263, 266–68 (4th Cir. 2010) (stating that a defendant's plea is voluntary, and thus valid, so long as the defendant had the option of proceeding to trial to rectify any improper denial of rights); Gomez v. Berge, 434 F.3d 940, 941 (7th Cir. 2006) (holding that a defendant who pleads nolo contendere relinquishes his right to later claim that the lower court improperly denied his pro se right); United States v. Montgomery, 529 F.2d 1404, 1407 (10th Cir. 1976) (holding that a defendant who pleads guilty to secure a more favorable sentence and avoid harsh penalties does so in a voluntary manner, and, as a result, the defendant cannot later challenge the denial of his right to self-representation). In 1976, in *United States v. Montgomery*, for example, the Tenth Circuit articulated a fear that, should courts allow defendants to challenge the constitutionality of the denial of their pro se rights, defendants would abuse that right and use it as a means of instituting frivolous appeals. 529 F.2d at 1407.

[94] *See Dewberry*, 936 F.3d at 805 (stating that criminal defendants are precluded from challenging the denial of their pro se rights after they have pleaded guilty); *Werth*, 692 F.3d at 497 (rejecting the defendant's argument that his plea was not voluntary because the court improperly denied him his pro se right); *Moussaoui*, 591 F.3d at 280 (holding that defendants' pleas are not involuntary when defendants are provided an opportunity to rectify constitutional defects on appeal); *Gomez*, 434 F.3d at 943 (declining to take up the question of whether a guilty plea may be rendered involuntary as a result of prior constitutional deprivations); *Montgomery*, 529 F.2d at 1406–07 (holding that a guilty plea was voluntary because the defendant who agreed to its terms sought to secure for himself a more favorable outcome).

[95] *See* United States v. Hernandez, 203 F.3d 614, 627 (9th Cir. 2000) (holding that criminal defendants' Sixth Amendment rights have been violated when requests to represent themselves are improperly denied and that this denial has the effect of rendering the defendants' pleas involuntary), *overruled on other grounds by* Indiana v. Edwards, 554 U.S. 164 (2008). Whereas most of the circuit courts held that a plea is knowing and voluntary so long as the defendant understands the consequences of his plea and is informed of the nature of the charges brought against him, the Ninth Circuit chose to define knowing and voluntary as informed by a defendant's request for self-representation. *Id.* at 620. In other words, so long as a defendant's invocation of the right to represent himself is made in a well-timed manner, is not made to stall the proceedings, and is also "unequivocal, as well as voluntary and intelligent," the defendant must be allowed to represent himself in the Ninth Circuit. *Id.* This allows for greater leniency in the granting of criminal appeals, as it sets a much lower hurdle for defendants to clear. *See id.* (stating that defendants must be allowed to represent themselves whenever they meet the requirements set forth). Due process is a right set forth in the Due Process Clause of the Fourteenth Amendment, and it can be characterized as either substantive or procedural. C.J.S. *Constitutional Law* § 1820 (2020); Ivan E. Bodensteiner & Rosalie Berger Levinson, State and Local Government Civil Rights Liability § 1:18 (2020). To determine whether there is a procedural due process issue, courts must un-

The key piece of disagreement among the circuit courts is the extent to which courts should examine whether a guilty plea is voluntary and intelligent.[96] The majority of circuits were quick to foreclose an inquiry into whether a defendant's plea could be anything but knowing and voluntary.[97] Those courts instead began with the presumption that defendants entering guilty pleas, absent evidence of overt coercion, do so of their own volition.[98] In contrast, the Ninth Circuit examined much more closely the connection between the defendant's Sixth Amendment right and the voluntariness of his plea.[99] In drawing a bright line rule that a defendant can challenge the denial of his Sixth Amendment right unless he did not make the request in a timely, unequivocal, voluntary, and intelligent manner, the Ninth Circuit stepped up to affirm criminal defendants' Sixth Amendment rights.[100] Once the court established that the lower court had infringed the defendant's Sixth Amendment right, it had little tolerance for the argument that the defendant's guilty plea foreclosed his con-

---

dertake a two-pronged examination—courts should first ascertain the existence of a "protected liberty or property interest," and then determine the procedures that liberty demands. BODENSTEINER & LEVINSON, *supra*, § 1:18. In 1976, in *Matthews v. Eldridge*, the Supreme Court listed three factors that courts should weigh when resolving the second prong: (1) a defendant's private interest, (2) the danger of this interest being improperly curtailed in the proceedings and the likely benefit of any added protections, and (3) the government's interest in economic, administrative, and judicial efficiency. *See* 424 U.S. 319, 334–35 (1976) (stating that constitutional due process requirements demand an analysis of three elements). As such, courts will make determinations of whether due process issues have arisen on the merits of each individual case. BODENSTEINER & LEVINSON, *supra*, § 1:18.

[96] *Compare Gomez*, 434 F.3d at 941 (stating that a defendant relinquishes his ability to challenge any constitutional defects in the proceedings against him when he pleads nolo contendere), *with Hernandez*, 203 F.3d at 626–27 (stating that a defendant can challenge the validity of his guilty plea when the defendant can show that the plea was not knowing, voluntary, and intelligent).

