DA 17-0442

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 1

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL CRAIG MARQUART,

Defendant and Appellant.

APPEAL FROM: District Court of the Tenth Judicial District,
In and For the County of Fergus, Cause No. DC-2015-87
Honorable E. Wayne Phillips, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Kent M. Sipe, Fergus County Attorney, Lewistown, Montana

Submitted on Briefs: December 5, 2019

Decided: January 7, 2020

Filed:

Justice Beth Baker delivered the Opinion of the Court.

¶1 Following a bench trial, the Tenth Judicial District Court convicted Michael Craig Marquart of burglary, theft, and violating an order of protection. The court imposed deferred sentences on all counts. Marquart appeals, arguing that the District Court: (1) denied his fundamental right to be present at all critical stages of his criminal proceedings when it held a hearing that he did not attend; and (2) denied him the right to represent himself when he unequivocally waived his right to counsel. We hold that Marquart waived his right to be present and that the record supports the District Court's conclusion that Marquart did not unequivocally assert his right to represent himself. We therefore affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 This case arises from an order of protection that Marquart's estranged wife Crissy obtained against him in June 2015 following their separation. The order of protection required Marquart to stay 300 feet away from her residence. The procedural history is dense, complicated by multiple substitutions of court-appointed attorneys, two substitutions of judge after Marquart filed civil suits against the first two judges, and the District Court's orders for psychological evaluations on the State's motions. We summarize the facts relevant to the issues on appeal.

¶3 On December 24, 2015, Crissy came home to find Marquart's truck parked on her property. Crissy called the police and waited in her car while Marquart carried boxes from the shop building to his truck. Once Marquart had left the property, she went into

the shop and noticed items of property were missing. On January 4, 2016, the State charged Marquart with burglary, a felony, along with violating an order of protection and theft, both misdemeanors.

¶4 The court convened the initial appearance on January 8, 2016. Marquart's first court-appointed attorney was present, but because Marquart failed to appear, the court rescheduled the hearing. In a January 10, 2016 letter to the Clerk of the District Court, Marquart, who had served in law enforcement for nearly twenty years, indicated that he had met with his attorney and resolved to represent himself moving forward. The State's response to Marquart's letter indicated it planned to request a mental health evaluation and believed that Marquart required standby counsel. Marquart's attorney filed a motion to withdraw on January 14, 2016.

¶5 Marquart and his court-appointed attorney appeared at the January 20 rescheduled initial appearance. The court inquired whether Marquart still wished to represent himself, explaining that his court-appointed attorney could serve on a standby basis. Marquart confirmed he was waiving his right to counsel and exercising his right to act as his own attorney. The court dismissed his attorney over the State's objections.

¶6 The District Court then explained Marquart's constitutional rights, the charges against him, and the potential penalties. After confirming that he understood his rights and the charges against him, Marquart entered not guilty pleas to all three charges. Before adjourning, the court urged Marquart to check his mail diligently to avoid missing any upcoming hearings. Two days later, the court issued an order setting an omnibus hearing for February 22, 2016.

¶7 On January 26, 2016, County Attorney Thomas Meissner filed a Motion for Mental and Physical Examination of Marquart, questioning his fitness to proceed and indicating the State's plan to offer testimony at a mental competency hearing. Meissner filed a Notice of Hearing for Friday, February 16, 2016, at 3:00 p.m., and served Marquart with both the motion and notice on January 26, 2016.

¶8 On February 12, four days before the competency hearing, Marquart emailed Clerk of District Court Phyllis Smith, asking whether there was another court-ordered hearing between then and the February 22 omnibus.[1] Clerk Smith informed Marquart that the County Attorney's request was sufficient and no court order was necessary. Meissner, whom Marquart had copied, responded via email, "You have been provided with notice of the hearing scheduled for Tuesday, February 16th at 3:00. You need to be there." A lengthy email exchange between Marquart, Meissner, and Clerk Smith ensued. Marquart objected to the hearing on the grounds that Meissner lacked authority to set a hearing and require Marquart's presence. He requested an order from the District Court setting the February 16 hearing, stating he would comply with a court order. Meissner responded that it is standard practice for counsel to "notice up" hearings. He further warned, "If you are not there, I will ask the Court to either proceed without you or issue an arrest warrant. The hearing is for a significant issue. You need to be there." In one follow-up email, Clerk Smith informed Marquart: "If you fail to show up on Tuesday,

[1] In a previous email communication, Clerk Smith had requested that Marquart desist from emailing filings to the District Judge. She instructed Marquart to file documents with the Clerk of Court, or "[a]ny document that you want to file electronically needs to be sent to my e-mail address."

February 16, the Judge will issue a Warrant for your arrest I am sure. You need to show up on Tuesday and the Judge will explain to you the process and that you did have proper notice." Meissner subsequently emailed Clerk Smith, asking her to request the District Judge to issue an order setting the hearing, but neither Clerk Smith nor the court responded.

¶9 Marquart did not attend the February 16 hearing on the State's motion for a mental health examination. Because the court had granted his request to proceed pro se and discharged his first court-appointed attorney, no counsel appeared on his behalf. The court conducted the hearing in Marquart's absence. Meissner requested that the court issue a warrant for Marquart's arrest. He then called three witnesses: Marquart's mother Edna Bergstrom, Crissy, and the Marquarts' daughter Carley. Edna, Crissy, and Carley testified to recent changes they perceived in Marquart's stability and mental health. The District Court ruled that Marquart must undergo both mental health and physical evaluations.[2] The court also granted Meissner's specific request that Dr. Dee Woolston conduct the evaluation; issued a warrant for Marquart's arrest pursuant to Meissner's request; and ordered that the email correspondence between Marquart, Clerk Smith, and Meissner be lodged in the court file. The court followed up with a written order the next day, explaining:

> The defendant was not present. . . . The record shows that the defendant was served with an Amended Notice of Hearing on January 28, 2016, setting the hearing on the State's Motion for a Physical and Mental

[2] The court later withdrew the ordered physical evaluation but ordered a second psychological evaluation on the State's motion. Aside from his right-of-presence argument, Marquart does not challenge these evaluations on appeal.

> Examination. The court was advised that the defendant had been in e-mail communication with the Clerk of Court about this hearing. In this e-mail communication, the defendant acknowledged the date and time of the hearing, and was advised by Ms. Smith that he needed to attend the hearing. However, the defendant advised Ms. Smith that he would not attend the hearing, because the hearing was not set by way of Court order, signed by the undersigned, but instead was set by the County Attorney by way of a Notice of Hearing.
>
> It is standard practice in this jurisdiction and many others that hearings are called before the Court by issuance of notices of hearing, signed by counsel. Simply because this court did not set the hearing, by signing an order, is no excuse or justification for the defendant's refusal to attend the hearing.

