13-4329(L)

To Be Argued By:
SUSAN L. WINES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-4329(L)
14-359(Con)

UNITED STATES OF AMERICA,
Appellee,

-vs-

BENJAMIN GREEN, III,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Final judgment entered on February 4, 2014. A23.[1] On February 6, 2014, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A244. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The abbreviations for the appendices filed in this case are as follows: "A__" (Defendant's Appendix); "SSA__" (Green's Sealed Supplemental Appendix); "GA__" (Government's Appendix).

Statement of Issue Presented for Review

Did the district court clearly err in finding that Green knowingly and intelligently waived his right to counsel where Green knew he had a choice between proceeding *pro se* and with assigned counsel, understood the advantages of being represented by counsel, and had the capacity to make an intelligent choice?

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Preliminary Statement

Before the district court allowed Benjamin Green to represent himself at trial, it conducted five lengthy hearings during which the court observed Green and engaged him in extensive colloquy. During those hearings, which occurred over the span of a year, the district court specifically advised Green that he had a choice to be represented by counsel or to represent himself, and that self-representation carried significant

risks given Green's lack of experience, training and education in the law. Green comported himself appropriately, responded to the district court's questions, had no difficulties communicating with the court or his standby counsel, and showed a keen interest in his defense by filing multiple motions.

In making its determination that Green validly waived his right to counsel, the court also considered the findings and conclusion of a competency exam. Although the psychiatrist concluded that Green was incompetent to represent himself, that conclusion was not based on any psychosis, severe mental illness or psychotic disorder. Instead, the psychiatrist relied on a conclusion that Green would be disadvantaged at trial because of his ignorance of many legal principles, lack of legal training, and certain personality disorders that impaired Green's ability to accept assistance. That conclusion aside however, the psychiatrist found many other facts showing that Green had ample capacity to represent himself, including that Green understood the nature of the offense, the potential penalties, and the criminal trial process; that he had conducted his own legal and factual research regarding his case, and that he wanted to represent himself because he firmly believed he was the best person to represent his interests. On this record, the district court allowed Green to represent himself

at trial and found that he knowingly, intelligently and voluntarily waived his right to counsel.

On appeal, Green argues that the district court should have denied his request to proceed *pro se* because he was not competent to do so. Green attempts to portray himself as "raving" and incoherent, but the record simply does not support that conclusion. Instead, Green was a passionate advocate for his point of view, appropriately responsive to the court's inquiries, and although his legal arguments may have been unpersuasive, he was entirely coherent in making them. Green filed numerous motions and other writings showing his active interest in his own defense, and his responses to the district court showed that he had performed his own legal research and had a detailed understanding of how a trial works. Green had no difficulties communicating directly with the court or with his standby counsel, who conferred with Green throughout the trial. Green's decision arose out of his careful weighing of options, and his ultimate conclusion that he would be better suited to represent himself than an attorney, despite his acknowledged lack of legal training.

On this record, the district court's finding that Green validly waived his right to counsel and should be allowed to represent himself was not clearly erroneous. The district court's judgment should be affirmed.

Statement of the Case

A. Introduction

On September 6, 2012, a federal grand jury returned an indictment against Green charging him with submitting false, fictitious and fraudulent claims in violation of 18 U.S.C. § 287, and attempting to interfere with the administration of the Internal Revenue laws in violation of 26 U.S.C. § 7212. A5.

As set forth in detail below, at various times, the defendant moved to represent himself at trial. After multiple extended colloquies and hearings, the district court (Vanessa L. Bryant, J.) granted that motion. On November 5, 2013, the defendant proceeded to trial, *pro se*, with standby counsel. A16, A18-19. On November 12, 2013, the jury returned a guilty verdict on both counts of the indictment. A19.

On February 3, 2014, the district court sentenced Green principally to 51 months of imprisonment. A23. On February 4, 2014, judgment was entered. A23. On February 6, 2014, Green filed a timely notice of appeal. A23, A244.

Green is currently serving his prison sentence.

B. The offense conduct and conduct relevant to the underlying scheme[2]

1. Green accessed the IRS FIRE system

Over one month before Green submitted his fraudulent tax return, Green applied for access to the IRS's FIRE ("Filing Information Returns Electronically") system. PSR ¶15. The FIRE system is a web-based user interface where information returns such as IRS Forms 1099 and 1098 are submitted to the IRS. *Id.* Ordinarily, only large businesses use the FIRE system. The IRS accepted Green's application to file information returns electronically, and issued him a Transmitter Control Code ("TCC") number. *Id.*

Green logged into the FIRE system nineteen times between February 9, 2009 and March 12, 2009, the day before Green filed his false federal tax return. PSR ¶16. Each time Green logged into the FIRE System, he was automatically directed to the "Important Bulletins" page. *Id.* On that page, which cannot be circumvented, the IRS posted a warning to transmitters in bold, red font reading: "**1099-OID Fraud Alert**.

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[2] Although the facts described in this section were established during the trial, because there is no dispute concerning the underlying conduct, the government has cited to the PSR instead of the trial record.

Fraud Alert: Transmitters of the Form 1099-OID." *Id.*

The Important Bulletins page notified readers of a "Form 1099-OID Fraud Alert," and directed transmitters to access an IRS problem alert located in the IRS.gov Newsroom before transmitting their file. PSR ¶17. The IRS problem alert page briefly describes the fraudulent Form 1099-OID scheme, and warns that the IRS has rejected this scheme in prior Revenue Rulings. *Id.*

Nonetheless, on March 1, 2008 and again on March 3, 2008, Green used his TCC number and password to access the IRS FIRE system and filed false tax information comprised of IRS Forms 1099-A ("Acquisition or Abandonment of Secured Property") and IRS Forms 1099-OID ("Original Issue Discount").[3] PSR ¶18. Green falsely reported receiving OID interest income of $920,062. *Id.*

When Green submitted his IRS Form 1099-OID to the FIRE system, the information was flagged by the system due to Green's claim of excessive tax withholding. PSR ¶19. When the system flags an error, it automatically sends an

[3] The Form 1099-OID is an income reporting document similar to a Form W-2, except that instead of reporting wages, it reports the difference between the price at which a debt instrument was issued and its stated redemption price at maturity. GA383.

email to the transmitter instructing them to log back into the FIRE system and review the error message. *Id.* The email to Green also included a link to the IRS problem alert page. *Id.*

After receiving the error message email, Green logged back into the FIRE System. PSR ¶20. One hour later, Green submitted a request to the IRS to override the error. *Id.* In his email, Green stated that he "stand[s] behind the 1099-OID filing as being accurate and correct under penalty of perjury." *Id.* As a result of Green's attestation, the IRS overrode the error and accepted his 1099-OIDs. *Id.*

2. Green's fraudulent tax return

On March 13, 2009, Green electronically filed a 2008 joint federal tax return for himself and his wife using TurboTax. PSR ¶9. Green asserted the OID tax scheme in which he falsely claimed his debts as interest income and a large amount of federal withholdings based on those debts. *Id.* In so doing, Green made four false statements on his federal tax return:

1. In Box 8a, Green falsely claimed $920,063 of taxable interest income;
2. On Schedule B, Interest and Ordinary Dividends, Green falsely itemized various debts as interest income totaling $920,063;

3. In Box 62, Green falsely claimed federal tax withholding of $929,702;

4. In Box 73a, Green falsely claimed a refund of $616,434.

Id.

