SCHALLER, J., dissenting, with whom NORCOTT, J., joins.

The majority reverses the conviction of the defendant, T.R.D., on the ground that the trial court failed to canvass him adequately with respect to his waiver of trial counsel and his decision to represent himself. The sole inadequacy that the majority identifies is that the trial court did not advise the defendant of the range of possible penalties that he would face upon conviction. Relying principally on our decision in *State* v. *Diaz*, 274 Conn. 818, 878 A.2d 1078 (2005), the majority determines that the waiver was not knowing, intelligent and voluntary because the omission of information as to the range of penalties, in and of itself, amounts to a violation of the defendant's sixth amendment right to counsel. In other words, in the majority's view, the trial court's omission, in canvassing the defendant, of one factor enumerated in Practice Book § 44-3, rendered the defendant's waiver of counsel not knowing, intelligent and voluntary and, as a result, the trial court's decision to accept that invalid waiver deprived the defendant of his sixth amendment right to counsel.

I respectfully dissent from the majority opinion because, in my view, the canvass as a whole complied with the constitutional standard that we previously have enunciated in *State* v. *Diaz*, supra, 274 Conn. 829–30, and *State* v. *Day*, 233 Conn. 813, 821–23, 661 A.2d 539 (1995). Viewed in its entirety, the canvass left no doubt that the defendant's waiver was knowing, intelligent and voluntary. It is undisputed that the trial court did not advise the defendant of the range of possible penalties, as specified in Practice Book § 44-3 (3), which, in this instance, was a sentence of one to five years of incarceration. I would not disagree with the proposition that the trial court should have included the possible penalties in the canvass. As the majority recognizes, however, the defendant does not have a constitutional right to a specifically formulated canvass to accomplish the purposes of the § 44-3 inquiry.

In this regard, it is worth repeating the applicable standard from *Diaz*. "The defendant . . . does not possess a constitutional right to a specifically formulated canvass [with respect to this inquiry]. His constitutional right is not violated as long as the court's canvass, whatever its form, is sufficient to establish that the defendant's waiver was voluntary and knowing. . . . *In other words, the court may accept a waiver of the right to counsel without specifically questioning a defendant on each of the factors listed in . . . § [44-3] if the record is sufficient to establish that the waiver is voluntary and knowing.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Diaz*, supra, 274

Conn. 831; see also *State* v. *D'Antonio*, 274 Conn. 658, 709, 877 A.2d 696 (2005) ("[r]ecognizing the constitutional implications attendant to . . . review [under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)], we do not review the proceedings for strict compliance with the prophylactic rule of Practice Book § 44-3, but rather for evidence that the waiver of counsel was made knowledgeably and voluntarily").

This leads to my first point of disagreement with the majority's analysis. While accurately reciting the constitutional standard from *Diaz*, the majority accepts the defendant's argument that "the trial court's canvass was constitutionally insufficient because the defendant was never made aware of the range of punishments that he could face upon conviction." The majority refers to *Diaz* as follows: "[W]e were not persuaded that the imprecise language used by the trial court was sufficient to satisfy the constitutional requirement that the defendant be advised of the range of permissible punishments he faced upon conviction . . . . *Diaz* controls the resolution of this issue in the present case." (Citation omitted.) The majority goes on to apply the reasoning of *Diaz* to the present case by indicating that "there is simply no evidence present in the record from which we could infer that the defendant had any meaningful appreciation of the period of incarceration he faced if convicted of the charges he faced." Based on this factor alone, the majority concludes that the trial court's failure to conduct an adequate canvass rendered the defendant's waiver of counsel invalid because it was not knowing, intelligent and voluntary, and that the defendant is entitled to a new trial.