¶10 Marquart was arrested and detained at the Fergus County Jail on February 20. Dr. Dee Woolston conducted the court-ordered psychological evaluation of Marquart in the county jail on February 26. Dr. Woolston concluded that Marquart did not require a medical examination and that he presented no imminent danger to himself or others. Dr. Woolston opined that Marquart "may be diagnosed as having Delusional Disorder, Persecutory Type," a condition characterized by well-organized but rigid false beliefs that may interfere with the person's day-to-day functioning. He concluded, however, that "there are no indications of active psychosis that might interfere with his judgment[]" and opined that Marquart was fit to proceed.

¶11 On March 28, 2016, the State moved to have counsel appointed, arguing that standby counsel alone was not "tenable because the defendant suffers from a mental disorder." Marquart reasserted his right to self-representation via handwritten motions, ex parte letters to the court, and during two court hearings on March 25 and April 28. During the March 25 hearing, after confirming that Marquart still wished to represent

himself, the District Court addressed Marquart, stating, "[Y]ou're sort of wearing two hats being the defendant and acting as your own counsel." During the April 28 hearing, the court engaged Marquart in the following colloquy:

> MR. MARQUART: I wanted to object to the standby counsel. . . .
>
> COURT: All right on January 20th Mr. Marquart you may remember that this Court informed you of your right to counsel is that correct?
>
> MR. MARQUART: Yes sir.
>
> COURT: And . . . the Court at that time discussed with you the perils of representing yourself. Did the Court do that?
>
> MR. MARQUART: Yes. . . .
>
> COURT: Well I want to go through that one more time because representation by counsel is a fundamental right under the US Constitution and the Montana Constitution. When you waive that right you are taking on some very, very difficult responsibilities. . . . Given all that you do still wish to proceed without an attorney, even standby attorney, which just means that they would be sitting there and if you or the Court felt that it was important for you to get some guidance you could get it? Do you still want to proceed without standby counsel?
>
> MR. MARQUART: I do Your Honor. . . . I knowingly with the knowledge of what you just told me in terms of the perils of what I'm doing I knowingly waive my right to counsel and I want to represent myself.

¶12 Meissner responded that, because "Dr. Woolston thinks that there is an underlying mental health issue," the court should "overrule [Marquart's] wishes and appoint counsel to represent him" despite his "proclamations that he feels he's competent and he understands all of the dangers[.]" The District Court granted the State's motion for appointment of counsel. In its order, the court expressed concern that, "though obviously

intelligent, [Marquart's] delusional thinking prohibited him from making rational choices." Marquart represented himself for the duration of the omnibus hearing.

¶13 From March to December 2016, Marquart was represented by counsel, but he continued to file pro se documents and request substitution of counsel. After one filing in June, in which Marquart argued that he had ineffective counsel, he again stated that he had the right to represent himself but also protested that the court had forced him to proceed without counsel at the omnibus hearing. Marquart moved to strike the omnibus hearing record and schedule a new hearing with counsel present and sufficient time in advance to consult with counsel. The District Court held a hearing the following month at which Marquart's counsel appeared with him. In response to the court's direct inquiry at the outset of the hearing, Marquart stated that he accepted counsel's representation of him at the hearing.

¶14 On December 8, 2016, the week before the scheduled trial, the District Court held a hearing on Marquart's motion to conduct his own defense with the assistance of a new court-appointed attorney as co-counsel. The following colloquy took place:

> COURT: Mr. Marquart is it your intention to want to represent yourself in this matter?
>
> MR. MARQUART: Your Honor it's not my intention to represent myself, but it's my intention to have another attorney. I'm not happy with Mr. Harris and my representation that I'm getting from him. . . .
>
> COURT: Just what is your intention today? Now you communicated that you wanted to represent yourself, now you are telling me that you're dissatisfied with your attorney which is it?
>
> MR. MARQUART: It's a combination of both. In my motion or letter to you Judge I said to you that I was not happy with Mr. Harris in essence I

> wanted to represent myself and I wanted to have an attorney that was effective and that's what I told you. . . .
>
> COURT: So, I'm still not clear. Is . . . your basic request is that you want a change of counsel?
>
> MR. MARQUART: I want a change of counsel and I do not want to continue to my trial that's for sure.

¶15 The District Court denied Marquart's motion. At the December 19, 2016 bench trial, Marquart was represented by his fourth public defender. The District Court found Marquart guilty of all three counts. At a separate sentencing hearing several months later, the District Court imposed six-month deferred sentences for the misdemeanors and a one-year deferred sentence for the felony, all to run concurrently. This appeal followed.

STANDARDS OF REVIEW

¶16 Our review of constitutional matters, including the right to be present at all critical stages of one's criminal proceedings, is plenary. *State v. Heavygun*, 2011 MT 111, ¶ 7, 360 Mont. 413, 253 P.3d 897 (citing *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934). We indulge in every reasonable presumption against waiver of a fundamental constitutional right. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 18, 396 Mont. 57, 443 P.3d 504 (citations omitted). The validity of a defendant's waiver of the right to counsel is a mixed question of law and fact reviewed de novo. *State v. Barrows*, 2018 MT 204, ¶ 9, 392 Mont. 358, 424 P.3d 612. "Where there is a question whether a defendant has waived [his] right to counsel, we will not disturb the district court's findings 'as long as substantial credible evidence exists to support that decision.'"

City of Missoula v. Fogarty, 2013 MT 254, ¶ 10, 371 Mont. 513, 309 P.3d 10 (citations omitted).

DISCUSSION

¶17 We address briefly the State's contention that Marquart's appeal is moot. The State points out that Marquart has fulfilled the conditions of his deferred sentence and is entitled to seek dismissal of his charges pursuant to § 46-18-204, MCA. An order of dismissal, according to the State, would preclude access to any records related to Marquart's charge without a district court order. Marquart responds that law enforcement agencies, district courts, and third parties who obtain a court order could still access his convictions.

¶18 "A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Walker v. State*, 2003 MT 134, ¶ 40, 316 Mont. 103, 69 P.3d 872. Marquart served in law enforcement for nearly twenty years prior to these criminal proceedings. His convictions and deferred sentences have the potential to impact his future job prospects or work to his detriment in a court of law. Accordingly, we address the merits of Marquart's claims.

¶19 *1. Did the District Court violate Marquart's constitutional right to be present at a critical stage of his criminal proceedings when it held the February 16, 2016 hearing in his absence and without defense counsel?*

¶20 Marquart argues that the District Court violated his constitutional right to be present at a critical stage of his criminal proceedings by conducting the February 16, 2016 mental competency hearing in his absence. The State argues that Marquart waived

his right to be present by choosing not to appear despite receiving a Notice of Hearing and being admonished by Meissner and Clerk Smith that his attendance was mandatory.

¶21 The United States and Montana constitutions both guarantee a defendant's right to be present at all critical stages of the proceedings against him. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *Heavygun*, ¶ 11. *See also State v. Tapson*, 2001 MT 292, ¶¶ 14-15, 307 Mont. 428, 41 P.3d 305. A critical stage is any step of the proceeding where there is potential for substantial prejudice to the defendant. *Heavygun*, ¶ 12.