IRS Court Witness Coordinator Paul Crowley testified that no IRS records supported Green's false claims. PSR ¶11. Indeed, Green's only significant source of income for tax year 2008 was his salary paid by Metro North Commuter Railroad. *Id.* Despite his claim of having received over $900,000 in interest income, IRS records show that three banks paid Green a total of $20 of taxable interest income in 2008. *Id.*

Green directed the IRS to deposit the tax refund to two Bank of America accounts, as well as Green's account with Municipal Credit Union. PSR ¶12. Between March 18 and 20, 2009, the IRS deposited the refunds to Green's accounts as directed. *Id.*

Special Agents from the IRS Criminal Investigation Division interviewed Green on February 2, 2010. PSR ¶13. During that interview, Green confirmed that he electronically prepared and filed his 2008 federal tax return using Turbo Tax. *Id.* Green also told the agents that he understood the difference between an asset and a liability, and was able to explain each concept to the agents. *Id.*

Green also confirmed that he received a tax refund from the United States Treasury; however, Green's defense of his conduct was vague and he was unable to articulate why he was entitled to use Forms 1099 to file his 2008 tax return. PSR ¶14. Green admitted that he did not research the negative aspects of OIDs because what he researched was "so good" that he did not feel the need to look into the negative aspects. *Id.*

3. Green received the fraudulently obtained refund and promptly spent it

The IRS deposited the erroneous refund into Green's three designated bank accounts between March 18 and 20, 2009. PSR ¶21. After receiving the fraudulently obtained refund, Green managed to spend or disperse almost all of the fraudulently obtained refund in a matter of months. *Id.* For example, bank records admitted at trial show that Green took trips to Hawaii, Miami Beach, Florida, Albany, New York, and Boston, Massachusetts. *Id.* Bank records also show thousands of dollars spent at Gucci, Fortunoff, Brooks Brothers, Armani Exchange, Banana Republic, Zara (a women's clothing store), Coach, Macy's and the Apple Store. *Id.*

Green used the bulk of the erroneously issued refund to pay off his mortgage with Washington Mutual Bank; the very mortgage he claimed was interest income on Schedule B of his 2008 feder-

al tax return. PSR ¶22. Green also paid off his auto loans and lines of credit with Sovereign Bank and Grand Central Terminal Federal Credit Union. *Id.* Green also spent almost $30,000 on refurbishing his home. *Id.*

Finally, Green gave his family members tens of thousands of dollars. PSR ¶23. Green gave his sister-in-law, Bianca Burgess, $30,000 on April 21, 2009. *Id.* Similarly, on the very same day that the IRS deposited the erroneous refund into Green's Bank of America accounts, Green gave his brother-in-law, Ronald "Monty" Burgess a $10,000 check on which Green had written "You're Next!" with a smiley face next to it in the memo line. *Id.*

4. After getting the fraudulent refund, Green immediately filed three fraudulent amended returns

To the extent Green's exhortation to his brother-in-law ("You're Next!") was an invitation to join the scheme, Green followed his own advice. PSR ¶24. Just three weeks after receiving the fraudulent refund, Green filed with the IRS three IRS Forms 1040X to amend his prior federal tax returns for tax years 2005, 2006, and 2007. *Id.* In those amended returns, Green claimed additional refunds of $830,678 for tax year 2005, $276,201 for tax year 2006, and $150,240 for tax year 2007. *Id.* The IRS flagged these amended tax returns as frivolous and did

not issue any refunds on the amounts claimed for tax years 2005, 2006, and 2007. *Id.*

5. Green attempted to obstruct the IRS's recovery of the refund

The IRS was able to recover $32,000 that it had deposited into Green's Municipal Credit Union account within two weeks of issuing the refund; however, the IRS's collection efforts with respect to Green's Bank of America accounts were less successful. PSR ¶25.

Green was more than simply uncooperative with the IRS Revenue Officers assigned to recover the erroneously issued refund; he actively undertook a course of conduct to obstruct the IRS's efforts. PSR ¶26.

a. Green falsely claimed to have repaid the IRS

On at least three occasions, Green sent correspondence to the IRS purporting to repay the money that he owed. PSR ¶27. Green never submitted a valid form of payment with any of these mailings. *Id.* On two occasions, Green provided the IRS with a bogus account number purporting to withdraw from a secret government account. *Id.* In September 2012, Green sent a check to the IRS in the amount of $1,244,397.92, however, Green issued this check from a closed bank account, and he invalidated the check by scribbling "Wire Transfer EFT Only" on the face of it. *Id.*

The IRS successfully levied Green's weekly wages and even seized Green's Mercedes-Benz. PSR ¶28. Green had not, however, made any voluntary payments to the IRS to repay the money he stole from the government at the time of sentencing. *Id.*

b. Green transferred title to his home to evade collection

Green also obstructed the IRS's efforts to place a lien on his residence. PSR ¶29. On May 7, 2009, Green received a Notice of Jeopardy Levy and Right of Appeal from the IRS. *Id.* That notice informed Green of the IRS's approval of a levy to collect the money Green owed to the government. *Id.* The letter also informed Green that the IRS might proceed with collection action even if Green requested administrative review of the levy. *Id.*

On May 15, 2009, Green transferred legal title to his home via quitclaim deed to an entity called "Son of My Right Hand." PSR ¶30. At trial, Revenue Officer Thomas Kilmartin testified that Son of My Right Hand is a Hebrew translation of the name, Benjamin. *Id.*

Bank records show that Benjamin Green created and controlled Son of My Right Hand. PSR ¶31. Green opened bank accounts on behalf of Son of My Right Hand and the entity used Green's home address as its mailing address. *Id.* As an entity, Son of My Right Hand was serially

undercapitalized, never maintaining more than $1,600 in its bank accounts. *Id.*

c. Green threatened to file formal complaints against IRS officials

Green sent correspondence to the IRS demanding that the IRS "immediately cease and desist collection actions / harassment / intimidation tactics regarding this case." PSR ¶32. Green purported to file formal complaints against Revenue Officer Thomas Kilmartin and his supervisors, and threatened to file liens against their personal property. *Id.*

> I am writing this in part to place a formal complaint against IRS REVENUE OFFICER THOMAS W. KILMARTIN… PSR ¶33.
>
> […]
>
> BE ADVISED I reserve my right to use any of the numerous commercial remedies available to me against the IRS and THOMAS KILMARTIN up to and including placing a commercial lien on the Operational/Commercial Bonds (and placing formal complaint against said bonds of the IRS and Mr. Kilmartin's supervisors with Dunn and Bradstreet) of the IRS and Mr. Kilmartin and placing a commercial lien on the personal property of Mr. Kilmartin and his supervisors.

PSR ¶34.

Green's intent in this course of conduct was laid bare by his own words. In his "Claim of Distress Infinite," Green states "this Distress Infinite is brought against Distress Defendants/Libelees to impede, with reasonable diligence, the commission of crime, because they are attempting through the mails to defraud [Green] of life, liberty, and property, and property rights […]."PSR ¶35.

Summary of Argument

The district court did not clearly err in finding Green validly waived his right to counsel or in allowing Green to represent himself at trial. The court was thoroughly familiar with Green from having engaged in multiple hours of hearings with him over the course of a year. Throughout those hearings, Green showed that he understood his choice to represent himself or be represented by counsel, understood the risks of self-representation, and had a demonstrated capacity to make that choice. Indeed, Green actively engaged the court in a colloquy concerning his decision to represent himself, showed a keen interest in his own defense by filing multiple motions, and had a detailed understanding of how a criminal trial proceeds. He was entirely coherent and appropriately responsive and based his decision to proceed *pro se* on his conclusion that he would do the best job at it. He intelli-

gently, knowingly and voluntarily waived his right to counsel and the district court's judgment should be affirmed.

Argument

I. The district court painstakingly protected Green's right to represent himself and did not clearly err in finding that Green knowingly and voluntarily waived his right to counsel.

A. Relevant facts

On October 2, 2012, Green's counsel filed a motion seeking leave to withdraw and for permission for Green to proceed *pro se*. A3. On November 1, 2012, counsel filed a motion for expedited hearing seeking a ruling on, among other things, counsel's prior motion to withdraw and for permission for Green to proceed *pro se*. A6.