The proper standard to use, I submit, is whether a review of the record of the entire canvass demonstrates that the waiver was knowing, intelligent and voluntary. Since a defendant has no constitutional right to any particular question or series of questions, notwithstanding the guidelines of Practice Book § 44-3, we must not base our determination on the absence of a single factor. In *State* v. *Day*, supra, 233 Conn. 822, this court elaborated on the reason why the test for waiver of the right to counsel "cannot be construed to require anything more . . . than is constitutionally mandated . . . ." (Internal quotation marks omitted.) "[S]uch a waiver triggers the constitutional right of an accused to represent himself. . . . The multifactor analysis of § [44-3], therefore, is designed to assist the court in answering two fundamental questions: first, whether a criminal defendant is minimally competent to make the decision to waive counsel, and second, whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion." (Citations omitted; internal quotation marks omitted.) Id. Put another way, this court, in cautioning that the right to counsel not be construed to require more than is constitutionally mandated, recognized that there are two constitutional

rights at issue in the review of a waiver canvass—both the right to counsel and the right to self-representation. These two rights exist in inherent tension with each other, and we have recognized that "[w]hen the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins." (Internal quotation marks omitted.) Id., 821.

This brings me logically to the second basis for my disagreement. The record of the canvass in this case provides ample support for my conclusion that the defendant's waiver was knowing, voluntary and intelligent, despite the omission in the canvass of specific information concerning the possible sentence. The canvass, which is recited by the majority,[1] reveals that the defendant was adamant about discharging his attorney and exercising his constitutional right to represent himself at trial and that he appreciated the problems inherent in doing so. Although the court repeatedly warned the defendant of the dangers of self-representation, even advising the defendant that it would be unwise to do so, the defendant persisted in stating his desire to take the risks of proceeding on his own. Despite many additional opportunities for assistance offered by the court during trial, the defendant persisted in exercising his constitutional right of self-representation throughout the trial.

The record in the present case stands in sharp contrast to that presented in *Diaz*. The record reflects the fact that the defendant had counsel, Attorney Christopher Sheehan, for approximately sixteen months prior to the trial. The defendant in *Diaz*, in contrast, "was represented by counsel only briefly and never, insofar as the record reflects, in connection with the narcotics charges except for bond purposes only." *State* v. *Diaz*, supra, 274 Conn. 832 n.14. We specifically noted in *Diaz* that, although the record in that case did not "support a presumption that the defendant had been apprised by counsel of the range of possible penalties that he faced if convicted . . . the existence of certain facts might give rise to such a presumption in another case . . . ." Id. Despite disagreements between the defendant and his counsel, and despite the defendant's ultimate decision to proceed without Sheehan, I submit that in the present case, we may presume that, at some point in their discussions, Sheehan made the defendant aware of the possible penalties. See, e.g., *State* v. *Caracoglia*, 95 Conn. App. 95, 113, 895 A.2d 810 ("[i]n general, a trial court may appropriately presume that defense counsel has explained the nature of the offense in sufficient detail" [internal quotation marks omitted]), cert. denied, 278 Conn. 922, 901 A.2d 1222 (2006); see also *State* v. *Wolff*, 237 Conn. 633, 658–59, 678 A.2d 1369 (1996) (relying on fact that defendant was represented by counsel for four months during proceedings in concluding that the "record is sufficient to support the presumption that the defendant's counsel . . . had

explained to him the nature of the offenses in sufficient detail''). Even though the defendant complained about a lack of communication from Sheehan, the record indicates that the dispute between the defendant and Sheehan appeared to involve mainly disagreement over trial strategy. In addition, the defendant had prior criminal convictions and was aware that a conviction for failure to register as a sex offender and to verify his address in violation of General Statutes (Rev. to 2003) §§ 54-251 and General Statutes 54-257 would be a class D felony. See General Statutes (Rev. to 2003) § 54-251 (e).

The defendant, like the defendant in *State* v. *Day*, supra, 233 Conn. 829–30, "made his position abundantly clear that he would rather risk self-representation than proceed to trial [with his counsel]." In the face of such adamant refusal of representation, courts have recognized that "the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." (Internal quotation marks omitted.) *State* v. *Varszegi*, 36 Conn. App. 680, 684–85, 653 A.2d 201 (1995), aff'd, 236 Conn. 266, 673 A.2d 90 (1996), quoting *Faretta* v. *California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "As long as the defendant clearly and unequivocally indicates that he wants to proceed pro se instead of proceeding [with his counsel], his waiver of counsel is knowing and voluntary." (Internal quotation marks omitted.) *State* v. *D'Antonio*, supra, 274 Conn. 718. Unlike the facts in *Diaz*, the facts in the present case indicate that specific knowledge of the relatively modest possible sentence was not a critical factor. Although the defendant faced the complexities of representing himself, about which the trial court warned him repeatedly, he did not face a sentence of magnitude, which was an important point in *Diaz*.