¶22 Waiver is the voluntary abandonment of a known right. *State v. McCarthy*, 2004 MT 312, ¶ 32, 324 Mont. 1, 101 P.3d 288 (citations omitted). A defendant may waive his fundamental right to be present either: (1) by failing to appear; or (2) through an express personal waiver. *McCarthy*, ¶ 32 (citing *Tapson*, ¶ 24). "A defendant who voluntarily fails to appear waives her right to be personally present." *State v. Bekemans*, 2013 MT 11, ¶ 25, 368 Mont. 235, 293 P.3d 843 (citing *McCarthy*, ¶ 32). "An absence is voluntary if the defendant knew of the hearing and failed to appear due to circumstances within his control." *Bekemans*, ¶ 25 (*citing State v. Clark*, 2005 MT 169, ¶ 16, 327 Mont. 474, 115 P.3d 208).

¶23 In *Bekemans*, the district court scheduled a show-cause hearing following Bekemans's request that her court-appointed counsel withdraw. *Bekemans*, ¶ 15. The court mailed Bekemans a notice stating her attendance was mandatory. *Bekemans*, ¶ 15. Bekemans nonetheless failed to attend the hearing, later citing scheduling conflicts. *Bekemans*, ¶¶ 15, 26. Her attorney was present, however, and persuaded the court to reschedule the hearing for a later date, which Bekemans attended. *Bekemans*, ¶ 16.

Bekemans was subsequently convicted. She appealed, arguing that the district court violated her right to be present. *Bekemans*, ¶ 26. Observing that the district court had mailed Bekemans a notice of the scheduled hearing and that she could have asked her attorney to request a continuance, we concluded that "Bekemans was not denied her right to be personally present at the [] hearing by anyone but herself. Bekemans voluntarily failed to appear at the [] hearing and thus waived her right to be personally present." *Bekemans*, ¶¶ 26-27.

¶24 We conclude that Marquart similarly waived his constitutional right to be present by voluntarily failing to attend the February 16 hearing on his fitness to proceed. Meissner served Marquart a Notice of Hearing, and Marquart acknowledged receipt of the notice. When Marquart questioned Meissner's authority to "notice up" a hearing, both Meissner and Clerk Smith informed Marquart that this was standard practice in Fergus County, that his presence was required, and that failure to appear could result in his arrest.

¶25 Marquart contends that he "was never specifically told by the county attorney, the clerk, or the district court that . . . a full-blown evidentiary hearing [on his mental competency] would be held in his absence[]" or that his mother, wife, and daughter would testify against him. But the State explicitly stated in its motion the prosecutor's intent to present testimony at the competency hearing. Marquart not only received the motion but also filed a response to it, arguing in part that spousal communications are privileged and noting his intent to offer a redacted mental health assessment "at a hearing." Marquart had demonstrated his attentiveness to the proceedings and a keen

understanding of his rights. Prior to February 16, Marquart had attended a hearing and properly filed and served coherent motions supported by legal authority. Marquart then inquired of the Clerk about upcoming hearings prior to the scheduled February 22 omnibus hearing. Instead of filing a motion or making his argument in court, Marquart simply rejected instructions about the hearing notice from the Clerk—an officer of the court—and voluntarily chose not to attend. Like Bekemans, Marquart was not denied his right to be present by anyone but himself.

¶26 Because we hold that Marquart voluntarily waived his right to be present, we need not address whether the competency hearing was a critical stage or whether Marquart suffered prejudice as a result of his absence. *See, e.g.*, *Bekemans*, ¶¶ 25-27 (holding, without considering the critical stage and prejudice factors, that Bekemans waived her right to be present by failing to appear); *McCarthy*, ¶¶ 29-35 (holding, without considering the critical stage and prejudice factors, that the defendant effectuated an express written waiver of his right to be present).

¶27 *2. Did the District Court violate Marquart's constitutional right to represent himself?*

¶28 The Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution guarantee a criminal defendant the right to assistance of counsel and the corollary right to conduct his or her own defense. *Faretta v. California*, 422 U.S. 806, 817, 95 S. Ct. 2525, 2532 (1975); *State v. Langford*, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994). Waiver of the right to counsel—known as a *Faretta* waiver—must be knowing, voluntary, intelligent, and unequivocal. *Fogarty*, ¶ 12; *Langford*, 267 Mont.

at 99, 882 P.2d at 492. We review the entire record to determine whether the district court had substantial credible evidence to support its ruling on a *Faretta* waiver. *Fogarty*, ¶ 13.

¶29 The District Court initially granted Marquart's unequivocal request to represent himself. It reconsidered several months later based on Dr. Woolston's explanation of Marquart's delusional disorder. By then, the third District Judge was presiding in Marquart's case because of Marquart's civil suits against the previous two presiding judges. Marquart also had filed a civil lawsuit against the prosecutor—which Marquart argued should result in the prosecutor's disqualification. Marquart correctly observes that a court may not deny a defendant's request to represent himself because he would not do so adequately. *State v. Swan*, 2000 MT 246, ¶ 18, 301 Mont. 439, 10 P.3d 102. But the court's comment about Marquart's ability to make "rational choices" reflects a concern about his capacity to make an intelligent waiver of the right to counsel.

¶30 The State argues that Marquart thereafter equivocated and then "completely abandoned his request to represent himself at the December 8, 2016 pretrial hearing." He stated at that hearing, "I want a change of counsel" and did not renew his request to proceed pro se. Marquart responds that his statements at the December 8 hearing did not constitute equivocation; rather, after the District Court's repeated denial of his requests to proceed pro se and with only a week to go before trial, Marquart had acquiesced to court-appointed representation.

¶31 We have recognized that when a defendant mixes his requests to represent himself with expressions of displeasure with counsel and requests for a new attorney, the trial

court is justified in maintaining counsel's appointment to represent the defendant. In *Swan*, ¶ 10, during a hearing on Swan's motion to dismiss his counsel, the defendant answered, "Yes, I do" to the court's question, "Do you want to represent yourself?" But he also stated in his written motion, "[I]f this court deems that an attorney be assigned to this case then the defendant respectfully requests that [his appointed attorney] be dismissed and that new counsel be assigned as co-counsel and be there for advice, and to ensure proper court guidelines are followed." *Swan*, ¶ 20. Upon review of the entire record, we concluded that "Swan's was an in-the-alternative request for self-representation." *Swan*, ¶ 19. In *Barrows*, we concluded likewise that, although the defendant made one unequivocal request to represent himself, the record on the whole supported the trial court's determination that Barrows "did not really want to represent himself." *Barrows*, ¶ 21. "Instead, Barrows desired not to have his appointed legal counsel represent him." *Barrows*, ¶ 21.