1. The November 27, 2012 *Faretta* hearing

The district court held a one-hour hearing on November 27, 2012 on the motion to withdraw and Green's request to proceed *pro se*. A38. Green started the hearing objecting to the court's jurisdiction and informing the trial judge that he would be exercising his Fifth Amendment right "not to incriminate myself." A41. The trial court proceeded to inform Green of his constitutional rights, including that: he is presumed innocent until proven guilty (A41); he has the

right to remain silent (A42); he has the right, but not the obligation, to be represented by counsel (A42); and that he has the right to represent himself. *Id.* Green refused to make an audible response to the district court's admonitions. A41-42.

The trial court specifically informed Green of the perils of representing himself, stating:

> [Y]ou should be aware that these proceedings are governed by the Federal Rules of Criminal Procedure and by the Federal Rules of Evidence as well as the criminal statutes of the United States.
>
> Accordingly, if you choose to represent yourself you will be representing yourself without the education, without the training, without the experience that opposing counsel, that is the United States Attorney will have in prosecuting this case.
>
> Mr. Green, that would put you at a severe disadvantage. I have read your three motions to dismiss this action and I have read your discovery motion, and I have heard you speak here today in court. And in all four of those instances you have illustrated glaringly the principle which I have just described to you, and that is that you lack the education, the training, the experience, the knowledge, and as a con-

> sequence the analytical ability to represent yourself.

A42-43.

The court specifically informed Green that "these charges carry substantial periods of incarceration." A43. The court noted that Green could be incarcerated for seven years if he were convicted,[4] and could be subject to a period of supervised release after which he would be subject to certain conditions, the violation of which could subject him to further periods of incarceration. A43-44. The court informed Green that he could be ordered to pay restitution and to pay fines, and the failure to make payment might result in the imposition of interest and penalties increasing the total amount of money Green would owe. *Id.*

The court also informed Green of his trial rights, including that he has the right to have the government prove his guilt beyond a reasonable doubt, either to the court or to a unanimous jury by the introduction of evidence. A45. The district court explained that the evidence would come in the form of witnesses and that Green would have the right to confront and cross-examine those witnesses if he chose to do so. *Id.*

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[4] The statutory maximum for the charges in the indictment is actually eight years, not seven (five year statutory maximum for 18 U.S.C. § 287; three year statutory maximum for 26 U.S.C. § 7212(a)).

The court further informed Green that he would also have the right to challenge any physical evidence offered by the government including any photocopies, checks, recordings, videotapes, bank statements, or telephone records. *Id.* The district court informed Green that he had the right but not the obligation to present a defense, and that if he chose not to present a defense, the court would instruct the jury that it could not hold that against him. A45-46. Finally, the court informed Green that if the government failed to prove to a unanimous jury or to the court that he was guilty beyond a reasonable doubt, he would remain innocent of and be acquitted of the charges. A46.

The district court repeatedly asked Green if he understood what was being said, but Green refused to respond. A42-45.

The district court confirmed with defense counsel that the magistrate judge had previously advised Green of his legal and constitutional rights and the penalties associated with the offenses at Green's initial appearance. A61-62. Defense counsel confirmed that after Green received that information, counsel communicated with Green, discussed how a case proceeds, the potential penalties, and the sentencing guidelines. A62.

Defense counsel also confirmed having discussed *Faretta* with Green and that the purpose of the hearing that day was for the court to ad-

vise Green of his legal rights and for Green to articulate his understanding of them. A62. Defense counsel also confirmed that she had no difficulty communicating with Green and that he responded to her in a way that demonstrated he had the capability of understanding what was being said. A63. Defense counsel confirmed that based on her communications with Green and his responses to her, she believed Green understood the purpose of the hearing. A64. Counsel also confirmed that she had advised Green of his right to remain silent and that Green had made statements indicating he understood that right. A64. Counsel also confirmed that she had explained to Green the advantages and disadvantages of not being represented by counsel, and the fact that if he were represented by counsel, he would be insulated from the court and the government. A65. Defense counsel confirmed that she had advised Green that he would receive advice from counsel which Green would not be able to provide, and that she had advised him of the charges, the elements of the offenses, and the penalties. A65-66. Defense counsel also confirmed that Green was communicative with her throughout. A66.

The court found that Green was aware of his rights, aware of the benefits of exercising those rights, aware of the detriments of not exercising those rights, and aware of the consequences of representing himself. A66-67. The court also

concluded that Green failed to demonstrate that he was entitled to have appointed counsel given that he refused to submit a financial affidavit, owns a property valued at approximately $400,000 mortgage free, earns approximately $85,000 a year with two dependents, and has a tenant in the property who is obligated to pay him rent. A67. The court therefore granted counsel's motion to withdraw unless and until Green decided to show that he qualified for appointed counsel and also thereby granted Green's motion to proceed *pro se* "by default." A67-69.

2. The competency exam

Given Green's refusal to participate in the November 27, 2012 hearing, the government filed a motion to reopen the *Faretta* hearing and order a competency exam for Green. A75. The court granted that part of the motion seeking a competency exam. A7.

The exam was conducted by a forensic psychiatrist at the Yale School of Medicine who examined Green for a total of five and a half hours on February 20, 2013 and March 1, 2013. SSA1. In addition, the psychiatrist had a colleague conduct a standard psychological test of Green on March 8, 2013. SSA1. The results of Green's examination make clear that Green understood the nature of the charges, his rights, the trial process, and the risks of proceeding *pro se*, and

that his decision to represent himself was because he believed he would do the best job at it.

Green was able to describe the offenses charged in the Indictment, stating that they related to "filing a fraudulent return and impeding IRS collection." SSA7. Green rationally explained the charges saying that filing a fraudulent return meant that a defendant allegedly "put information on the 1040 and 1099 that was inaccurate," and that impeding an IRS collection meant a defendant allegedly "did things to stop collection of a tax payment." *Id.* Although Green could not recite the "elements" of the offense charging the filing of a false return, after some discussion with the psychiatrist, he stated that the government would have to show that a fraudulent return was actually filed and that he did this knowingly and therefore "prove intent." SSA12. Specifically, Green said this meant that "I knew that this was wrong and that I did it anyway." *Id.*

Green understood that he was charged with felony offenses, and understood the difference between a felony (a "serious offense") and a misdemeanor (a "minor offense"). SSA7. Green also demonstrated that he understood the district court's admonitions during the November 27, 2012 hearing because he told the psychiatrist that the potential penalty if convicted was a "possible seven-year prison sentence," something

that the district court specifically (and incorrectly) told him. SSA7; A43.

Green also confirmed the fact that he understood what his counsel told him, stating that he had no difficulty communicating with her. SSA9. Green's counsel, likewise, expressed no concern about their working relationship and did not identify any difficulties in communicating with Green. SSA10.

Green showed a firm understanding of the criminal legal process and was able to describe the role of the judge and prosecutor, the difference between a bench trial and jury trial, the purpose of a jury and how they were selected, and guilty pleas and plea bargains. SSA7-9. Green also stated that he knew a trial involved the presentation of evidence and calling of witnesses. SSA9.

Green had particular opinions about his defense, stating that the fraudulent return charge was wrong since the IRS had gone ahead and disbursed the payment. SSA7. Green refused to discuss the evidence and witnesses he would present out of concern that he would be prematurely disclosing his defense strategy but said that he believed the government "had a weak case." SSA12.

Green stated that he was aware of the rules of evidence, and knew that evidence had to be "authenticated" and had to be relevant to the

case. SSA12. Green also said that he was familiar with the rules of criminal procedure and had actually read those rules before his last court appearance. SSA13.

Green stated that a witness's testimony was put through scrutiny and had to be relevant and truthful. SSA12. He specified that the judge was the final arbiter as to what evidence or witnesses were introduced because the judge makes sure that "the record is clean" and "nothing fraudulent" is introduced in court. *Id.*

Green demonstrated that he was fully aware of the risks associated with self-representation. The psychiatrist reported:

> Mr. Green said he knew that attempting to represent himself without the services of an attorney might increase the risk of a bad outcome, including being convicted on all the charges. He acknowledged that he lacked legal training and that his knowledge and expertise in matters of law was not comparable to that of an attorney. However, he stated that this was a personal decision he made having considered the risk of losing the case and being exposed to a maximum sentence in federal prison, which he estimated was seven years. He stated that this was a risk he was willing to take.