[97] *See Werth*, 692 F.3d at 497 (stating that it is unclear whether a guilty plea may be considered involuntary and, as a result, void if the court did not afford the defendant his complete pro se right); *Moussaoui*, 591 F.3d at 280 (holding that guilty pleas are presumed valid because defendants have the option of seeking recourse for any constitutional violations at trial on appeal); *Gomez*, 434 F.3d at 943 (stating that the defendant's waiver of rights is final and unconditional); *Montgomery*, 529 F.2d at 1406–07 (articulating the notion that a plea is voluntary when it is made in furtherance of the defendant's self-interest, including obtaining a more favorable sentence).

[98] *See Werth*, 692 F.3d at 497 (rejecting the petitioner's argument that Sixth Amendment deprivations automatically result in the guilty plea becoming involuntary); *Moussaoui*, 591 F.3d at 280 (holding that defendants' ability to address pre-trial constitutional deprivations on appeal precludes their guilty pleas from being deemed involuntary); *Gomez*, 434 F.3d at 943 (failing to address the relationship between a guilty plea entered after a defendant's pro se right was curtailed and the voluntariness of the plea); *Montgomery*, 529 F.2d at 1406–07 (stating that, after assessing the lower court's record, it was evident that the guilty plea was entered voluntarily because the defendant did not renew his Sixth Amendment assertions and sought to agree on a less severe punishment).

[99] *See Hernandez*, 203 F.3d at 627 (stating that the lower court's removal of a fair trial from the defendant's choices created unreasonable restrictions on the defendant's ability to decide his fate and, as a result, rendered his plea involuntary).

[100] *See id.* at 620, 623–25 (reasoning that courts must afford defendants their pro se rights so long as they meet the enumerated requirements).

stitutional challenge.[101] Instead, the court held that the defendant's guilty plea could not possibly have been voluntary.[102] As such, the Ninth Circuit properly demonstrated its commitment to protecting criminal defendants' pro se rights.[103]

If the Ninth Circuit's approach had been applied in *Dewberry*, the defendant likely would have received a much more favorable outcome.[104] Dewberry expressed several times that he preferred to represent himself.[105] Because his requests were timely, unequivocal, voluntary, and intelligent, the Eighth Circuit would have allowed Dewberry to proceed pro se under the Ninth Circuit's test.[106] Although this change may not have resulted in Dewberry being acquitted of the crimes he was charged with, it would have protected his Sixth Amendment right and ensured that he received a fair adjudication.[107]

CONCLUSION

In 2019, in *United States v. Dewberry*, the U.S. Court of Appeals for the Eighth Circuit held that a criminal defendant denied his Sixth Amendment right in the lower court could not later attack the constitutionality of that denial as having rendered his guilty plea unknowing or involuntary. This decision, like that of the Fourth, Sixth, Seventh, and Tenth Circuits, was misguided and unduly limited the rights of criminal defendants. These courts adopted a narrow view of the constitutional requirements of guilty pleas, determining that these requirements are satisfied so long as a defendant is not coerced into the plea. The Ninth Circuit's contrary holding is preferable. This approach takes a more expansive view of the Sixth Amendment right and holds that the underlying constitutional requirements for a guilty plea cannot be met when a defendant's pro se right is denied in spite of being made in a timely, unequivocal,

---

[101] *Id.* at 626.

[102] *Id.*

[103] *See id.* at 627 (holding that defendants do not have a fair choice when their only options are to plead guilty or submit to a trial that does not respect their Sixth Amendment rights); Baradaran, *supra* note 1, at 724 (reaffirming the essential character of the presumption of innocence to the criminal justice system).

[104] United States v. Dewberry, 936 F.3d 803, 807 (8th Cir. 2019) (holding that the defendant waived his right to challenge the lower court proceedings when he pleaded guilty to the charges against him, *reh'g denied en banc*, No. 17-1649, 2019 U.S. App. LEXIS 29626 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020); *Hernandez*, 203 F.3d at 627 (stating that trial courts may not place unnecessary restrictions on defendants' self-representation rights).

[105] *Dewberry*, 936 F.3d at 804.

[106] *See id.* (failing to note any errors in the defendant's pro se requests to the court); *Hernandez*, 203 F.3d at 620–21 (stating that courts may not interfere with a defendant's Sixth Amendment right when he has requested to proceed pro se in a manner that is punctual, unambiguous, and self-willed and when he is aware of the circumstances).

[107] *Dewberry*, 936 F.3d at 804 (stating that the defendant acknowledged his waiver of rights in pleading guilty).

voluntary, and intelligent manner. Other courts should adopt this approach to protect the Constitution's guarantee of self-representation.

RACHAEL A. MINASSIAN

Preferred citation: Rachael A. Minassian, Comment, *Pro Se Perils: The Eighth Circuit's Approach to Sixth Amendment Challenges After Guilty Pleas*, 62 B.C. L. REV. E. SUPP. II.-405 (2021), http://lawdigitalcommons.bc.edu/bclr/vol62/iss9/24/.