¶32 We distinguished in *Swan* a Ninth Circuit ruling that a trial court erred in refusing a defendant's request to waive counsel when there was "no evidence on the record that indicate[d the defendant] ever changed his mind about his decision to represent himself." *Swan*, ¶ 21 (citing *United States v. Arlt*, 41 F.3d 516, 523 n.5 (9th Cir. 1994)). We observed that the Ninth Circuit's later decision in *United States v. Hernandez*, though reaching a similar conclusion, acknowledged that "in some instances the failure of a defendant to renew a self-representation request will provide support for the conclusion that the request was equivocal." *Swan*, ¶ 23 (quoting *United States v. Hernandez*, 203 F.3d 614, 623 (9th Cir. 2000)). *See also Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir.

1994) ("Once asserted, however, the right to self-representation may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether."); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (holding defendant waived his right to self-representation where, after the initial hearing, he never informed the court of his continuing desire to conduct his own defense, and an opportunity to renew his request was available until the day before trial).

¶33 Although there are factual dissimilarities between the record here and those we examined in *Swan* and *Barrows*, we conclude that a review of the entire record through the lens of the relevant legal authority supports a conclusion that Marquart was not unequivocal. He asked for substitute counsel on several occasions and, by the time the matter got to trial, he told the court directly that he did not intend to represent himself. He advised the court that his letter to the judge said, "[I]n essence[,] I wanted to represent myself and I wanted to have an attorney that was effective[.]" When the court inquired further, Marquart said, "I want a change of counsel." In light of Marquart's vacillating requests, culminating in these statements on the eve of trial, it was reasonable for the District Court to deny Marquart's request to proceed to trial pro se.

¶34 We caution that a defendant is not obligated to continually reassert a desire to represent himself once he has "stated his request clearly and unequivocally and the judge has denied it in an equally clear and unequivocal fashion." *Arlt*, 41 F.3d at 523. As the Ninth Circuit explained:

> To impose such a requirement on defendants would lead to an absurd result: the constant burdening of district judges with fruitless motions designed to prove what has already been established – that the defendant

> desires to represent himself. Once the defendant has met his burden of making a clear and unequivocal request, he is entitled to accept the judge's ruling as final and to take all proper steps he deems necessary to obtain the best possible defense.

Arlt, 41 F.3d at 523-24. *See also Hernandez*, 203 F.3d at 622 ("Where it is reasonable for a defendant to believe that a further request would be pointless, we have rejected any suggestions that a defendant must renew his request to represent himself."). Here though, in contrast to *Arlt*, the District Court asked Marquart point-blank whether he wished to represent himself or to obtain new counsel, and Marquart said it was not his intention to represent himself. On review of the record as a whole, we conclude that substantial credible evidence exists to support the District Court's determination that Marquart did not intend to represent himself. Consequently, the District Court did not violate Marquart's constitutional right to do so.

CONCLUSION

¶35 The District Court did not violate Marquart's constitutional rights to be present at all critical stages of his proceedings and to act as his own attorney. The judgment is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶36 Had the District Court and County Attorney followed rules of law designed to ensure the protection of basic constitutional rights, Crissy and Michael Marquart may have been able to pick up the pieces and, as Crissy explained, "move forward as a family whatever that looks like." Instead, Marquart's fundamental right to self-representation was repeatedly denied; several unwanted mental and physical evaluations were performed—despite Marquart having been found competent and fit to proceed each time—and Marquart was detained 14 months, in both a local jail and a state mental hospital, for a simple and low-level criminal charge. At her husband's sentencing hearing, Crissy said the biggest mistake she made was asking the county for help. After it was all over, Marquart received a deferred sentence of two years. All of this, in the name of unwanted benevolence.

¶37 I dissent. Given the Court's stunted recitation of the record, it is necessary to more completely explain the factual and procedural history in this case.

a. Factual and Procedural Background

¶38 After being married for nearly twenty years, Crissy and her husband, Michael Marquart, began having marital problems following Marquart's termination from employment with the Department of the Interior in Nevada. Marquart, who has no criminal record and a master's degree in criminal justice, was employed as a Ranger and earning $120,000 a year when he was terminated. Marquart's termination was extremely difficult and emotionally stressful. The family returned to Montana and Marquart took a job with the Montana Mental Health Nursing Facility as a correctional officer. Including

five years as a Fergus County Sheriff's Deputy prior to his federal employment, Marquart had over twenty years of law enforcement experience which Crissy characterized as "unblemished." At the time of the offense on December 24, 2015, they were raising four teenage children.

¶39 Crissy had obtained an order of protection against Marquart in June 2015. Those proceedings have not been made part of this record. However, Crissy later testified at Marquart's sentencing hearing that "if I had any idea that that stupid restraining order would've gotten us here today there is no way I would've taken it out. Never would've done it. I did it on the basis of believing that . . . that it would force Michael to get help and I thought that was in his best interest and I don't feel . . . I don't feel that way [now]." Crissy testified that her primary motivation for getting the order of protection was "absolutely" to get counseling for Michael; that none of the family were "victims"; and that "no, I don't believe that we were in any physical danger."

¶40 Marquart first asserted his desire to waive his right to counsel and proceed as his own attorney in a letter filed with the District Court on January 12, 2016. The State responded, questioning whether the District Court should permit Marquart to represent himself and expressing the need for a mental and physical examination. In my opinion, this was the State's first attempt to pursue, on Crissy's behalf, the help Crissy thought Marquart needed. Based on Marquart's expressed desire to waive his constitutional right to counsel, the Office of the State Public Defender ("OPD") filed a motion to withdraw on January 14, 2016.

¶41 At Marquart's initial appearance and arraignment on January 20, 2016, Marquart again requested he be allowed to represent himself. The District Court responded: "you are telling me you're gonna waive counsel and represent yourself is that what you intend to do?" to which Marquart responded, "Yes, Your Honor." The District Court then granted OPD's motion to withdraw as Marquart's counsel, and Marquart represented himself throughout the remainder of his arraignment. In its January 22, 2016 order following the arraignment, the District Court stated, "It appears to the Court that Mr. Marquart is fully advised of the consequences of self-representation, and is insistent that he be allowed to represent himself. The Court will honor his request, but may require he have counsel at a later time."

¶42 On January 26, 2016, the State filed a Motion for a Mental and Physical Examination and Notice of Hearing, to which Marquart objected. The State averred that there was "probable cause to believe that the defendant suffers from the mental disorder of schizophrenia, and as a result may not be fit to proceed in this matter." The State also requested that Marquart submit to an "MRI or brain scan to rule out any physiological reason for the defendant's mental condition." The District Court never ruled on the County Attorney's motion or Marquart's objection. Marquart repeatedly requested through emails that the County Attorney or Clerk of Court provide him with the District Court's order resolving the State's motion and his accompanying objection. On February 12, 2016, in response to Marquart's email requests, the Clerk of Court advised Marquart that the proper "procedure to get the motion before the court is for the moving party (i.e. County Attorney) to set a hearing and that is what has happened in your [Marquart's]

case." The Clerk of Court further advised Marquart that: "The District Court Judge does not need to issue a Court Order for you to appear." The County Attorney responded to the email exchange between Marquart and the Clerk of Court, asking the Clerk of Court: "Would Judge Oldenburg consider entering an order requiring [Marquart] to appear next Tuesday[, February 16]?" Presumably the District Court was not made aware of Marquart's objections or the County Attorney's inquiry because the District Court never entered an order setting the matter for hearing.