SSA10.

Green repeatedly made clear that his election to proceed *pro se* was a well-considered decision, stating that he "preferred to pursue his case *pro se*," that he "understood the case better than an attorney since he was directly involved," and that he "was the one with 'the most to lose.'" SSA9, 10, 12.

Indeed, Green stated that he had done "research" on the outcome of cases such as his and concluded that legal representation did not guarantee a good outcome because only 2% or 3% of defendants won similar cases using the services of an attorney. SSA10. He made clear that he had not given up or resigned himself to a particular outcome, but that his decision to represent himself was based on his belief that he had a strong case and could "best tell my story." *Id.*

The psychiatrist concluded that Green was not suffering "acute psychosis" or a "major mental disorder." SSA14-15. Instead, the psychiatrist concluded that Green was overly guarded, displayed a "pattern of suspicious defensiveness," showed a pattern of "rigidity and overvaluation of his own opinion," and was "dismissive and defensive" when reviewing the government's case. SSA14-17. The psychiatrist dismissed the notion that Green suffered any significant short term memory impairments and concluded that Green was competent to stand trial. *Id.* The psychiatrist concluded that Green

lacked the "capacity to represent himself" not based on Green's ability to knowingly and voluntarily waive his right to counsel, but rather, on Green's "impair[ed] capacity" to "receive information from the judge" and to "flexibly consider all available options;" his increased anxiety under stress; his "obsessive rigidity and narcissistic preoccupation with the correctness of his own views;" and his "style of minimizing psychological difficulties and disavowing his anxiety." SSA14-15. The psychiatrist acknowledged however, that Green appeared to have "knowingly, intelligently and voluntarily" decided to represent himself "on the surface," has a "superficial understanding of some legal processes," and demonstrated "the capacity to understand the proceedings against him." SSA15.

3. The June 26, 2013 competency hearing

On April 15, 2013, Green filed an Affidavit stating "Affiant reverses his previous requests to continue solely pro se" and "ask[ed] the Court to allow that assistance of counsel be provided as to issues of procedure and law within this instant matter." A8; GA9.

On June 26, 2013, the district court held a 45-minute competency hearing during which the psychiatrist reiterated his conclusion that Green was competent to stand trial but not to represent himself. A87.

Green represented himself during the hearing and the district court advised Green that he had a right to remain silent, that anything he said "can and likely will be used against you," and that if he speaks at the hearing or spoke in the past, that he could stop speaking at any time. A88. Green acknowledged that he understood those rights. *Id.* Green told the district court that "in regards to willful criminal intent, I believe I can anticipate or provide evidence of my state of mind to my counsel sufficient enough to help form a defense in addition to what counsel may wish to present." A90. Green then informed the district court that he believed he was entitled to know the experience of his standby counsel in "trials involving facts comparable to the facts present in this case." A91.

Because Green had revoked his earlier request to proceed *pro se* and now wanted to be represented by counsel, the court acknowledged the findings of the psychiatrist's report, stating that Green lacked "expertise in the area of the law in which you have no education, no training or experience," and appointed Green's standby counsel to represent him. A94. Green made sure to clarify that while he agreed he was not "trained in the law":

> I do feel that I can add value in terms of evidence of the truth that I can bring to this court, and that I have a right to participate in bringing that truth forth to the

> court, and that I would not be told, if you will, to bring that evidence to the court.
>
> So I just want the record to show that that is my intent to have a participation in the proceedings and to help in defending myself.

A95.

The district court then went on to explain to Green his "representational options," namely, that "you can represent yourself with standby counsel who you can consult, or you can be represented by counsel with whom you consult." A96. The court used an analogy of being a passenger with a chauffeur, saying "where you are represented by counsel, the attorney is the limousine driver and you are the passenger. You can dictate the course but the limousine driver drives the vehicle." A96-97. In the case of standby counsel, the court explained that "you are the driver and standby counsel is the back seat driver." A97. By having counsel appointed, the district court told Green his attorney would be the chauffeur and he would be the passenger. *Id.* Green objected, saying that he wanted to "go *pro se* with the assistance of counsel in that analogy of me having control of the vehicle and then [counsel] being able to be a co-pilot, if you will." *Id.* The district court made sure to inform Green that if he chose to represent himself:

> [Counsel] will not frame questions for you, she will not make evidentiary objections for you. You will have the opportunity to consult with her but not on each and every sentence you utter or each and every objection which is raised by counsel. You will be making all of the decisions despite the fact . . . that you have no knowledge, no – you may have passing knowledge, but you certainly have no in-depth working knowledge of the rules that govern this proceeding or the law that applies to the offense you face.

A98. Green stated that he understood. *Id.*

The court suggested to Green that he allow his counsel to represent him so that he:

> can see the nature of the undertaking and can have an actual understanding as opposed to a philosophical sense of what's involved. I am suggesting this not in any way to silence you, but I'm suggesting this so that you can make an informed decision. Without having participated in this type of legal proceeding it's very difficult for you to make the assessment in a total vacuum.

A99. The court made clear that Green had a choice in the matter, telling him that the decision is not "irrevocable," and that the court is "open to reconsidering it" after Green had an op-

portunity to determine whether his counsel was advocating in his interest. A100.

Green then engaged the court in a colloquy about his counsel's qualifications relative to the government prosecutor, stating that because his attorney, an experienced Assistant Federal Public Defender, had never tried a tax case, he felt he was at a "disadvantage." A105. The court elicited from the government that this case did not involve complex tax principles, but rather, involved a false tax return. A107.

The district court again encouraged Green to "accept [its] order" to have his counsel represent him, but assured Green that the choice remained his and that the court's "ears are open" should Green later feel he wanted to represent himself. A110. The court repeated however:

> But as I have advised you in the past, you would be at a decided disadvantage were you to do so because of your lack of familiarity with the laws and the procedures that are going to govern, and the potential that you might inadvertently conduct yourself in a way that would be harmful to your interests.

A110.

Green acknowledged that he understood, stating: "Your Honor, I agree with what you just said, especially for me being not knowledgeable in terms of law and procedure. I wholeheartedly

agree with you and I know I'm at a disadvantage. Again, I just have to convey to the court that I have reservations in terms of the relationship that I – I still respect your understanding and your view of trying to cause me not to harm myself." *Id.*

Green then consented to having counsel appointed. A111-12.

4. The August 8, 2013 hearing regarding exclusion of time and extension of trial date

On July 15, 2013, the government filed a motion for an order setting a trial date. A10; GA12. On July 16, 2013, the district court held a conference call in which counsel for Green represented that the defense needed some additional time to prepare for trial because Green wanted to file additional motions and wanted an additional witness subpoenaed. GA15. Counsel conferred and agreed on a November 5, 2013 jury selection date. GA15-16. Green then refused to sign a waiver in support of a defense motion to continue so the government moved for a continuance and for exclusion of time under the Speedy Trial Act. A10; GA15-16.

On August 8, 2013, the district court held an hour-long hearing to address the trial date and the issue of exclusion of Speedy Trial time. GA12. The district court first confirmed with Green that during the earlier conference in July,

he had motions he wanted to file and someone he wanted to subpoena for trial. GA20. Before the court could address the trial date, Green informed the court that he had a transcript in his hand that showed a zero balance on his account and that therefore "this court does not have a valid controversy of disputes over the monetary value and does not have an injured party" and that the "United States of America has not been injured in this case as a result of any action of said defendant." GA21-22. Green also inquired of the district court whether the prosecutor had a duty to produce "any type of evidence to prove that the party is innocent." *Id.*

The government stated that it believed Green had obtained a transcript from an account that was no longer operative due to the institution of the criminal case against Green, and that the transcript was not Brady, exculpatory or Giglio. GA23. Green objected, stating that he had not been provided the file material, but when the court asked Green whether the government had disclosed the amount of money it claimed he owed and why it claimed he owed it, Green conceded that such information had been disclosed to him. GA24-25. Green also acknowledged that the government had disclosed the tax periods to which the amounts relate, what portion is tax, what portion is penalty, and what portion is interest. GA25.