After clarifying the constitutional standard, the court in *Diaz* focused on the trial court's failure to inform the defendant about the potential penalties that he would face if he were convicted. The significance of the possible sentences in *Diaz*, however, was notably different from that in the present case. The defendant in *Diaz* faced a sentence of nearly fifty years. After his trial, he received a total effective sentence of forty-three years imprisonment.[2] By contrast, in the present case, the maximum sentence is five years.[3] See General Statutes § 53a-35a (7). Although the trial court in *Diaz* warned the defendant that the charges were " 'very substantial' " and that the cases were " 'big prison time cases' "; *State* v. *Diaz*, supra, 274 Conn. 832; the defendant was not given more specific information. The fact that the court in *Diaz* concluded that, under those particular circumstances, the defendant did not receive "a realistic picture from [the court] regarding the *magnitude* of his decision [to proceed to trial without counsel]"; (emphasis added) id., 833; by no means controls the present case, which involves vastly different circumstances.

It is noteworthy, as well, that the decision in *Diaz* did not turn simply on the failure to inform the defendant of one factor of § 44-3. The decision turned on the constitutional significance of the *magnitude* of the possible sentence in the overall picture. In *Diaz*, the court stated clearly that the defendant did not have the constitutional right to be questioned on each and every factor in § 44-3. Id., 831. Because of the "true magnitude" of the consequences, of which the defendant was not informed, however, the canvass as a whole did not pass constitutional muster. The application of the constitutional standard in *Diaz* does not govern the present case, in which the possible sentence factor was proportionately less significant in the overall picture. The majority's interpretation of the significance of *Diaz* would shift the well established focus of this constitutional inquiry. Reviewing courts would be led to focus on whether a single factor was omitted, rather than determining whether the canvass as a whole established that the waiver was knowing, intelligent and voluntary. Changing the focus in this way would not take proper account of the fact that, in deciding to represent himself, a defendant is exchanging one constitutional right for another.

As this court stated in *State* v. *Day*, supra, 233 Conn. 828, our inquiry, in determining whether a canvass sufficiently assured that a defendant's choice to forego his right to counsel and to elect his right to self-representation was made knowingly, intelligently and voluntarily, is aimed at discerning whether "the defendant knew what he [was] doing and his choice [was] made with eyes open. *Faretta* v. *California*, supra, [422 U.S. 835], citing *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, [87 L. Ed. 268] (1942)." (Internal quotation marks omitted.) "When a defendant is faced with the choice of proceeding with counsel he is not entirely happy with or defending pro se, the trial judge must satisfy himself that if the defendant chooses to proceed pro se, he does so knowingly, with a full understanding of the risks involved. . . . This requirement, in effect, simply restates the rule that a waiver of the right to counsel must be clear and unequivocal. *Faretta* v. *California*, supra, [835] . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Day*, supra, 829–30.

Given the full context of the canvass in this case, the defendant's prior experience with the criminal justice system, and his lengthy attorney-client relationship with Sheehan, the trial court's omission of the factor concerning the possible sentence did not amount to a constitutional violation. To the contrary, the record indicates that the defendant's waiver of his right to counsel, and his determination to exercise his right to represent himself, was knowing, intelligent and voluntary.

[1] See footnotes 11 and 12 of the majority opinion.

[2] In *Diaz*, the trial court imposed the total effective sentence of forty-three years imprisonment following the defendant's conviction of two counts of possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b), two counts of possession of narcotics in violation of General Statutes § 21a-279 (a), and one count of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). *State* v. *Diaz*, supra, 274 Conn. 819.

[3] The defendant was sentenced to three years imprisonment, execution suspended after one year, and five years probation.