¶43 Pausing for a second from the factual and procedural background of this case, it is necessary to evaluate from a legal standpoint the practice of a party "noticing up" hearings. I am, first, concerned that a Clerk of Court would have this sort of involvement and role in a court proceeding. Section 3-5-501, MCA, sets out the general duties of district court clerks, which includes the responsibility to "(1)(c) issue all process and notices required to be issued" and to "(1)(d) enter all orders, judgments, and decrees proper to be entered." The statute does not charge the Clerk of Court with dictating the procedure to get a motion before the court or with issuing orders; nor does the statute equate the issuance of notices with entry of orders. Second, neither informal email communication with Marquart, nor the County Attorney's notice filing, has the same force and authority as issuance of an order setting a hearing. While the practice in some judicial districts may be that a county attorney, public defender, or other party may "notice up" a hearing, the issue arises, as here, what force and effect a "notice" has when a party does not appear? Further, if it were true that the State could effectively issue an order by "noticing up" a hearing, does the State then have the reciprocal power to cancel,

or dictate the terms of, that same hearing? *See Coate v. Omholt*, 203 Mont. 488, 494, 662 P.2d 591, 594-95 (1983). If the proper procedure was, as the Clerk of Court advised Marquart in email exchanges, "for the moving party . . . to set a hearing" in order to get a motion before the District Court, would the County Attorney and District Court Judge be required to attend a hearing "noticed up" by Marquart?

¶44 While a judicial district may have a practice of allowing a party to a proceeding the luxury of disposing of a court's calendar in this manner, it is simply not within the enumerated powers of a judicial officer to enforce, through issuance of an arrest warrant, unofficial email correspondence between a clerk of court, a self-representing criminal defendant, and a county attorney. It *is*, however, within a judicial officer's powers to "compel obedience to the officer's official *orders* as provided in th[e MCA]." Section 3-1-402, MCA (emphasis added). I disagree with this Court when it concludes Marquart was required to appear for the hearing in the absence of a court order, and when he failed to do so his presence was waived. The question is, first, whether a court may conduct a hearing ex parte when neither the defendant nor counsel have been ordered to appear; and, second, whether the court may issue an arrest warrant when the defendant's appearance has not been compelled through an order. While perhaps "business as usual" works for the majority of cases, the events which followed demonstrate why "business as usual" may not always work or provide a basis from which a court may legitimately exercise its authority.

¶45 Not surprisingly, Marquart did not appear for the February 16, 2016 hearing "noticed up" by the State. Marquart represented that he had previously appeared for

hearings when the court issued an order requiring him to be there but maintained the County Attorney's response "that it was standard practice for counsel to 'notice up' hearings" did not provide statutory authority requiring his appearance. While I do not condone Marquart's nitpicking actions, in my opinion he was legally correct. Nonetheless, and despite that Marquart was acting as his own counsel, the District Court held a hearing—essentially an ex parte hearing—because the defense had neither an attorney nor the defendant present. During this hearing, the District Court considered highly inflammatory evidence from three State's witnesses concerning "probable cause" for requiring Marquart to undergo a mental and physical examination: Crissy, Marquart's mother, and Marquart's daughter. All testified that they wanted their husband, son, and father, respectively, to get the "help" and mental health counseling that, according to their testimony, he so very much needed. As a result, the District Court ordered a mental health exam and, pursuant to a request made by the State, issued a warrant for Marquart's arrest on the basis that he did not appear at a hearing "noticed up" by the State. Marquart was arrested four days later on a "no bail" warrant. His initial bond of $50,000 was revoked and the District Court rejected Marquart's request for release, ultimately keeping Marquart's bail at $50,000.

¶46 After conducting the mental examination, the evaluating psychologist, Dr. Woolston, filed his report with the District Court on March 11, 2016. In the report, Dr. Woolston opines: "Mr. Marquart is fit to proceed. . . . I find him to be a bright, rational person who has an unusually detailed knowledge of legal proceedings for a non-attorney. . . . [T]here are no indications of active psychosis that might interfere with

his judgment." Dr. Woolston noted that "Mr. Marquart *may be* diagnosed as having a Delusional Disorder, Persecutory Type" (emphasis added). However, "the behavior that led to the current criminal charges cannot be described as being the direct product of the Delusional Disorder." While Marquart "might have been influenced by his persecutory beliefs," Dr. Woolston stated that he "do[es] not believe that [Marquart] was unable to conform his behavior to the requirements of the law." Dr. Woolston declined recommending that Marquart undergo a physical examination.

¶47 Again, I pause from the factual and procedural background to note the complete picture of these proceedings. In addition to a period of involuntary detention at the Montana State Hospital, Marquart remained incarcerated in the local jail for 14 months while the State sought "help" for an "as-yet-to-be-substantiated" mental health condition. Later, a remorseful Crissy would testify at Marquart's sentencing that she and her children were never "victims" and that "[h]e's been incarcerated for 14 months. It's not something that I can wrap my mind around. I don't know . . . other than him I don't think anybody in this room can understand what it's like to lose your freedom in that respect." I similarly cannot "wrap my mind around" these proceedings. But it gets worse.

¶48 Following more pro se motions by Marquart, the State again asked to have counsel appointed. In its March 28, 2016 motion, the State contended the *possibility* Marquart may have a delusional disorder prevented Marquart from representing his own interests because "[w]hile a competent person has the right to represent himself, a person with a mental disorder does not" since a mental disorder "prevents him from making rational and intelligent decisions." The State's unsupported opinion that Marquart could not

make rational and intelligent decisions concerning his choice to represent himself directly conflicted with the State's own expert, Dr. Woolston, who opined Marquart was "a bright, rational person who has an unusually detailed knowledge of legal proceedings for a non-attorney." Marquart, as this Court recognizes, repeatedly "reasserted his right to self-representation via handwritten motions, ex parte letters to the court, and during two court hearings on March 25, and April 28[, 2016]," where he successfully objected to the admittance of testimony based on spousal privilege, medical opinion, and hearsay. Opinion, ¶ 11.