The court then turned to the trial date issue and informed Green that the date had been continued because he previously told the court he needed more time to file motions and subpoena a witness. GA26. The court then stated that it intended to set a trial date of November 5. GA27. Green confirmed that he intended to file motions, but had not yet filed them, and could not say precisely when he would file them. GA29.

Green then engaged the court in a lengthy colloquy, asking numerous questions about how his filing of motions might impact the trial date. GA31. ("[H]ow does the court view me acknowledging and saying I wish to file motions?" GA32; "[I]f I choose not file a motion, what is the reality of making that decision?" GA32; "[R]egardless if I say I want to file a motion or not, the court itself is going to stop the speedy time clock, is that correct, your Honor?" GA33; "[A]t this point no matter what it will be tolled or excluded as you say whether I choose option A or B, am I correct?" GA33). The court explained that time under the Speedy Trial Act would be excluded because Green previously told the court that he would not be ready for trial on the earlier trial date, and needed more time to file motions and arrange for the testimony of a witness. GA33. Green then asked the court if he intended to file motions whether that would "possibly extend [the trial] even further time past November" and the court explained that a further continuance

was a possibility, depending on what Green decided to file. GA37.

Green repeated his belief that the case should be dismissed and should not proceed at all. GA39-40. Green then concluded that since his objections to the Speedy Trial excludable time issue were noted on the record that it "would be prudent of me to possibly go forward and file a motion since it's already been tolled regardless of my objection or not." GA40.

He also asked the court about whether he had the option of filing motions through his counsel or could do it himself. The district court told him he could do it himself. GA43.

The court asked Green whether he recalled that at the end of the prior proceeding he had concluded that it was in his best interest to have counsel represent him. GA46. Without prompting, Green raised the court's driver-passenger analogy, stating that he was the client, his counsel was "like a limousine driver" and reminded the court that it had been left open for him to raise the issue later. GA46-47. The court then engaged in another lengthy colloquy with Green aimed at educating him on the dangers of self-representation using another analogy, this time involving a doctor. GA47.

The district court described a hypothetical situation where a tumor needed to be removed and asked Green whether he would operate on

himself. GA49. Green responded that he would not because he might harm himself, "cut an artery or something like that." GA50. The court asked why Green would trust a doctor to perform that operation and asked whether it was because the doctor's superior education, training and experience would make it advisable to rely on the doctor to operate instead of doing it himself. *Id.* Green concurred and told the court that he understood and appreciated the point. GA 51.

The court then related the doctor analogy directly to Green's criminal case, reminding Green that the psychiatrist who evaluated him determined that he had cognitive issues that made it inadvisable for him to represent himself. GA51-52. The court explained that the additional time for the trial was given to ensure that he had time to file whatever he wanted to file and give him an opportunity to present whatever he wanted to present. GA52-53. Green informed the court that "I understand and I respect, your Honor, what you're saying. So thank you very much." GA54.

Green concluded the hearing by promising the court that he would confer with counsel in the filing of motions. GA57-58.

5. The October 2, 2013 *pro se* hearing

After the Speedy Trial hearing Green changed his mind about having an attorney represent him. On September 10, 2013, Green,

through his counsel, filed a motion seeking leave to proceed *pro se* with his counsel serving as standby counsel. A11; GA62.

On October 2, 2013, the district court held a 30 minute hearing on Green's *pro se* motion. A13; 119. Green stated unequivocally that he wanted to represent himself *pro se* and have his current lawyer act as standby counsel. A123. The district court summarized its prior admonitions noting that it had informed Green of his right to be represented by counsel, the charges, penalties, and the disadvantages and advantages of being represented by counsel, and that Green's narrative responses indicated his understanding of those admonitions. A123.

The court also summarized the findings of the competency exam pointing out that Green was not found to be suffering from psychosis, severe mental illness or any psychotic disorder. A124-26. Further, the court noted that Green was found to understand, among other things, the risks of self-representation, the charges, possible penalties and his right to counsel. A125. The court acknowledged that the competency exam found Green was not competent to represent himself, but the court pointed out that that conclusion was based largely on the fact that Green was ignorant of many legal principles and had no legal training, not on the presence of any mental illness. A126-27. The court noted that the personality disorders Green displayed as de-

scribed in the competency exam, affected his willingness to accept assistance, but did not disqualify Green from exercising his constitutional right to represent himself. A127.

The district court also summarized its observations based on exhaustive colloquies with Green. The court found him to be a "responsible, respectful" and "sincere individual whose comportment is in every respect appropriate." A128. The district court found, based on the entire record, that Green understood the charges against him, the penalties he faced and the advantages of being represented by counsel. A128. The court further found that Green was aware of his right to have an attorney represent him, that Green had conducted legal and factual research regarding the case and appeared rational, lucid and professional. A128. The court therefore concluded that Green had made a "knowing and intelligent waiver of his right to be represented by counsel and that the waiver is unequivocal." A128. Because of the competency exam's finding that Green had "oppositional personality traits," the court appointed his attorney as standby counsel. A129.

The district court judge then advised Green:

> Mr. Green, I'm sure you understand that means that you will be presenting your case, [standby counsel] will not prepare to present your case, but that she will be available to answer questions and to

> provide you guidance during the course of the trial, and you are encouraged to utilize her by asking questions and seeking her advice during the course of the trial.
>
> However, having made this decision and the court having granted your motion to represent yourself, it will be you who will be making all of the presentations to the court and the jury; you who will be calling the witnesses; you who will be examining and cross examining the witnesses; you who will be making objections and defending objections to the introduction of evidence; you who will be introducing evidence; you who will be making opening and closing statements should you choose to; and you who will be selecting the jury and engaging in all of the other conduct that will be necessary to try this case . . . .

A129-30.

The district court then engaged Green in a colloquy about deadlines for filing pretrial documents, including a trial memo, and how he should go about filing documents and exhibit binders. A133-35.

6. The November 4, 2013 *Faretta* hearing

On October 30, 2013, Green filed a motion to extend the trial date based on a "counterclaim" he filed and a purported request he had made for

taxpayer assistance with the IRS. A14; GA69. In that motion, Green also asserted that "justice is being deprived and due process is being violated because the court has deprived me of counsel knowing and willing to assign counsel to me that has never won a case like mine or a case reasonably similar . . . ." GA80.

In light of Green's statement regarding an alleged deprivation of counsel, the government filed an emergency motion for a limited *Faretta* inquiry to ensure that Green was not wavering on his election to proceed *pro se*. A14; GA116.

On November 4, 2013, the day before jury selection was scheduled to begin, the district court held a hearing on Green's motion for extension of time and the government's motion for a limited *Faretta* hearing. A15. Green sought to have the district court address a "common law counterclaim" he had filed and, for reasons unclear, repeatedly referred to presenting himself as a "flesh and blood man." A143-51. However, the district court doggedly pursued clarification on whether Green now wanted an attorney to represent him and Green ultimately made clear that he did not. A143 (Court: "Are you saying you no longer wish to represent yourself?" Green: "No, your Honor. I am appearing specially, not pro se . . . ."); A144 (Court: "Do you intend to defend yourself or are you requesting that the court appoint counsel to represent you?" Green: "I plan on presenting myself as the flesh and

blood man in this court under—and presenting to opposing law counsel a common law counterclaim."); A146 (Court: "So as a flesh and blood man, Mr. Green, do you intend to represent yourself or are you seeking that the court appoint counsel to represent you?" Green: "I am not seeking the court to have someone represent me. I'm here to – not to represent but to present myself because I am myself."); A150-51 (Court: "Do you intend . . . to represent yourself in this action, to speak for yourself, or are you asking me to appoint an attorney to speak on your behalf?" Green: "Your Honor, I am not asking the court for an attorney to speak on my behalf.").

The district court explained to Green that a "counterclaim" is typically filed in a civil case, not in a criminal case, and that his having filed it would not derail the trial date. A148-49. The court also stated that Green's having requested taxpayer assistance did not stay the trial date either. A153-54.

The court then confirmed with Green that he intended to act as his own attorney, participate in jury selection, make an opening statement, cross examine the government's witnesses, call and question his own witnesses, and make a closing statement. A149. Green confirmed that he would participate, although he repeated that he wanted his counterclaim addressed. *Id.*

The court explained in detail the purpose of the jury selection process and how it was going

to be accomplished, including what the court would ask, that the jurors would fill out questionnaires, the difference between peremptory and for cause challenges, and how the parties would be allowed to exercise challenges. A154-57. Green told the court that he understood. A157. The court also explained what an opening statement is and that Green would have an opportunity to make one, and Green again indicated that he understood. A158-59.

7. The trial.

Green actively defended himself at trial and fully participated in the proceedings. After the discussion about his counterclaim, the jury was brought in and Green introduced himself to the jurors, telling them that he "look[s] forward to presenting evidence . . . to be able to exonerate me." GA148. On the first day of evidence, Green filed an emergency motion for stay and extraordinary writ with this Court and pressed the district court for an explanation for why the court denied his motions to dismiss. GA273-74, GA276.

During the course of trial, Green made an opening statement GA287-89; he made multiple objections during the testimony of government's witnesses (objections to Paul Crowley (GA295-296; GA302; GA305; GA308; GA316; GA323-25); objections to Michael Thompson (GA359); objections to Shawna Henline (GA378; GA401); objections to Mark Everson (GA418; GA421; GA427;

GA430; GA436; GA443; GA445-446; GA476-477); objections to Thomas Kilmartin (GA505; GA510; GA513; GA521; GA526); objections to Nicholas Scorza (GA552; GA564); he cross-examined each of the government witnesses (cross-examination of Crowley (GA337-351); re-cross of Crowley (GA354-355); cross-examination of Thompson (GA367-371); cross-examination of Henline (GA402-409); cross-examination of Everson (GA453-60; GA470-75); cross-examination of Kilmartin (GA528-40); and cross-examination of Scorza (GA585-89).

Green presented to the district court his research regarding the Fair Debt Collections Act (GA593-97), and he moved for acquittal pursuant to Rule 29 (GA597). Green also made a closing argument (GA626-39), and after the jury verdict, moved the court to set aside the verdict based on insufficient evidence (GA719-20). Throughout the entire trial Green had the assistance of standby counsel with whom he conferred, who actively advised Green, and at times, interjected on the record on his behalf (GA129-30; GA148-49; GA223; GA349; GA350; GA354; GA440; GA531; GA539; GA599-600; GA728; GA733).

A. Governing law and standard of review

"[A] district court's conclusions regarding the constitutionality of a defendant's waiver of his

right to counsel is subject to *de novo* review," and "its supporting factual findings [are reviewed] under a clearly erroneous standard." *United States v. Spencer*, 995 F.2d 10, 11 (2d Cir. 1993). This Court "will affirm a district court's conclusion that a defendant knowingly and voluntarily waived his constitutional rights if any reasonable view of the evidence supports it." *Id.* (internal quotation marks omitted).

Under *Faretta v. California*, 422 U.S. 806 (1975), a criminal defendant has a Sixth Amendment right to self-representation. A defendant may choose to represent himself if the decision is made "intelligently and knowingly, with full awareness of the right to counsel and the consequences of the waiver." *United States v. Tracy*, 12 F.3d 1186, 1191 (2d Cir. 1993).

Whether a valid waiver has occurred turns on all the surrounding facts and circumstances, including the experience, background and conduct of the accused. *Tracy*, 12 F.3d at 1192. In evaluating the validity of a waiver, the district court should consider whether: 1) the defendant understood that he had a choice between proceeding *pro se* and with assigned counsel; 2) he understood the advantages of having a trained lawyer to represent him; and 3) the defendant had the capacity to make an intelligent choice. *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998). Although the district court should strive for a "full and calm" discussion with the

defendant to assure that he fully understands his decision, this Court has declined to require any particular "talismanic" procedures to this end. *United States v. Hurtado,* 47 F.3d 577, 583 (2d Cir. 1995); *Tracy,* 12 F.3d at 1192. This Court does not "analyze the district court's every word, so long as the record as a whole demonstrates that the defendant knowingly and intelligently waived [his] right to counsel." *Torres*, 140 F.3d at 400. In short, the district court must be satisfied that the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835.

B. Discussion

1. Green's words and conduct showed he understood he had a choice to represent himself or have counsel, understood the risks of self-representation, and had the capacity to make that choice.

Green argues the district court improperly accepted his waiver of his right to counsel because he was incompetent to waive that right and failed to ensure that he was competent. AB41. In doing so however, Green simply ignores the detailed factual findings the district court made and the extensive record upon which the court relied in making those findings. The district court repeatedly and painstakingly informed Green of the risks of self-representation,

held multiple hearings to ensure that Green's choice to proceed with counsel or *pro se* was honored, and ultimately ensured that Green had the capacity to waive his right.

The record on which the district court based its findings that Green knowingly and intelligently waived his right to counsel was more than sufficient. The district court held five substantial hearings during which it had an opportunity to observe Green and, in four out of the five, engage him in colloquy. The district court personally advised Green that he had a choice regarding whether to represent himself or be represented by counsel on numerous occasions. The court ensured that Green had been advised of this right by the magistrate judge who handled his initial appearance and by his counsel, and that counsel believed Green understood that choice.

Any doubt that Green understood he had this choice is removed by Green's own conduct. He flip-flopped on the issue several times—choosing to represent himself during the November 27, 2012 hearing, electing to be represented by counsel during the June 26, 2013 and August 8, 2013 hearings, and then electing to represent himself again during the October 2, 2013 and November 4, 2013 hearings and during the trial. The record amply demonstrates Green not only understood this choice, but exercised it several times.

Just as clear is that Green understood the risks of self-representation. Again, the district court personally advised Green of the risks associated with representing himself in four separate hearings and the court ensured that Green's counsel also had advised him of these risks. Most definitive on this issue however, is Green's explicit admission that he knew he was at a disadvantage in representing himself. During the June 26, 2013 competency hearing, after the district court reminded Green that he would be at a disadvantage because of his lack of familiarity with the governing laws and procedures, Green stated:

> Your Honor, I agree with what you just said, especially for me being not knowledgeable in terms of law and procedure. I wholeheartedly agree with you and I know I'm at a disadvantage. Again, I just have to convey to the court that I have reservations in terms of the relationship that I—I still respect our understanding and your view of trying to cause me not to harm myself.

A110.

Green was not simply advised of the risks of self-representation, he affirmatively acknowledged his understanding of those risks. That fact weighs heavily in favor of finding a knowing and voluntary waiver of his right to counsel.

Green repeatedly showed he had the capacity to make an intelligent choice about self-representation by weighing various representational options and strategizing about his case. Even before he elected to proceed *pro se,* Green made clear to the district court his belief that he could "add value" . . . "in bringing truth forth to the court," and intended to have a "participation in the proceedings and to help in defending myself." A95.

Green engaged in multiple colloquies with the district court about his "representational options," specifically, whether he wanted to represent himself or to be represented by counsel. A28. This discussion occurred over the course of several hearings during which Green and the district court discussed whether he wanted to be the limousine driver or a passenger, or whether, in another analogy, Green would operate on himself or rely on a doctor.

Green rationally considered why he wanted to represent himself, specifically, because he "understood the case better than an attorney since he was directly involved," and was the one with "the most to lose." SSA9, 10, 12. The record shows that Green had ample capacity to make an intelligent choice. Green carefully weighed his options, and assessed why he believed he would be better suited to represent himself rather than an attorney despite his acknowledged lack of legal training.

Green's written submissions demonstrated his active interest in his own defense, and his responses to the district court showed that he had performed his own legal research and had a detailed understanding of how a trial works. Based on this extensive record, the district court did not err in allowing him to proceed *pro se*.

2. The district court was not required to reject Green's request to proceed *pro se*.

Green relies on *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) to argue that the district court should have required him to be represented by counsel; that is, that the court should have rejected his explicit request to proceed *pro se*. AB43.

The Supreme Court has recognized that, in certain cases, a court may deny a defendant's knowing and intelligent waiver of his right to counsel where he lacks the mental capacity to put on a defense at trial. *Indiana v. Edwards*, 554 U.S. 164, 176-78 (2008). In *Edwards*, the Court held that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.* at 177-78. Defendants who are "competent enough to stand trial" but nevertheless "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by

themselves" may be denied the right of self-representation. *Id.* at 178. Accordingly, a trial court may exercise its discretion to deny an otherwise valid waiver of the right to counsel based on the defendant's inability to conduct a defense due to mental illness. *Id.*

But *Edwards* merely authorized, it did not require, district courts to reject otherwise valid requests to proceed *pro se* where the record indicates that the defendant, while competent to stand trial, lacks the capacity to put on a defense. *Edwards*, 554 U.S. at 178 ("[T]he Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960),] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (emphasis added). As a number of other circuits have found, *Edwards* confers discretion upon the trial court, it does not impose a new duty." *See United States v. Turner,* 644 F.3d 713, 724 (8th Cir. 2011) (stating that "*Edwards* clarified that district court judges have discretion to force counsel upon" certain defendants but "does not mandate two separate competency findings for every defendant who seeks to proceed *pro se*" (internal citation omitted)); *United States v. Berry*, 565 F.3d 385, 391 (7th Cir. 2009) ("The Constitution may have allowed the trial judge to block his request to go it alone, but it certainly

didn't require it." (emphasis omitted)); *United States v. Ferguson*, 560 F.3d 1060, 1070 n.6 (9th Cir. 2009) ("*Edwards* does not compel a trial court to deny a defendant the exercise of his or her right to self-representation; it simply permits a trial court to require representation for a defendant who lacks mental competency to conduct trial proceedings."); *United States v. DeShazer*, 554 F.3d 1281, 1290 (10th Cir. 2009) ("[W]hile the district court was not compelled to find [the defendant] competent to waive his right to counsel simply because the court had found him competent to stand trial, it does not follow that the district court was absolutely prohibited from doing so.").

As set forth above, the record does not justify, let alone mandate, that the district court have denied Green's request to proceed *pro se* because Green had the capacity to put on a defense. Indeed, Green displayed every attribute that this Court's case law suggests should be present in a defendant seeking to represent himself. Although the psychiatrist concluded that Green was not competent to represent himself, as the district court pointed out, that conclusion was based on certain personality disorders and Green's lack of education, not on any mental disease or defect. In any event, the psychiatrist's conclusion is certainly not dispositive of the issue as this Court has made clear that such an opinion is only one of the factors a court may re-

ly on in determining a defendant's competency. *See, e.g., United States v. Nichols,* 56 F.3d 403, 411 (2d Cir. 1995) (declining to question district court judgment as to competency where one opinion conflicts with other expert assessments and stating that "In making a determination of competency, the district court may rely on a number of factors, including medical opinion and the court's observation of the defendant's comportment."); *United States v. Villegas*, 899 F.2d 1324, 1341 (2d Cir. 1990) (stating that district court's choice between two permissible views of the evidence as to competency "cannot be deemed clearly erroneous"). It was perfectly permissible for the district court to have relied on its own assessment of Green's intelligence, knowledge and deportment in making its own determination of whether a valid waiver had occurred.

There is no support in the record for the notion that Green was "suffer[ing] from severe mental illness" as described in *Edwards*, and, in fact, the psychiatrist concluded that Green was not. Further, the psychiatrist's conclusion did not account for the later court hearings in which Green and the district court engaged in extensive colloquies which confirmed that Green understood the trial proceedings, had the ability to follow instructions, was engaged in his own defense and appreciated the risks of self-representation. Simply put, *Edwards* does not

require any different result than what the district court concluded here.

3. Green inaccurately portrays the district court's findings and leaves out critical procedural details about why the court ultimately allowed him to proceed *pro se*.

Green makes much of the court purportedly having "found" him to be incompetent ("[t]he court first found Mr. Green was not competent to represent himself . . ." (AB3); "the court itself initially found that [Green] was not competent to represent himself" (AB41)). Notwithstanding Green's repeated assertions, the district court made no such finding. During the June 26, 2013 competency hearing, the court did nothing more than acknowledge the conclusion of the psychiatrist, stating:

> [The psychiatrist] has indicated you lack the capacity to represent yourself in some measure due to the understandable stress and strain of being a criminal defendant and your understandable lack of expertise in the area of law in which you have no education, no training or experience.
>
> Therefore, the court will appoint [counsel] to represent you.

A93-94. Importantly, shortly before this hearing, Green filed an affidavit revoking his prior re-

quest to proceed *pro se*. A8; GA9 ("Affiant reverses his previous requests to continue solely *pro se* and would ask Court to allow that assistance of counsel be provided as to issues of procedure and law within this instant matter."). Thus, the district court appointed counsel, not over Green's objection, but rather, at his express request. In doing so, the court did not need to (nor did it) make a finding that Green was "incompetent" to represent himself.

Green also claims that the district court "inexplicably . . . reversed itself on October 2, 2013, and permitted [Green] to represent himself." A46. But again, the district court did no such thing. Green has simply left out critical procedural details which show that the district court's ruling was a direct response to another of Green's requests.

As explained above, at the June 26, 2013 hearing, the district court appointed counsel to represent Green. A94. Counsel also represented Green at the Speedy Trial hearing on August 8, 2013. GA13. After that however, Green had another change of heart and on September 10, 2013, filed another motion to proceed *pro se*. A11. Thus, the October 2, 2013 hearing was a direct response to Green's motion to proceed *pro se*, not an "inexplicable" reversal. Indeed, this fact was made abundantly clear on the record of that hearing. A119 ("Court is convening this afternoon to address Docket Number 97, which is

Green's motion for self-representation."); A120 (Green: "One question I have is this meeting or hearing based off of my motion?" Court: "Yes. It's based off of your motion to represent yourself at trial."); A120-21 ("So, again I just want to be clear, the reason why we're having this hearing is because of me filing this pro se, a motion to proceed pro se, or was it otherwise?" Court: "Yes. No, that is the reason why." Green: "Okay."). The court then went on to make its expansive factual findings and concluded that Green's waiver of his right to counsel was knowing, intelligent and voluntary. A121-28.

Thus, the district court's decision to allow Green to represent himself was not at all "inexplicable," but rather, prompted by Green's own motion seeking permission to proceed *pro se*. The trial court was scrupulous in its efforts to honor Green's choice.

As discussed above, Green's espousal of unconventional legal views, while inadvisable, did not reasonably call into question his competence. Throughout the proceedings, Green represented himself for extended periods of time and demonstrated that he understood the meaning of an exclusion of time under the Speedy Trial Act ("[R]egardless if I say I want to file a motion or not, the court itself is going to stop the speedy time clock, is that correct, your Honor?" GA33), understood how to and did file numerous motions (A5, A6, A8, A9, A10, A11, A13, A14, A16,

A19); and conducted legal and factual research concerning his case (A128; SSA10; GA593-97). Green suggested possible legal defenses to the charges, namely, that the IRS had failed to present him with a Form 4490 and therefore "violated due process" (A172); that there was no amount in controversy and the government had not been injured because an IRS transcript showed that he did not have an amount owed (GA21-22). In short, Green was fully competent and understood he had the right both to represent himself and to have counsel at trial. In these circumstances, the district court did not plainly err in allowing Green to represent himself at trial.