¶49 At the omnibus hearing on April 28, 2016, Marquart—unquestionably and unequivocally—asserted a waiver of his right to counsel during the District Court's colloquy: "I knowingly and with the knowledge of what you just told me in terms of the perils of what I'm doing I knowingly waive my right to counsel and I want to represent myself." Notwithstanding Marquart's clear waiver, the District Court granted the State's motion for appointment of counsel based on the State's selective reading of Marquart's psychological report and *State v. Dawson*, 2006 MT 69, 331 Mont. 444, 133 P.3d 236, a death penalty case discussing what standard should be used "in deciding whether a person under a sentence of death has the required mental competence to waive his right to further judicial review." *Dawson*, ¶ 19. Despite the District Court's ruling requiring appointment of counsel, remarkably, the District Court elected to complete the remainder of the hearing with Marquart representing himself because it was "just an omnibus." In its ensuing order, the District Court agreed with the State's assertion: "While a competent person has the right to represent himself, a person with a mental disorder does not,"

seemingly deducing that the possibility of having a mental disorder automatically renders a defendant incompetent enough to be unable to represent himself, but not so incompetent that he cannot be tried for the crime.

¶50 On June 13, 2016, the State requested a *second* mental examination and a physical examination of Marquart, to obtain an MRI brain scan and lab work which the State had originally requested but withdrew upon Dr. Woolston's report declining to recommend a physical examination of Marquart. The District Court denied the State's request for a second mental evaluation on July 13, 2016, but approved its request for a physical examination. The basis for the court's written denial was that the "State has not articulated any reasons why the [previous mental] examination d[id] not satisfy the Court's responsibility under [§] 46-14-206, MCA or why it is insufficient from any other perspective." However, the District Court left open the possibility to reconsider its decision upon "a new Motion after appropriate argument." Thereafter, during the July 21, 2016 pretrial hearing, Marquart's appointed counsel asserted that he found Marquart fit and competent to represent himself, and that it would be proper, if the court found Marquart was not fit and competent, for the court to dismiss the charges rather than subjecting Marquart to ongoing psychological and physical testing over a simple and low-level criminal charge. The District Court then reversed its July 13, 2016 order, and granted the State's motion for a second mental examination of Marquart along with the physical examination for blood work and an MRI, because the State wanted "a second opinion."

¶51 After several weeks at the Montana State Hospital, a second mental examination report on Marquart was filed with the District Court on November 16, 2016. In this report, Marquart was again deemed "fit to proceed," and was declared to not suffer "from a mental disease as defined by" § 53-21-102, MCA, or "developmental disability as defined in" § 53-20-102, MCA. It was noted that Marquart might be a difficult client to represent and there likely would be ongoing difficulty in the court process because Marquart had a distrust and suspiciousness of others that they were exploiting or deceiving him. At this point, Marquart had undergone two mental health evaluations, each confirming he was competent and fit to proceed; a physical examination, including blood work and an MRI; involuntary detainment at the Montana State Hospital for several weeks; incarceration for nearly a year in the local jail on a $50,000 bail, following an arrest for failing to appear at a hearing "noticed up" by the County Attorney; and had his unequivocal and clear requests to exercise his constitutional right to self-representation repeatedly denied by the court. Based on this record, in conjunction with the State's benevolent persistence in pursuing unwanted mental health treatment and appointment of counsel, I am not sure Marquart's suspicions were misplaced.

¶52 In addition to the clear and unequivocal assertions of his constitutional right to represent himself in the record, Marquart further indicated that he wished to represent himself: (1) by filing a writ for supervisory control to this Court in which Marquart's appointed counsel argued that Marquart was competent and had a state and federal constitutional right to represent himself at trial; (2) by continuing to file pro se motions with the court although he was represented by counsel; (3) at the July 21, 2016 hearing,

during which Marquart's appointed counsel asked to withdraw and stated that Marquart repeatedly raised concerns about having counsel represent his interests when he wished to represent himself; and (4) at the November 29, 2016 hearing, in which Marquart wished to address the court directly but was rejected because of the presence of appointed counsel.

¶53 The Court ignores this record and fixates on a single hearing held a week before Marquart's trial, finding at last that Marquart expressed some equivocation. To be clear, Marquart, on December 1, 2016, again asserted his right to self-representation via pro se motion to the court. In response, the District Court issued an order on December 8, 2016, stating, "[T]he Defendant requested that he be allowed to represent himself, with stand-bye [sic] counsel. A hearing on that issue is scheduled for December 8, 2016. This request for self-representation is the latest in a series which the Court has previously rejected and responded to by requiring counsel." At the hearing, the court asked Marquart if it was his intention to represent himself. Marquart replied, "Your Honor it's not my intention to represent myself, but it's my intentions to have another attorney. I'm not happy with [the court-appointed attorney] and my representation that I'm getting from him." Upon further discussion, the court asks, "Just what is your intention today? Now you communicated that you wanted to represent yourself, now you are telling me that you're dissatisfied with your attorney which is it?" Marquart responded, "It's a combination of both. In my motion or letter to you Judge I said to you that I was not happy with [the court-appointed attorney] in essence I wanted to represent myself and I wanted to have an attorney that was effective and that's what I told you."

¶54 My review of the record leads me to conclude that Marquart, except for a three-month period between January 20, 2016, and April 28, 2016, where he represented himself, was denied his constitutional right of self-representation. My conclusion is based on Marquart's repeated, indeed incessant, demands to exercise his constitutional right of self-representation for the entire period preceeding his trial.

b. Discussion

¶55 I will focus primarily on Marquart's right of self-representation because it clearly was violated and requires reversal of his conviction. In doing so, however, I do not want to overlook the error of conducting an evidentiary hearing in Marquart's absence and then issuing a warrant when there was no order requiring his appearance. Essentially, the District Court conducted an ex parte hearing where it received uncontroverted, damning evidence of Marquart's actions which the County Attorney believed would substantiate the need for a mental health examination.

¶56 Although § 46-14-202, MCA, requires a trial court judge to grant a motion requesting a mental examination of a defendant,[1] other discretionary matters pertaining to a defendant's mental examination and accompanying report remain within the trial

[1] In *State v. Campbell*, 278 Mont. 236, 251-52, 924 P.2d 1304, 1314 (1996), we reviewed a criminal defendant's claim that § 46-14-202(1), MCA, places an affirmative duty on the trial court to "enforce" its order granting a written motion for an examination. While enforcement is not presently in question because the District Court failed to order a hearing or examination prior to February 16, 2016, the *Campbell* Court's analysis of the language of § 46-14-202, MCA, illustrates the mandatory requirement for district courts upon written motion for a mental competency examination. *See Campbell*, 278 Mont. at 252, 924 P.2d at 1314.

judge's purview pursuant to § 46-14-206, MCA.[2] Under this statutory scheme, a trial court has several options upon the filing of a motion requesting a mental fitness examination by the defendant or defendant's counsel, or if the issue of the defendant's fitness to proceed is raised by the court, prosecution, or defense counsel. *See* §§ 46-14-202, -206, MCA. At the very least, the trial court is required to issue an order appointing a qualified practitioner "to examine and report upon the defendant's mental condition." Section 46-14-202(1), MCA. The basic requirements for the contents of this report are found in § 46-14-206(1)(a)-(c), MCA. At this point, the trial court may choose to direct the practitioner conducting the examination to include in their report those discretionary matters in § 46-14-206(1)(d)-(e), MCA, in addition to the basic requirements in § 46-14-206(1)(a)-(c), MCA. Alternatively, the trial court may opt, as it did here, to hold a preliminary hearing on the motion, wherein each side puts on evidence to assist the court in deciding whether to require those discretionary subjects to be included in the examination report. Section 46-14-206(1)(d)-(e), MCA. Importantly, although § 46-14-202, MCA, *does* require the trial judge to appoint a qualified practitioner to evaluate a defendant's mental fitness when raised by motion or otherwise, the statutes *do not* require the trial court to hold a preliminary hearing on the matter. Whether or not to issue an order appointing a practitioner to conduct and report on the mental examination

[2] Section 46-14-206(1)(d)-(e), MCA, provides: "(1) A report of the examination must include the following: . . . (d) *when directed by the court*, an opinion as to the capacity of the defendant to have a particular state of mind that is an element of the offense charged; and (e) *when directed by the court*, an opinion as to the capacity of the defendant, because of a mental disease or disorder or developmental disability, to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law" (emphasis added).

straight away, or to first issue an order scheduling a preliminary hearing on the defendant's mental examination prior to ordering the appointment of a practitioner, remains within the province of the trial court.

¶57 Accordingly, conducting the hearing in the absence of a defendant and counsel implicate the constitutional right to be present and the constitutional right to self-representation, each with different analytical frameworks. However, under either analysis, a determination must be made whether the preliminary hearing for a mental health examination was a critical stage of the proceeding. By jumping to a waiver analysis, the Court acknowledges that the February 16, 2016 preliminary hearing on mental competency was a critical stage of the proceedings. Opinion, ¶ 22. Otherwise, if the preliminary competency hearing was deemed to be outside the critical stages of the proceedings against Marquart, then Marquart would not have a constitutional right to be present, and no waiver of the right could have occurred; for there is no constitutional right to be present at non-critical stages of the proceedings. This is, after all, the reason for distinguishing between critical and non-critical stages. *See State v. Roedel*, 2007 MT 291, ¶ 59, 339 Mont. 489, 171 P.3d 694 ("We have determined that a defendant's fundamental right to be present at the proceedings applies without exception only to those stages deemed critical."). I agree with the Court that because of the circumstances that transpired, this was a critical stage of the proceeding. Having so concluded, I would find that Marquart was prejudiced when the hearing was conducted in his absence for the simple reason that it led to his subsequent incarceration for the remainder of the case. Here, however, I would conclude the more easily resolved error, and one that requires

reversal, is the denial of Marquart's repeated and unequivocal requests to proceed without counsel. I turn now to Marquart's second asserted error: that he was denied his constitutional right to self-representation.

¶58 "The right to assistance of counsel is embodied in the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution. The Sixth Amendment has been interpreted to include a defendant's right to represent himself." *State v. Langford*, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975)). "A person charged with a crime has the constitutional right to proceed pro se." *State v. Swan*, 2000 MT 246, ¶ 16, 301 Mont. 439, 10 P.3d 102 (citing *State v. Woods*, 283 Mont. 359, 372-73, 942 P.2d 88, 96 (1997); *Faretta*, 422 U.S. at 819, 95 S. Ct. at 2532). "This Court has stated that before a court may grant a request for self-representation, it must first determine that the defendant's waiver of the right to counsel is unequivocal, as well as voluntary, knowing, and intelligent." *Swan*, ¶ 17 (citing *Langford*, 267 Mont. at 99, 882 P.2d at 492).

¶59 I am aware of the serious nature of the inquiry into whether a defendant wishes to waive his right to counsel, and respect authority which obliges "courts [to] indulge in every reasonable presumption against waiver." *United States v. Arlt*, 41 F.3d 516, 520-21 (9th Cir. 1994) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242 (1977)). Before engaging in an examination into whether Marquart's waiver was unequivocal and informed, it is necessary to first address the underlying issue: whether the District Court's ruling as to Marquart's competency was proper.

¶60 The District Court found Marquart was not competent to proceed pro se based on a mental competency report in which Marquart was explicitly found "fit to proceed."[3] The examining psychologist found Marquart "to be a bright, rational person who has an unusually detailed knowledge of legal proceedings for a non-attorney" and discovered "no indications of active psychosis that might interfere with [Marquart's] judgment." In denying Marquart's request to represent himself on this ground, the District Court erred as a matter of law. *See Arlt*, 41 F.3d at 518. The "standard for measuring a defendant's competency to stand trial focuses upon whether 'the defendant has a "rational understanding" of the proceedings.'" *Arlt*, 41 F.3d at 518 (quoting *Godinez v. Moran*, 509 U.S. 389, 397, 113 S. Ct. 2680, 2686 (1993)). "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Arlt*, 41 F.3d at 518 (quoting *Godinez*, 509 U.S. at 399, 113 S. Ct. at 2687) (emphasis in original).

¶61 There is no evidence in the record Marquart was not competent to choose to proceed pro se.[4] *See Arlt*, 41 F.3d at 518. The first psychological examination report's finding that Marquart "may be diagnosed" with a delusional disorder, but that "the current criminal charges cannot be described as being the direct product" of that disorder, along with the psychologist's determination that Marquart was "fit to proceed," does not

[3] As discussed above, Marquart was also found fit to proceed in a second mental competency examination report.

[4] Therein lies the logical fallacy of the majority opinion: if Marquart could competently waive his right to be present at the preliminary mental examination hearing, he possessed the corresponding competency to waive his right to counsel in the ensuing trial. The Court's finding of equivocation by Marquart impliedly upholds the District Court's ruling that Marquart was incompetent to waive his right to an attorney and represent himself.

support the District Court's denial of Marquart's constitutional right to self-representation. Thus, the record does not support the District Court's finding that Marquart was not competent to represent himself.

¶62 Because Marquart was competent to represent himself, his decision to waive his right to counsel in the first instance should be held valid if his request was unequivocal, voluntary, knowing, and intelligent. *City of Missoula v. Fogarty*, 2013 MT 254, ¶ 12, 371 Mont. 513, 309 P.3d 10; *see also Arlt*, 41 F.3d at 519 (citing *United States v. Schaff*, 948 F.2d 501, 503 (9th Cir. 1991)).

¶63 Marquart's request to proceed without counsel was unequivocal. "The requirement that a request for self-representation be unequivocal . . . serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." *Langford*, 267 Mont. at 100, 882 P.2d at 493 (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989)). The Ninth Circuit in *Arlt* best summarized the rule where repeated assertions of the right to proceed pro se are denied and later attempts to defend against the charges are taken:

> [O]nce a defendant has stated his request clearly and unequivocally and the judge has denied it in a[n] equally clear and unequivocal fashion, the defendant is under no obligation to renew the motion. . . . Once the defendant has met his burden of making a clear and unequivocal request, he is entitled to accept the judge's ruling as final and to take all proper steps he deems necessary to obtain the best possible defense.