4. The district court's expression of "concern" about Green on the first day of trial does not render the court's prior findings inadequate.

Green argues that the trial court "completely failed" to ensure that he was "competent to represent himself" after having expressed "concern" about Green on November 5, 2013, the day of jury selection. That morning, Green argued that the government had failed to provide a "Form 4490 Proof of Claim" detailing the existence of a "disputed material fact showing a specific liability statute." A172.

Green then engaged, not in incoherent ramblings, but in an argumentative exchange with the court. He stated that the Form 4490 had not

been filed as the IRS is required to do. A172. The district court then clarified that Green was not being prosecuted by the IRS, but in a criminal proceeding being prosecuted by the Department of Justice. A173. The court reminded Green that he was charged with filing a false tax return by inflating fraudulently his income, receiving a false refund, and then obstructing collection efforts. A173-74. Green then argued with the court about whether it had accused him of the conduct in the indictment or not, saying "Your Honor . . . you just made a statement saying that factually that I inflated the numbers." A174. When the court clarified that "these are the Government's allegations in the indictment," Green ignored the court saying "you said on the record that I did these things. . . . You did not say 'allegedly,' so you're literally testifying from the bench." A174.

At the end of this exchange the district court told Green that it had "clearly and unambiguously" informed him of the charges and factual basis for the charges and said that it was "very concerned" that Green "appear[s] not to be mentally competent." A175. Green immediately objected, saying "Your Honor, I would have to rebuff [sic] that. I am very mentally competent." *Id.* When the court then asked if Green recalled the indictment, Green acknowledged that he did. *Id*. But he continued to argue with the court, saying that he was "not too sure" that the indictment alleged he owed the government a tax.

A175. The court stated that it was "really concerned" and Green asked the court what it was concerned about. The court then said:

> I'm concerned because you don't seem to understand why you're here. You've-you just stated that you believe you're here for the failure to pay a tax which is due, and that is not what the Government has charged you with. The Government has charged you with filing a false tax return and frustrating the Government's efforts to collect the refund to which you were not entitled.

A176.

Green then continued his argument that he was denied due process by IRS collections because he had not been presented with a Form 4490. A181. He insisted that "I don't understand how this could be brought to this venue when . . . due process was never . . . ." (A183); and "I just don't understand why we are here but I'll take . . . ." A184. The court interrupted him and asked if he could focus on the trial and Green confirmed that he could. *Id.* During this entire exchange, which spanned a total of 10 pages of the record (A172-77; A181-84), Green responded appropriately (although perhaps belligerently) to the court's questions.

The court's concern about "why you're here" was not that Green was having any sort of psy-

chotic episode that rendered him unaware of the nature of the proceedings or incapable of defending himself. Rather, that comment and the court's comments about Green's "competency," when read in context, clearly arose out of the district court's frustration with Green's arguments. Showing that he understood precisely what was going on, immediately after this colloquy, Green aptly summarized the false return charge saying "they're coming after me, as the man, because I filed a fraudulent tax return, that I had willful intent to file a tax return." A176. Green also concurred with the district court's recitation of counts one and two of the indictment. A177.

Neither Green's statements nor the district court's expression of "concern" indicate that Green lacked an understanding of the charges. Nor do they indicate that Green was suffering from any sort of mental breakdown, as the appellant's brief suggests. Rather, Green was relentlessly pursuing his argument that the government had violated due process by not presenting him with a Form 4490. While misguided and overly argumentative, Green's statements and conduct do not even suggest that he was in any way disoriented or incapable of understanding the proceedings. Throughout this exchange he was responsive to the district court's inquiries. Indeed, immediately after this exchange, Green introduced himself to the jury and told

them that he was going to present his case for the claims against him. GA148. In short, neither the district court's expression of "concern" nor Green's statement that he "didn't understand why we are here" indicates that Green was confused about the trial, the charges, or the consequences of the proceedings.

5. Green's purported deficiencies as a trial lawyer are irrelevant to the issue of his valid waiver of the right to counsel.

Green also argues that his purportedly subpar performance as a trial lawyer shows that he was incompetent to represent himself. AB4. For example, Green points out that he did not file proposed voir dire, requests to charge, motions in limine, or subpoena witnesses or documents, and that his cross-examination of witnesses "had no semblance of a colorable defense." AB4.

These criticisms of Green's trial performance are entirely misguided. The Supreme Court has made clear that a defendant's "technical legal knowledge" is "not relevant" to whether he is competent to waive his right to counsel, *Faretta,* 422 U.S. at 836, because "the 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." *Godinez v. Moran,* 509 U.S. 389, 399 (1993) (emphasis in original). Although a defendant "may conduct his own defense ultimately to his own

detriment, his choice must be honored." *Faretta,* 422 U.S. at 834; *Godinez,* 509 U.S. at 400 (same). While "'[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,' a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Godinez,* 509 U.S. at 400 (emphasis in original) (*quoting Faretta,* 422 U.S. at 834).

In short, an after-the-fact examination of how a *pro se* defendant performed is irrelevant to the question of whether he was competent to waive his right to counsel. *Faretta*, 422 U.S. at 835-36 ("We need make no assessment of how well or poorly [defendant] had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.").

Although Green's performance at trial is not relevant to the waiver inquiry, it is worth mentioning that his performance was entirely adequate. He told jurors in his opening statement that he was "one man against a large entity of IRS and the government," (GA228) that he would never have intentionally defrauded the IRS and put his family at risk; and urged them to keep an "open mind." *Id.* Through cross-

examination of the IRS records custodian Paul Crowley, Green established that the witness had not seen Green fill out any of the forms and did not know what Green was thinking at the time (GA337-38); that there were anomalies in the IRS records (GA341-44); and that the witness could not say that the records were accurate (GA349). Green established with Shawna Henline, the IRS witness who testified about OID schemes and the head of the fraudulent return unit, that there were people who sold the idea of "the OID method of accessing [] Treasury accounts" (GA403). Green questioned Mark Everson, the IRS employee who testified about the FIRE system, about the nature and circumstances under which the FIRE system generates notices (GA455-58); that a large number of logins by a user does not necessarily mean they are engaging in fraud (GA472); and that the fraud alert page introduced by the government appears different than it would have appeared in 2008 (GA474-75). With the revenue officer, Green established that the IRS is a collection agency (GA528); and that a Form 1040-X is a taxpayer's effort to amend a prior return (GA533). Green examined Special Agent Nicholas Scorza and established that one of the IRS's functions is as a collection agency (GA586); and that he has remained at the same job and at the same address even though the IRS has been garnishing his wages. GA587-88.

Green's closing argument emphasized that the government had the burden of proof, and that the government's witnesses established that he had never filed an OID return before 2008, that tens of thousands of taxpayers had filed these OID returns, that the OID return was a scheme that people were selling, and that Green acted in good faith when he filed his OID return. GA626-27. He argued that there was no evidence that he clicked on the fraud alert on the FIRE website, and given the FIRE website witness's testimony about the differences between the warnings in 2012 and 2008 when Green would have logged on, that the jury could not be sure of what, if any, warning Green would have seen. GA627-28. Green argued that he reasonably concluded that his return was legitimate given that he received the refund, and that his actions after having received the money, making home improvements and paying off debt, were not the actions of a thief. GA629-30. Green also argued that he did not impede collection efforts by submitting a check drawn on a closed account and that the correspondence the government used to show he impeded collection efforts was instead an attempt to resolve the dispute. GA631-35. He urged the jury to conclude that his efforts were a good faith attempt to resolve issues and that he was exercising his "American right" by "questioning and trying to get answers as to his responsibility and obligations." GA638-39.

Certainly criticism can be made of Green's performance as a trial lawyer, but such could be made of any lawyer's performance. Whatever deficits there were in Green's performance "furnish no basis to refuse a knowing, voluntary and unequivocal waiver of one's right to counsel." *Williams v. Bartlett,* 44 F.3d 95, 99 (2d Cir. 1994).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,327 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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