Arlt, 41 F.3d at 523-24. The trial record clearly demonstrates that Marquart did not vacillate between his decision to represent himself and his right to counsel. In fact, the District Court permitted Marquart to represent himself from his initial appearance on

January 20, 2016, through the omnibus hearing on April 28, 2016. At the April 28, 2016 omnibus, Marquart clearly and unequivocally waived his right to an attorney and again asserted that he wished to continue to represent himself, a request which was denied. The clarity and forcefulness of Marquart's repeated requests demonstrate that he unequivocally articulated his decision to proceed pro se. *See Arlt*, 41 F.3d at 519 (citing *Adams*, 875 F.2d at 1445).

¶64 The Court holds that Marquart's request at the December 8, 2016 pretrial hearing—one week before trial, and eight months after his unequivocal waiver—for a "change of counsel" constituted an equivocation on the part of Marquart. Opinion, ¶ 33. I disagree. The fact that Marquart made a pretrial request for a different attorney on December 8, 2016, provided absolutely no basis for a conclusion that he no longer wished to represent himself; nor did his assertions give rise to any ambiguity with respect to his previous wishes. Precedent holds that Marquart was under no obligation to renew his request to represent himself.

¶65 In *Arlt*, the Ninth Circuit reviewed a federal district court decision with facts similar to those presently at issue. There, the defendant filed a motion to substitute counsel after the trial court had denied his unequivocal requests to proceed pro se four times. *Arlt*, 41 F.3d at 520. The trial court held that the defendant's motion for substitution of counsel indicated an equivocation on the defendant's part and served as a waiver of his right to self-representation. The Ninth Circuit disagreed, and admonished the trial court for its legally erroneous conclusion that "[o]nce [the defendant]'s request to proceed pro se [was] denied, his decision to seek representation by counsel of his own

choosing rather than counsel chosen by the district judge" implied that he had abandoned his request to proceed pro se. *Arlt*, 41 F.3d at 522. The same is true in Marquart's circumstances. The District Court repeatedly denied Marquart's requests to proceed pro se on numerous separate occasions, and, as a result, made it abundantly clear that Marquart's first choice, self-representation, was not an available option. This left Marquart with two options—he could be represented by the lawyer appointed by the District Court, or he could be represented by a lawyer that he preferred. Marquart's decision to pursue a change of counsel rather than proceed with the court-appointed attorney cannot reasonably be held to indicate that his vehement desires for self-representation had changed. In the alternative, had the District Court properly granted Marquart's request to represent himself, and Marquart later demanded court-appointed counsel to represent his interests, then it would be clear that Marquart equivocated on his waiver of his right to counsel. However, that is not the case here, as Marquart's repeated requests to represent himself were consistently denied.

¶66 I disagree that Marquart was asked "point-blank whether he wished to represent himself or to obtain new counsel" in the December 8, 2016 hearing. Opinion, ¶ 34. I would reject the State's contention that Marquart's decision to request a change of counsel constitutes a waiver of his self-representation request. In support of its holding, the Court relies on two decisions: *State v. Swan*, 2000 MT 246, 301 Mont. 439, 10 P.3d 102; and *State v. Barrows*, 2018 MT 204, 392 Mont. 358, 424 P.3d 612. The Court acknowledges that "there are factual dissimilarities between the record here and those we

examined in *Swan* and *Barrows*," but nonetheless concludes that Marquart equivocated in his request to represent himself. Opinion, ¶ 33.

¶67 In *Swan*, during a single hearing on the defendant's motion to dismiss his counsel, the court asked the defendant, "Do you want to represent yourself?" to which the defendant replied, "Yes, I do." *Swan*, ¶ 20. However, "when the District Court orally asked [the defendant] . . . about his professed desire to proceed pro se, [the defendant] made it perfectly clear that what he was 'actually' 'hoping for' was (1) to have different counsel appointed to represent him, and (2) to be allowed to use the law library." *Swan*, ¶ 20. The circumstances in *Swan* are clearly distinguishable because Marquart, unlike the defendant in *Swan*, unequivocally asserted his wish to represent himself to the District Court in the April 28, 2016 hearing, following an extensive colloquy into Marquart's understanding of the risks of self-representation. The District Court then issued an equally unequivocal denial of Marquart's request. Over eight months passed between Marquart's initial assertion of his right and his alleged "equivocation," during which time Marquart repeatedly requested to exercise his right to self-representation. Just as "no evidence on the record . . . indicate[d the defendant] ever changed his mind about his decision to represent himself" in *Arlt, see Swan*, ¶ 21, nothing in the record here indicates that Marquart ever changed his mind about his self-representation wishes.

¶68 Our decision in *Barrows* is equally distinguishable. There, citing *Faretta*, the defendant's request to waive his right to counsel and proceed pro se was denied because "it [was] clear [the defendant] was not able or willing to conform his behaviors to abide by rules of the courtroom and was at risk of continuing to abuse the dignity of the

courtroom and engage in obstructionist misconduct such that he could not represent himself." *Barrows*, ¶¶ 20-21. Because of the defendant's inappropriate and disruptive conduct, his "invocation of the right to self-representation was not unequivocal, voluntary, knowing, and intelligent." *Barrows*, ¶ 21. I am unsure how the Court's holding in *Barrows* is on point in this instance. The *Barrows* Court did not engage in an examination of the equivocalness of the defendant's waiver. There is no evidence on the record here that Marquart's conduct in the courtroom was inappropriate or disruptive, and neither the Court nor the State argues as such.

¶69 I appreciate the County Attorney's averment that having counsel appointed for criminal defendants "always actually makes [their] job easier . . . ." But an inquiry into the waiver of one's constitutional right to counsel, and corresponding right to self-representation, does not include a determination as to whether the waiver is convenient for the court or the State. Marquart was subjected to two mental evaluations, a physical examination, counseling, MRIs, medication, blood tests, and involuntary incarceration as a consequence of asserting his right to represent himself in the charge of ordinary burglary, entirely disproportionate in relation to the totality of circumstances in this case. I would hold that Marquart's request to represent himself was timely, clear, unequivocal, and informed. Contrary to the Court's holding, I do not believe that, once Marquart's request to represent himself was clearly made and conclusively denied, that his self-representation right was waived by virtue of his request for a change of counsel.

¶70 Considering the entire record, I would conclude the District Court violated Marquart's constitutional right of self-representation. I would reverse Marquart's conviction and remand for a new trial based on these violations.

/S/ LAURIE McKINNON

Justices Dirk Sandefur and Ingrid Gustafson join in the dissenting Opinion of Justice McKinnon.

/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR