THE ROLE OF STANDBY COUNSEL IN CRIMINAL CASES: IN THE TWILIGHT ZONE OF THE CRIMINAL JUSTICE SYSTEM

ANNE BOWEN POULIN*

In this Article, Professor Anne Poulin explores the role of standby counsel appointed to assist pro se defendants in criminal cases. Many courts and attorneys assume that acting as standby counsel entails less work than serving as lead counsel and that an active standby counsel would threaten the defendant's right to self-representation. Professor Poulin argues instead that a properly functioning standby counsel actually shoulders a greater burden than normal, following the case from pretrial procedures through sentencing, and not only providing assistance when the defendant asks, but also remaining alert for issues that the defendant missed. Professor Poulin concludes that a standby counsel must act as a shadow counsel, preparing the case as full as if she were the lead counsel.

> Is their role akin to that of the phone psychics who advertise on late-night television, giving advice, which may or may not be heeded, only when asked? Or is it more like that of a theatrical understudy, ready to step into the trial should the primary actor, the defendant, be for any reason unable to continue?[1]

INTRODUCTION

The United States Constitution guarantees an accused criminal the right to represent herself. When a defendant chooses to proceed pro se, the trial court may appoint standby counsel, an attorney to assist the defendant as she conducts her defense. The role of standby counsel, however, has never been clearly defined. An appointment as standby counsel casts an attorney into an uncomfortable twilight zone of the law. The attorney may be unsure of her duties and the extent of her obligation. She functions in a context where the usual professional and ethical guides to attorney conduct appear not to fit, and she is constrained from assuming the normal role of an attorney.[2]

* Professor of Law, Villanova University. B.A., 1969, Radcliffe College; J.D., 1973, University of Maine; LL.M., 1975, University of Michigan. I am grateful to all my colleagues for their helpful comments, particularly Len Packel. I am also indebted to Katherine Neikirk and Cara Leheny for their research assistance, and to Villanova University School of Law for its generous support.

1 State v. Richards, 552 N.W.2d 197, 205 (Minn. 1996).

2 See, e.g., Brookner v. Superior Court, 76 Cal. Rptr. 2d 68, 71 (Ct. App. 1998) ("Advisory or standby counsel must often, and necessarily, remain confused and indecisive as to

In some cases, the confusion undermines the fairness of the proceeding. Consider, for example, *Appel v. Horn*.[3] The defendant, charged with first degree murder and facing the death penalty, was initially represented by two public defenders.[4] After the defendant, Appel, claimed he wanted to represent himself, the court set a date for a competency hearing.[5] Although the court appointed the attorneys to serve as standby counsel, they did not consider themselves Appel's counsel and took no action on his behalf before or during the hearing, at which the court ultimately found him competent.[6] Appel then pled guilty and received a death sentence.[7] Eventually, the defendant filed a habeas petition in federal court, arguing in part that he was not competent to plead guilty.[8] Thirteen years after the charged offense, a federal court granted Appel a new trial because of the confusion concerning the role of standby counsel.[9]

When a defendant exercises the right to proceed pro se, she imposes a greater burden on the trial court and the justice system to ensure a fair and efficient trial. Pro se representation threatens to create a disorderly and unfair trial because the defendant is both unversed in courtroom etiquette and uneducated in the law.[10] Courts often provide standby counsel to alleviate the burden of presiding over the trial of a pro se criminal defendant and possibly to avert an unfair trial.[11] On the other hand, some courts regard pro se defendants as clever manipulators of the justice system.[12] Judges may per-

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their roles and responsibilities, in contrast to counsel appointed to defend the case, whose duties are well-defined and for whom a standard of ineffectiveness is well-known.").

3 No. Civ.A.97-2809, 1999 WL 323805 (E.D. Pa. May 21, 1999).

4 See id. at *2.

5 See id.

6 See id. at *2-*3.

7 See id. at *3.

8 See id.

9 See id. at *17.

10 An extreme example is found in Mayberry v. Pennsylvania, 400 U.S. 455, 462 (1971), where the Supreme Court stated that the pro se defendants' "brazen efforts to denounce, insult, and slander the court and to paralyze the trial [were] at war with the concept of justice under law."

11 See John H. Pearson, Comment, Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial, 72 Cal. L. Rev. 697, 704-15 (1984) (discussing how standby counsel can instruct pro se defendant on trial procedures and protect defendant's interest in receiving fair trial).

12 See, e.g., Berry v. Lockhart, 873 F.2d 1168, 1171 (8th Cir. 1989) (acknowledging that requests for change of counsel are sometimes dilatory tactics); United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982) (noting that trial court perceived defendant's motions—first, to obtain substitute counsel, and later, to replace himself with "effective counsel"—"as an attempt to manipulate the court and to introduce error into the proceedings"). But see State v. Bruch, 565 N.W.2d 789, 793 (S.D. 1997) (rejecting prosecution argument that defendant was manipulating trial schedule).

ceive defendants' requests for substitution of counsel as dilatory tactics and then respond by presenting defendants the choice of proceeding with an unsatisfactory attorney or representing themselves with appointed standby counsel.

Appointment of standby counsel, however, creates its own set of problems. The role of standby counsel may be unclear to the attorney.[13] In addition, courts walk a fine line between violating the defendant's Sixth Amendment right to assistance of counsel and violating the defendant's right to proceed pro se.[14] One court cautioned that "[t]he trial judge must be alert to clever defendants who could seek to play one constitutional right against another, claiming that the trial judge either failed to restrict or overly restricted the role of standby counsel."[15]

This Article argues that standby counsel's role should be strengthened and more clearly delineated. Courts should both expand the role of and give greater guidance to standby counsel, clearly stating the expectation that standby counsel will be an active and supportive force in the pro se defendant's trial. Attorneys assigned to act as standby counsel need to have a better sense of their obligations.

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[13] The court in Brookner v. Superior Court, 76 Cal. Rptr. 2d 68 (Ct. App. 1998), in addressing the public defender's petition seeking to be relieved of standby counsel appointment, captured the dilemma that often confronts standby counsel appointed to a dissatisfied former client:

> The attorney, now bereft of control over the case, is then appointed advisory or standby counsel. What is the attorney expected to do? Devote his time to the case at the expense of his other clients, and perhaps his practice, or merely check in from time to time? Sit at the counsel table or in the public gallery? Advise the defendant—a former client who was dissatisfied with his services to begin with—on the proper course of action, or remain silent? Conduct his own independent investigation or an evaluation of the defendant's proposed witnesses or strategies, or do the crossword? Draft motions and urge the defendant to consider filing them, or doodle? And how is standby counsel supposed to blithely resume representation after the pro. per. defendant decides he is in over his head? How can the standby counsel get quickly up to speed? How can he repair the damage the defendant may have caused to the case?

Id. at 72.

[14] See, e.g., United States v. Proctor, 166 F.3d 396, 401 (1st Cir. 1999) (discussing problem confronting trial courts); Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (stating that trial court must tread carefully between improperly allowing defendant to proceed pro se and improperly requiring defendant to proceed with counsel); People v. Williams, 661 N.E.2d 1186, 1190 (Ill. App. Ct. 1996) (claiming "appointment of standby counsel frequently creates more problems than it solves"). See generally Marlee S. Myers, Note, A Fool for a Client: The Supreme Court Rules on the Pro Se Right, 37 U. Pitt. L. Rev. 403, 404 (1975) (discussing difficulties in "resolving the clash between two constitutional imperatives").

[15] Molino v. DuBois, 848 F. Supp. 11, 14 (D. Mass. 1994); see also United States v. Singleton, 107 F.3d 1091, 1095-96 (4th Cir. 1997) (discussing difficulty of protecting both right to assistance of counsel and right to self-representation).

Standby counsel should not view themselves as a passive resource; rather, they should expect to prepare the case as if they were trying it and to support the pro se defendant completely, while understanding that much of their efforts will remain behind the scenes.

Section I of this Article examines the right to self-representation, the legal basis for appointing standby counsel, and the constitutional limits on standby counsel. Section II highlights practices that undermine the ability of standby counsel to function effectively. Courts sometimes manipulate reluctant defendants into self-representation and then appoint as standby counsel attorneys from whom the defendants are estranged. This takes place in a setting where the obligation to serve as standby counsel and the mode of compensation are ill-defined. These practices compound the difficulty facing standby counsel and reduce the likelihood that standby counsel will help preserve the defendant's right to a fair trial. Instead, the courts should attempt to clarify standby counsel's role and enhance standby counsel's contribution to the fairness of the trial. Section III considers the appropriate role for standby counsel and discusses the specific actions standby counsel should take at different stages of the proceedings. Section IV considers the application of the effective assistance of counsel guarantee to standby counsel.

This Article takes the position that neither the court nor the attorney should view an appointment as standby counsel as assigning a less challenging role to the attorney. Properly conceived, the obligation of standby counsel may in fact be more onerous than the more straightforward job of representing an accused. Involvement as standby counsel does not relieve the attorney of the obligation of zealous representation, but merely redirects the attorney's efforts and forces much of her work to remain behind the scenes at trial. Standby counsel must maintain a low profile in front of the jury and must cede to the defendant many decisions that would normally fall to defense counsel. Despite this deferential role, standby counsel must be as diligent as defense attorneys should be, investigating the case and exploring the legal issues as if in preparation for trial. Furthermore, standby counsel must assume an educative role beyond that normally expected of counsel. She should evaluate pretrial and trial strategies thoroughly enough to help the defendant understand the choices to be made; she must stand ready to offer a guiding hand to the pro se defendant, even one she believes to be embarking on the wrong course. Thus, the obligation of standby counsel is substantial and far from the "not quite a lawyer in the case" concept reflected in the reported decisions.

Before proceeding, I must note one problem I faced in writing this Article. In considering the role of standby counsel, I had to confront the gap between what defense representation should be and what it is. Defense representation often falls short. Many defense attorneys handle too many cases; some public defenders are assigned an excessive workload, and some private attorneys try to increase their income by taking on a large number of clients.[16] In addition, most defenders' offices are structured horizontally, transferring the client from attorney to attorney as the case progresses; this practice undermines formation of a meaningful attorney-client relationship and reduces the likelihood that the defendant will receive the best defense representation.[17] Because the standard for effective assistance of counsel is low, no legal consequence flows from the system's tolerance of such defense representation.

How do the foregoing observations relate to standby counsel? We currently allocate too few resources to defense of criminal cases to guarantee excellent representation for most defendants,[18] so why should any of those resources be diverted to pay for standby counsel? Given that defense attorneys can provide low-quality representation and not be faulted for it, why discuss holding standby counsel to a high standard? To discuss the role of standby counsel, I have refused to be grounded by the sad reality of the justice system. Instead, I have considered standby counsel's role against a backdrop that assumes defense representation at an appropriate level. I do so because I feel strongly that legal scholarship must not only discuss the faults of the system as it exists, but must also define aspirational goals in an effort to bring the system nearer to what it should be. This Article sets forth a normative standard for standby counsel that should guide trial

16 See United States v. DeCoster, 624 F.2d 196, 280 n.89 (D.C. Cir. 1979) (Bazelon, J., dissenting) (discussing typically heavy caseload of defendant's attorney who had handled 284 cases in 1972, more than one case per working day). Some attorneys also fail to investigate cases adequately because they fear these expenses will be subtracted from their fees. See id. at 278 n.80.

17 See Richard Klein, The Emperor *Gideon* Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625, 676-79 (1986) (discussing "horizontal representation or the 'zone defense'").

18 See generally Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 646-47 (1989) (Blackmun, J., dissenting) (discussing lack of resources and consequent impact on defense representation); Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783, 783 (pointing to "remarkably thin" ration of legal services for poor persons that leads to "perfunctory representation"); Klein, supra note 17, at 675 (noting that "prosecution receives almost four times the amount of funds spent by state and local governments on indigent defense").

courts in conducting fair and efficient trials of pro se criminal defendants.

I
BACKGROUND: THE CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION AND LIMITATIONS ON STANDBY COUNSEL

Two decisions of the Supreme Court define the constitutional status of standby counsel. In *Faretta v. California*,[19] the Supreme Court recognized a right under the Sixth Amendment to represent oneself in a criminal proceeding[20] but also acknowledged that the court could appoint standby counsel to aid a pro se defendant.[21] In *McKaskle v. Wiggins*,[22] the Court considered the role of standby counsel and defined the constitutional limitations on that role. This section offers a brief reprise of each case.

In *Faretta*, the trial court rejected the defendant's offer to waive his Sixth Amendment right to assistance of counsel and represent himself.[23] After probing the defendant's understanding of voir dire procedure and evidence law, the judge determined that the defendant could not represent himself competently and further concluded that the defendant had no constitutional right to proceed pro se. The Supreme Court disagreed and found that the trial court had violated the defendant's Sixth Amendment right to self-representation.[24] The Court eliminated a trial court's discretion to refuse a defendant's request to proceed pro se merely because she may not represent herself effectively.

Faretta created tension between the defendant's right to proceed pro se and society's interest in maintaining the fairness of the criminal justice system. The Court acknowledged this tension in its decision,[25] and it has since been discussed frequently.[26] One way to avoid an

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19 422 U.S. 806 (1975).

20 See id. at 818-20.

21 See id. at 835 n.46.

22 465 U.S. 168 (1984).

23 See *Faretta*, 422 U.S. at 808-10.

24 See id. at 836.

25 See id. at 832-33 (acknowledging that holding seems antithetical to right to counsel cases that posit that assistance of counsel is essential to fair trial); see also id. at 839 (Burger, C.J., dissenting) (arguing that goal of justice is undermined and integrity of system suffers when easy conviction results from defendant's decision to proceed pro se); id. at 849 (Blackmun, J., dissenting) (arguing that majority ignores principle that justice be done).

26 See Richard H. Chused, *Faretta* and the Personal Defense: The Role of a Represented Defendant in Trial Tactics, 65 Cal. L. Rev. 636, 649-51 (1977) (discussing Court's treatment in *Faretta* of conflict between defendant's right to represent herself and society's

unfair trial, as well as to check an unruly pro se defendant, is to appoint standby counsel. While the Court recognized the right to self-representation in *Faretta*, it noted that the pro se defendant must comply with the procedural and substantive rules that normally govern a trial.[27] This requirement, however, may frustrate an unassisted pro se defendant. The Court stated that standby counsel could be appointed "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[28] Moreover, the Court emphasized that a trial court may appoint standby counsel even over the defendant's objection.[29]

The Court further clarified the role of standby counsel in *McKaskle*. *McKaskle* arose when a pro se defendant alleged that standby counsel's active involvement in the trial violated his Sixth Amendment right to represent himself.[30] The defendant, Wiggins, invoked his right to represent himself at trial, and the court appointed two lawyers as standby counsel. As the case progressed, Wiggins repeatedly changed his mind about what he wanted standby counsel to do. At times he objected to their very presence; at others he consulted with them or asked them to take over aspects of the case. Standby counsel took an active role in the trial, arguing legal points, performing specific tasks, and occasionally making motions over Wiggins' objection. Once convicted, Wiggins complained that standby counsel had been overzealous and had interfered with his *Faretta* right to self-representation by their "distracting, intrusive, and unsolicited participation."[31] The Court of Appeals for the Fifth Circuit agreed and stated that standby counsel is "to be seen, but not heard."[32] However, the Supreme Court rejected the argument that standby counsel could not take an uninvited, active role in the trial, and it concluded that Wiggins' attorneys had not overstepped the constitutional limits on their

interest in fair trial); Pearson, supra note 11, at 709-13 (examining society's interest in fair trial and defendant's interest in personal autonomy); see also Paul H. Byrtus, Comment, *Pro Se* Defendants and Advisory Counsel, 14 Land & Water L. Rev. 227, 231-32 (1979); Mark S. Coco, Case Note, 37 Ohio St. L.J. 220, 226 (1976); John S. Teetor, Note, *Faretta v. California*: The Constitutional Right to Defend Pro Se, 5 Cap. U. L. Rev. 277, 280 (1976).

27 See *Faretta*, 422 U.S. at 835 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

28 Id.

29 See id.

30 See McKaskle v. Wiggins, 465 U.S. 168, 170-73 (1984).

31 Id. at 176.

32 Wiggins v. Estelle, 681 F.2d 266, 273 (5th Cir. 1982), rev'd sub nom. McKaskle v. Wiggins, 465 U.S. 168 (1984).

role.[33] The Court stated that the right recognized in *Faretta* "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."[34]

The Court specifically held that the right to self-representation includes the right actually to control the defense as well as the right to have the jury perceive the defendant as controlling the defense.[35] These guarantees of actual and perceived control preclude standby counsel from substantially interfering with significant tactical decisions or "speak[ing] *instead* of the defendant on any matter of importance."[36] However, as long as standby counsel does not usurp actual control or interfere with the perception of control, standby counsel is permitted to participate actively in the proceedings. The defendant must retain final authority over all decisions, but standby counsel may express disagreement outside the jury's presence without violating the defendant's constitutional rights.

In short, the constitutional guidance concerning standby counsel is limited. The pro se defendant cannot demand the assistance of standby counsel. A court may appoint standby counsel but is not required to. Appointed standby counsel may actively assist the pro se defendant but cannot interfere with the defendant's control of the case or the defendant's appearance of control. This bare standard reveals the importance of establishing more defined guidelines for the appointment of standby counsel and the obligations of the designated attorney.

II

PROBLEMS IN CURRENT PRACTICE

Judicial decisions addressing pro se defendants' complaints reveal troubling patterns in the appointment of standby counsel that heighten the importance of better defining standby counsel's role. The cases depict problems in how defendants choose to represent themselves and how courts assign standby counsel. The decision whether to appoint standby counsel for a pro se defendant generally

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33 See *McKaskle*, 465 U.S. at 187-88.

34 Id. at 176-77.

35 See id. at 178 ("First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . Second, participation by standby counsel should not be allowed to destroy the jury's perception that the defendant is representing himself.").

36 Id.

falls within the trial court's discretion, although appointment is considered the better practice.[37]

Nevertheless, many courts are ambivalent about whether a defendant who waives assistance of counsel should receive the benefit of standby counsel. Most decisions hold that a trial court may properly refuse to appoint standby counsel,[38] and some courts are actually hostile to defendants' requests for assistance. For example, one court argued that "[t]he appointment of standby counsel frequently creates more problems than it solves and often is viewed by defendants as an important factor in making the decision to proceed *pro se*."[39] In

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[37] See Mayberry v. Pennsylvania, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring) (recognizing wisdom of appointing standby counsel and commenting that standby counsel can perform varied tasks at trial, protect public interest in fair trial, and step in if defendant is unable to continue pro se); United States v. Spencer, 439 F.2d 1047, 1051 (2d Cir. 1971) (arguing that "desirable practice" is to appoint standby counsel to act as resource to lay defendant and to perform various tasks to assist defendant). Some jurisdictions mandate that trial courts appoint standby counsel for a pro se defendant, at least in serious cases. See, e.g., Minn. R. Crim. P. 5.02 (requiring courts to appoint advisory counsel for defendants charged with serious crimes); State v. Parson, 457 N.W.2d 261, 263-64 (Minn. Ct. App. 1990) (noting that under Minnesota rules of criminal procedure courts must appoint standby counsel for indigent pro se defendant in felony or gross misdemeanor cases). The decision whether to appoint standby counsel often focuses on the nature of the charges, the likely complexity of the proceeding, and the capability of the defendant. See People v. Bigelow, 691 P.2d 994, 999-1002 (Cal. 1984) (finding trial court's failure to appoint standby counsel in capital case involving difficult issues to be abuse of discretion requiring automatic reversal); People v. Gibson, 556 N.E.2d 226, 233-34 (Ill. 1990) (noting relevant criteria and holding that trial court abused its discretion by declining to appoint standby counsel for inexperienced defendant facing capital charges in case involving complex expert and forensic evidence).

[38] See, e.g., McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985) (holding that appointment of standby counsel is not mandatory); State v. Green, 471 N.W.2d 413, 421-22 (Neb. 1991) (rejecting defendant's claim that trial court was required to appoint standby counsel); State v. Small, 988 S.W.2d 671, 673-75 (Tenn. 1999) (holding that defendant has no constitutional right to appointment of advisory counsel); cf. Russaw v. State, 572 So. 2d 1288, 1295-96 (Ala. Crim. App. 1990) (stating that trial court should consider appointing standby counsel for defendant in capital case who waives counsel and then refuses to participate in trial).

[39] People v. Williams, 661 N.E.2d 1186, 1190 (Ill. App. Ct. 1996). Interestingly, some courts take the position that a defendant who seeks to waive assistance of counsel but also requests standby counsel has not tendered the unequivocal waiver necessary to proceed pro se. See United States v. Salemo, 81 F.3d 1453, 1460 (9th Cir. 1996) (finding that defendant had not unequivocally waived his right to counsel because he requested appointment of advisory counsel and asked that advisory counsel be compensated under Federal Criminal Justice Act); United States v. Oakey, 853 F.2d 551, 552-54 (7th Cir. 1988) (finding defendant's waiver of counsel equivocal because he requested continued assistance of counsel); People v. Dennany, 519 N.W.2d 128, 143 (Mich. 1994) (holding that "a request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights"); see also Naomi Gaynor, *People v. Dennany*: The Right to Self-Representation, 1995 Det. C.L. Rev. 255, 271-73 (discussing *Dennany* decision's evaluation of right to standby counsel).

Brookner v. Superior Court,[40] a California appellate court suggested that the defendant be given the stark choice of self-representation (with no standby counsel) or assistance of counsel: "A self-representing defendant should be flying solo—without the comforting knowledge that if turbulence shakes his confidence, a superbly qualified pilot is sitting in the front row of first class."[41]

Standby counsel always confronts a difficult situation, but the difficulty may be aggravated by the way in which the appointment transpires, the trial court's hostility to pro se representation, or the manner in which the trial is managed. In a typical scenario, the defendant complains to the court that her present attorney is not providing the assistance to which she is entitled. The trial court, with an eye on the court calendar and viewing the defendant's complaint as an effort to forestall the trial,[42] declines to bring a new attorney into the case. Instead, the court offers the defendant a choice: Proceed pro se or continue with the unsatisfactory attorney.[43] When the defendant elects to proceed pro se, the court creates a record of the required waiver of the constitutional right to assistance of counsel and provides standby counsel for the defendant. And who is that standby counsel? It is the very attorney whose representation precipitated the defendant's complaint. Thus, the defendant who requested a new lawyer now unwillingly proceeds pro se with her only source of guidance: an attorney from whom she is estranged.[44] Furthermore, the attorney as-

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[40] 76 Cal. Rptr. 2d 68 (Ct. App. 1998).

[41] Id. at 72 (describing typical pro se case as one in which "[a] criminal defense attorney has been representing a headstrong, difficult client to the best of his ability"); see also Donna M. Hitscherich, A Criminal Defendant Has No Constitutional Right to Standby Counsel While Conducting a Pro Se Defense, 57 St. John's L. Rev. 615, 639-40 (1983) (arguing that pro se defendants should not have benefit of standby counsel).

[42] See generally Chused, supra note 26, at 647 (claiming that courts limit substitution of counsel to prevent disruption in trial schedules).

[43] See United States v. Mullen, 32 F.3d 891, 894 (4th Cir. 1994) (noting that trial judge insisted that defendant either proceed with assigned counsel or proceed to trial by herself). In Johnstone v. Kelly, 808 F.2d 214 (2d Cir. 1986), the prosecution argued that defendant asserted his *Faretta* rights merely to obtain a new attorney and that this ploy was a common practice of criminal defendants. See id. at 216 & n.1. But see Angela D. McCravy, Self-Representation and Ineffective Assistance of Counsel: How Trial Judges Can Find Their Way Through the Convoluted Legacy of *Faretta* and *Nelson*, Fla. B.J., Oct. 1997, at 44, 44 (commenting on difficulty of distinguishing ineffective assistance from mere "personality differences between the defendant and attorney" and encouraging trial judges to respond to every complaint about court-appointed attorney with advice about right to self-representation).

[44] See, e.g., *Mullen*, 32 F.3d at 893-95 (detailing defendant's attempts to dismiss counsel and counsel's attempts to withdraw); Tate v. Wood, 963 F.2d 20, 22 (2d Cir. 1992) (noting that defendant requested new attorney or self-representation and received self-representation with former attorney as standby counsel); State v. Oliphant, 702 A.2d 1205, 1209 n.2 (Conn. App. Ct. 1997) (citing defendant's comments on trial court's selection of standby

signed to support a hostile pro se defendant must try to define an appropriate role with little direction as to what that role should be.

This pattern of appointment detracts from the ability of standby counsel to serve as a useful resource for the pro se defendant and to protect the fairness of the trial. But the procedure generally withstands appellate scrutiny unless the defendant was legally entitled to substituted counsel or the trial court did not create an adequate record of the defendant's waiver of the Sixth Amendment right to assistance of counsel.[45] Nevertheless, it raises troubling issues.

Trial courts often force defendants to proceed pro se and then exercise their discretion to select standby counsel as a tool to limit delay of the trial rather than to ensure the trial's fairness. First, when the decision to proceed pro se is engineered by the trial court, rather than arrived at freely by the defendant, doubt is cast on the validity of the defendant's choice to represent herself. The defendant merely complains of unsatisfactory representation, and the trial court, unwilling to delay the trial and appoint new counsel, maneuvers a defendant into self-representation. A request for substitute counsel becomes a "choice" to proceed pro se.

Second, the trial court's selection of standby counsel undermines the purpose of that role when the attorney selected is the one previously assigned to the defendant—a lawyer from whom the defendant is estranged and in whom the defendant has little confidence. The court may even designate an attorney who objects to being involved in

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counsel: "Why him, Your Honor? . . . I have been seeking from . . . the beginning of this trial and the beginning of the last trial, to have him removed"); Harris v. State, 687 A.2d 970, 971 (Md. 1997) (noting that defendant complained about counsel's lack of preparation and told court that relationship had broken down); State v. Harmon, 575 N.W.2d 635, 641-42 (N.D. 1997) (treating defendant's repeated unsuccessful motions for substitution of counsel as waiver of right to counsel and noting trial court's appointment of original attorney to serve as standby counsel).

In *Scott v. Heath*, Judge Murnaghan's dissent referred to this practice as the "inevitably and inherently suspect appointment as standby counsel of the very person found unsatisfactory for the job of counsel itself." No. 88-6031, 1989 WL 134596, at *2 (4th Cir. Oct. 27, 1989) (Murnaghan, J., dissenting); see also Tuitt v. Fair, 822 F.2d 166, 178-79 (1st Cir. 1987) (upholding trial court's rejection of equivocal Sixth Amendment waiver and demand that defendant go to trial with original counsel). In some cases, of course, the defendant maintains a satisfactory relationship with counsel. See, e.g., United States v. Mills, 895 F.2d 897, 899 (2d Cir. 1990) (noting that pro se defendant requested appointment of former attorney as standby counsel).

[45] Ideally, the trial court will conduct the colloquy prescribed in the Benchbook for U.S. District Court Judges. See Federal Judicial Ctr., Benchbook for U.S. District Court Judges § 1.02, at 4-5 (4th ed. 1996) (suggesting questions judge should ask defendant who wishes to proceed pro se). In addition, if the defendant raises a substantial question about counsel's effectiveness, the court must explore the basis for the defendant's complaint. See *Mullen*, 32 F.3d at 896-97 (noting that inquiry into basis of defendant's dissatisfaction is necessary to determine existence of good cause for substitution of counsel).

the case at all. When the trial court maneuvers the defendant into self-representation and then saddles her with a rejected lawyer as standby counsel, it undermines the appearance of fairness and places standby counsel in the untenable position of supporting a hostile pro se defendant.

Third, cases reveal that self-representation tends to drift toward a hybrid representation, which both amplifies the ambiguity of standby counsel's role and signals the defendant's discomfort with pro se representation. Once pro se defendants understand the difficulty of self-representation, they often attempt to transfer some responsibility to standby counsel. This shift provides the court an opportunity to improve the fairness of the trial without forcing the defendant to abandon entirely the right to self-represent. Again, however, the cases reveal a pattern of confusion: Courts often either force the defendant to relinquish her *Faretta* right or refuse to grant standby counsel a larger role in the trial.

Finally, the uncertainty surrounding the status of standby counsel creates another barrier to effective support of the pro se defendant. The attorney's obligation to serve as standby counsel may be unclear, or the question of payment for standby counsel may be unresolved. This uncertainty reduces the likelihood that standby counsel will undertake energetic assistance of the pro se defendant.

The following sections explore these four problems in greater detail.

A. The "Choice" to Proceed Pro Se

Faretta requires a court to respect a defendant's choice to represent herself.[46] In a significant number of cases, however, the "choice" to proceed pro se flows from the court's refusal to substitute counsel after the defendant complains about the quality of representation. There is ample evidence that a defendant who complains of deficient representation may be presenting an accurate picture.[47] The quality of defense representation has been repeatedly criticized and is unquestionably a major problem facing the criminal justice system.[48]

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[46] See Faretta v. California, 422 U.S. 806, 807 (1975).

[47] See generally The Defense Counsel (Sage Criminal Justice Sys. Annals vol. 18, William F. McDonald ed., 1983) (discussing state of defense representation); Chused, supra note 26, at 637-38 & 638 n.5 (noting increase in instances of disagreement between defendant and counsel and tendency of defense counsel to usurp defendant's role); Klein, supra note 17, at 656-63 (discussing inadequate funding of defender offices and resulting ineffective representation by counsel).

[48] See, e.g., Vivian O. Berger, The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?, 86 Colum. L. Rev. 9, 60-64 (1986) (examining problem of poor defense representation); Bright, supra note 18, at 785-86 (detailing numerous examples of

Nevertheless, the system is often unresponsive to the defendant's complaint.

When a defendant seeks to discharge counsel, the trial court's discretion comes into play. The court is entitled to consider the government interest in taking the case to trial and avoiding the delay that results from a change in defense counsel.[49] The court also assesses the timeliness of the motion. Both trial courts and appellate courts often seem impatient with defendants who request new counsel on the eve of trial. The defendant, however, may see no other opportunity to raise the issue.[50] Only as the trial date approaches does the defendant discover her attorney's strategy and level of preparation for trial. Moreover, as a nonlawyer, the defendant may not know how to draw the issue to the court's attention before the next scheduled court appearance, which is likely to be the date assigned for trial. Although some defendants probably are crafty manipulators, others may actually be victims of lawyer incompetence or neglect.

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inadequate representation); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the *Strickland* Prejudice Requirement, 75 Neb. L. Rev. 425, 440-63 (1996) (discussing examples of poor defense representation, including cases where counsel was not present, not admitted to bar, intoxicated, mentally ill, or asleep); Klein, supra note 17, at 657-75; William W. Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 Harv. L. Rev. 633, 633 (1980) ("Inadequate performance of trial lawyers has become a growing concern to the bench, the bar, and the public."); Mark D. Ridley, Note, The Right to Defend Pro Se: *Faretta v. California* and Beyond, 40 Alb. L. Rev. 423, 426 (1976).

In addition, the allocation of responsibility to the defense attorney may create difficulties in the attorney-client relationship if the defendant has opinions concerning how she would like the case conducted. The legal system allocates to the attorney responsibility for all tactical decisions and does not expect the attorney to speak for the defendant when the attorney disagrees with the defendant. See generally 1 Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 85-A (5th ed. 1988) (describing allocation of responsibility, advising counsel to inform defendant of options and allow defendant fully to consider options unless time does not permit, and stating that counsel is not defendant's "mouthpiece"); Chused, supra note 26, at 638-49 (discussing pre-*Faretta* caselaw on allocation of control between attorney and defendant); Judith L. Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. Davis L. Rev. 1049, 1099-1105 (1984) (discussing allocation of decisionmaking responsibility between attorney and defendant). As a result, the defendant may feel insufficiently involved in her own case and conclude that the attorney is not paying attention to her views.

[49] See United States v. Betancourt-Arretuche, 933 F.2d 89, 96 (1st Cir. 1991) (upholding trial court's denial of defendant's untimely motion to proceed pro se because jury was already sworn in and defendant had earlier opportunities to waive counsel).

[50] Some defendants take the initiative to write the court a letter complaining about counsel. See, e.g., United States v. Calderon, 127 F.3d 1314, 1342-43 (11th Cir. 1997) (stating that defendant sent letters to judge complaining that counsel was "derelict in filing proper motions, biased, inexperienced, and generally unenthusiastic about representing him"); United States v. Hall, 35 F.3d 310, 312 (7th Cir. 1994) (discussing detailed letter that defendant sent to district court complaining about his attorney).

In weighing the defendant's request for new counsel, the trial court asks whether the breakdown in the relationship between the defendant and defense counsel would prevent an adequate defense.[51] The governing legal standard is demanding. A disagreement over tactical decisions is not sufficient.[52] The defendant can only insist on a substitution of counsel if there is a "'conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'"[53] Moreover, a lack of reliable information may hamper the court's assessment. If the defense attorney has investigated defendant's claims about the offense and been unable to substantiate them, the attorney may not want to compromise the client's position by disclosing the investigation to the court; indeed, the attorney may be constrained by the attorney-client privilege and the obligation to maintain client confidentiality. On the other hand, if the defendant's allegations of inadequate representation are accurate, the attorney may not be candid with the court.

This legal framework does not assure a satisfactory resolution of the defendant's complaint and in some cases undermines the appearance of fairness in the system. Only rarely, however, will the reluctant pro se defendant successfully challenge a conviction. Although appellate courts often review the exercise of the trial court's discretion and the adequacy of the trial court's inquiry into the basis for the defendant's request, more often than not, the trial court's actions withstand appellate review.[54]

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[51] See *Calderon*, 127 F.3d at 1343 (finding that trial court did not err in refusing to allow counsel to withdraw because motion was untimely and no total breakdown of communications occurred between defendant and counsel); *Hall*, 35 F.3d at 313-14 (same); United States v. Swinney, 970 F.2d 494, 499 (8th Cir. 1992) (rejecting defendant's argument that trial court erred in refusing to grant his request for substitution of counsel because record did not reveal "irreconcilable conflict or complete breakdown in communication").

[52] See State v. Ortisi, 706 A.2d 300, 307 (N.J. Super. Ct. App. Div. 1998) (finding that dispute over trial strategy did not require substitution of counsel).

[53] United States v. Webster, 84 F.3d 1056, 1062 (8th Cir. 1996) (quoting United States v. Long Crow, 37 F.3d 1319, 1324 (8th Cir. 1994)) (affirming district court's denial of defendant's request for new counsel upon finding motion untimely and defendant's complaints unrelated to counsel's representation); see also Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (remanding to determine whether there was conflict of interest or such breakdown in communication that defendant was entitled to new counsel); State v. Rosales, 521 N.W.2d 385, 390 (Neb. Ct. App. 1994) (concluding that substitution was properly denied even though defendant had filed complaint against attorney with state bar association). See generally Chused, supra note 26, at 645-48 (discussing defendants' difficulties in obtaining new counsel).

[54] See, e.g., *Calderon*, 127 F.3d at 1343 (finding adequate inquiry); United States v. Brown, 79 F.3d 1499, 1506-07 (7th Cir. 1996) (same); *Hall*, 35 F.3d at 313-14 (same); United States v. Zillges, 978 F.2d 369, 372-73 (7th Cir. 1992) (finding inadequate inquiry to be harmless error). But see United States v. Welty, 674 F.2d 185, 192 (3d Cir. 1982) (finding absence of inquiry to be abuse of discretion).

Defendants who proceed pro se after courts deny their motions for substitution of counsel have tried to argue that they were unconstitutionally presented with a "Hobson's choice" between an unprepared attorney and pro se representation.[55] *Gilbert v. Lockhart*[56] is a rare case in which the argument succeeded. Despite the fact that appointed counsel had not conferred with the defendant until the morning of trial, the trial court forced the defendant to elect either to represent himself or to proceed to trial with his unprepared attorney.[57] In addition to finding the defendant's waiver of the right to counsel inadequate, the appellate court concluded that the trial court violated the Sixth Amendment by imposing this choice on the defendant.[58] In most cases, however, these arguments fail. Reluctant pro se defendants have not persuaded the courts that their waivers of the Sixth Amendment right to counsel were involuntary because they were forced to choose between proceeding with ineffective counsel or representing themselves.[59] Instead, the courts have concluded that the waivers were voluntary unless the defendant's objections to assigned counsel entitled the defendant to substituted counsel under the exacting standard set out above.[60]

Under this standard, the risk of unfairness is substantial. The reported cases reveal foundering pro se defendants who never truly wanted to represent themselves. The practice of denying substitute counsel and accepting a reluctant waiver of the right to assistance of counsel risks forcing a reluctant defendant into pro se representation. The defendant's reluctance in turn poses special problems for standby counsel. Unless the defendant's pattern of behavior clearly indicates inability or unwillingness to work with any defense attorney, the court

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55 See Commonwealth v. Johnson, 676 N.E.2d 1123, 1126 (Mass. 1997) (stating that court is "wary of putting any defendant in the Hobson's choice of being forced to proceed with an unprepared lawyer or representing oneself").

56 930 F.2d 1356 (8th Cir. 1991).

57 See id. at 1357 (discussing counsel's lack of preparation and trial court's actions).

58 See id. at 1360; see also Howard v. State, 701 So. 2d 274, 279-80 (Miss. 1997) (holding waiver invalid where trial court forced defendant to choose between two rights—speedy trial with self representation or assistance of counsel at later trial date).

59 See, e.g., United States v. Tribble, No. 92-3532, 1993 WL 306110, at *2 (7th Cir. Aug. 6, 1993) (rejecting defendant's argument that he was forced to represent himself because his attorney was unprepared and concluding that counsel's lack of preparation resulted from defendant's frequent changes of position on proceeding pro se); United States v. Burson, 952 F.2d 1196, 1199 (10th Cir. 1991) (holding defendant's waiver of counsel voluntary because he failed to show good cause for dissatisfaction with appointed counsel); State v. Day, 661 A.2d 539, 550-51 (Conn. 1995) (finding defendant's waiver valid when defendant was fully apprised of risks of self-representation); State v. Harmon, 575 N.W.2d 635, 640-42 (N.D. 1997) (finding continued requests for substitute counsel, after court denied requests, to be functional equivalent of voluntary waiver).

60 See supra notes 51-53 and accompanying text.

should resist a waiver of counsel proffered by a defendant complaining of ineffective assistance as an alternative to proceeding with the unsatisfactory lawyer.

B. The Selection of Standby Counsel

Appointment of inappropriate standby counsel heightens the difficulties of an attorney assuming that role. When a court decides to appoint standby counsel, it exercises discretion in determining who should fill the role and often views a previously assigned attorney as the likely candidate. This choice undermines the ability of standby counsel to play a meaningful part in the proceedings. The impatience that leads courts to force defendants into pro se representation also infects the selection of standby counsel. Many courts quickly dismiss complaints by pro se defendants—many of whom have rejected a series of attorneys, appointed or retained[61]—and conclude that any arrangement will provoke allegations of unfairness.[62] In *United States v. Swinney*,[63] for example, the defendant requested appointment of a new standby counsel, and standby counsel attempted to withdraw because of his "contentious relationship" with the defendant.[64] The court expressed its expectation that the defendant's relationship with substitute standby counsel would be equally fractious, and found that the governmental interest in proceeding toward resolution of the case further justified the trial court's refusal to bring a new attorney into the picture.[65]

This response risks ignoring serious complaints by the defendant about the adequacy of counsel. In *United States v. Mullen*,[66] for example, the defense attorney failed to contact the defendant in the month before trial after filing a motion to withdraw.[67] When the defendant reluctantly decided to represent herself,[68] the trial court required her

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61 See, e.g., United States v. Schmidt, 105 F.3d 82, 85-86 (2d Cir. 1997) (noting that defendant was attempting to dismiss her third attorney); Brookner v. Superior Court, 76 Cal. Rptr. 2d 68, 69 (Ct. App. 1998) (describing defendant's unhappiness with each of four public defenders assigned to his case); Commonwealth v. Johnson, 676 N.E.2d 1123, 1126 (Mass. 1997) (noting that defendant had fired two attorneys).

62 See, e.g., *Brookner*, 76 Cal. Rptr. 2d at 69 n.1 (stating that court told defendant, who claimed to have conflict with assigned counsel: "I suspect you are going to have a conflict with anybody").

63 970 F.2d 494 (8th Cir. 1992).

64 See id. at 498-99 (finding that district court did not abuse its discretion in denying defendant's request for new counsel).

65 See id. at 499-500.

66 32 F.3d 891 (4th Cir. 1994).

67 See id. at 893.

68 See id. at 894 (noting that defendant told court that her attorney had informed her that "he didn't want to help [her]" and that he prayed the court would dismiss him).

to proceed and appointed her estranged defense attorney as standby counsel.[69] While judicial impatience with defendants facing serious charges threatens to undermine the fairness of proceedings,[70] the discussion of pro se representation in appellate opinions reveals tolerance for a punitive attitude toward pro se defendants.[71]

Courts should not appoint the prior defense attorney to serve as standby counsel when the relationship between the defendant and the attorney has soured, unless there are compelling reasons for doing so. For example, if the defendant has already fired at least one attorney and the delay necessary to appoint different counsel as standby counsel would jeopardize the prosecution's case, the court may feel compelled to require the defendant to proceed with the current attorney. Although the defendant clearly has no right to choose standby counsel,[72] the court should use its authority to select and appoint standby counsel likely to enhance the fairness of the trial. The appointment of an estranged attorney only increases the likelihood that pro se representation will lead to unfair proceedings by providing an advisor to whom the defendant will not turn. In addition, the attorney assigned to assist an unwilling pro se defendant should resist the appointment and support the assignment of a new attorney to the case.

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[69] See id. at 897-98 (holding that district court abused discretion by not appointing new lawyer).

[70] See, e.g., Oses v. Commonwealth, 961 F.2d 985, 986 (1st Cir. 1992) (finding that trial judge's comments amounted to complete rejection of validity of defendant's pro se defense); United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982) (reporting intemperate comments by court to defendant, including: "You made this bed, my friend, and you're going to lie in it. I am not wasting a lawyer's time to sit around here and hold your hand."); United States v. Beckwith, 987 F. Supp. 1345, 1347 (D. Utah 1997) (remarking that standby counsel "is not available full time to respond immediately to every inquiry or request of defendant").

[71] See, e.g., United States v. Gellis, Nos. 89-5025, 89-5084, 1990 WL 139341, at *1-*4, *8 (4th Cir. Sept. 25, 1990) (affirming defendant's conviction for assault although trial court not only refused to permit defendant to substitute counsel but also found defendant in contempt six times); United States v. Mills, 895 F.2d 897, 903 (2d Cir. 1990) (affirming defendant's conviction but questioning trial court's rejection of defendant's request for his former attorney to act as standby counsel while calling trial court's dismissal of defendant's former attorney out of courtroom "harsh").

[72] See *Mills*, 895 F.2d at 904 (holding that defendant is not entitled to choose standby counsel); United States v. Romano, 849 F.2d 812, 816 (3d Cir. 1988) (stating that defendant has no right to standby counsel of choice); see also John F. Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L.J. 483, 533-34 (1996) (discussing whether defendant has right to choose counsel after court revokes defendant's waiver of counsel). But see Sheila Oliver, Recent Decision, 62 Temp. L. Rev. 451, 455-58 (1989) (arguing that giving pro se defendants right to standby counsel of choice would promote fairness and judicial efficiency).

C. *The Drift to Hybrid Representation*

In cases where the defendant is not irretrievably estranged from standby counsel, the role of standby counsel is complicated by the tendency of some defendants to drift from pro se representation into hybrid representation where the defendant and counsel share duties.[73] The law is clear that the defendant is not entitled to hybrid representation: The defendant must either accept the assistance of counsel (in which case counsel speaks for the defendant) or waive that right and proceed pro se (with or without standby counsel).[74] Unless the trial court grants unusual latitude, the defendant cannot share responsibility with counsel by handling some aspects of the defense herself and allowing counsel to handle others.

Nevertheless, judicial decisions reflect the reality that pro se representation with standby counsel often results in hybrid representation.[75] In extreme cases, the defendant relinquishes the right to self-representation and accepts the representation of standby counsel.[76] In some cases, standby counsel assumes enough responsibility for the defense to fulfill the Sixth Amendment guarantee of assistance of counsel, eliminating any concern that the defendant's waiver of that right was not valid.[77] Indeed, the trial court may appoint standby counsel to encourage the defendant not only to turn to standby coun-

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[73] See Decker, supra note 72, at 537-39 (defining hybrid representation as situation "where a defendant conducts a portion of [her] defense while an attorney conducts the balance").

[74] See McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation . . . ."); United States v. Nivica, 887 F.2d 1110, 1121 (1st Cir. 1989) (cautioning that hybrid representation should be "employed sparingly"); People v. Bloom, 774 P.2d 698, 712 (Cal. 1989) ("[T]he record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both at once."); cf. Henley v. State, 729 So. 2d 232, 236 (Miss. 1998) (recognizing that hybrid representation offers way to strike balance between right to counsel and right to self-representation, although finding no absolute right to hybrid representation). But see Chused, supra note 26, at 651-56 (arguing in favor of hybrid representation).

[75] See, e.g., *McKaskle*, 465 U.S. at 182-83 (describing "hybrid representation . . . actually allowed" by trial court and invited or agreed to by defendant); *Nivica*, 887 F.2d at 1121 (noting that trial court granted defendant's request for hybrid representation but imposed limitations).

[76] See, e.g., State v. Day, 661 A.2d 539, 552-56 (Conn. 1995) (affirming trial court's decision to allow standby counsel to assume representation but rejecting defendant's motion for mistrial based on claim that effort at self-representation injected prejudice into trial); State v. Harmon, 575 N.W.2d 635, 638 (N.D. 1997) (noting that trial court re-appointed counsel after defendant waived his right to self-representation).

[77] Unless standby counsel takes on most of the traditional functions of the defense attorney, however, the availability of standby counsel does not satisfy the Sixth Amendment. See Bledsoe v. State, 989 S.W.2d 510 (Ark. 1999) (rejecting state's argument that level of standby counsel's activity mooted issue of validity of Sixth Amendment waiver); Briscoe v. State, 606 A.2d 103 (Del. 1992) (same).

sel for advice but also eventually to ask to be represented by the attorney.[78]

Unfortunately, the defendant's confusion about the relationship with standby counsel can contribute to the drift toward hybrid representation. Pro se defendants often assume that standby counsel is not merely a resource but also someone available to act for the defendant.[79] They often not only consult with standby counsel but also ask standby counsel to perform tasks such as arguing particular motions or examining some witnesses, which the court often will not allow.[80] *McKaskle* itself illustrates the defendant's tendency to vacillate between insisting on the right to self-representation and relying on the assistance of standby counsel.[81] Similar confusion appears in *United States v. Betancourt-Arretuche*,[82] in which the defendant asked to represent himself even though he spoke no English. He explained to the court that he had an interpreter and that court-appointed counsel would continue to represent him "in the written part."[83]

This confusion may signal the defendant's discomfort with proceeding pro se. Even when the defendant wants to represent himself, however, confusion can lead to the loss of the defendant's *Faretta* rights. If the judge allows standby counsel to share responsibility with the defendant, and the defendant allows standby counsel to take over significant portions of the representation, the court may treat the de-

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[78] See State v. Gethers, 497 A.2d 408, 411 n.4 (Conn. 1985) (reporting that trial court told defendant: "I think sometime during the trial you are going to finally realize you are out of your depth and if she stays in the room as stand-by counsel and is available to you for consultation, she will be available to step in when we reach that stage . . . ."). The Benchbook for United States District Judges instructs: "It is probably advisable to appoint standby counsel, who can assist defendant or can replace defendant if the court determines during trial that defendant can no longer be permitted to proceed pro se." Federal Judicial Center, supra note 47, § 1.02, at 5; see also United States v. Proctor, 166 F.3d 396, 402 (1st Cir. 1999) (holding that defendant must be able to reclaim right to assistance of counsel).

[79] See, e.g., State v. Cooley, 468 N.W.2d 833, 836-37 (Iowa Ct. App. 1991) (noting that defendant asked to have his "legal assistant"—standby counsel—argue motion in limine, but that court rejected hybrid model); State v. Thomas, 417 S.E.2d 473, 476-78 (N.C. 1992) (detailing defendant's persistent belief that standby counsel would be his assistant and he would be lead attorney).

[80] See, e.g., Cooley v. Nix, No. 92-3184, 1993 WL 122093, at *1-*2 (8th Cir. Apr. 22, 1993) (upholding trial court's refusal to allow standby counsel to argue motion for defendant or intervene during cross-examination of the defendant); *Nivica*, 887 F.2d at 1120-23 (upholding trial court's refusal to allow standby counsel, who shared responsibility for portions of trial, to examine defendant when he testified).

[81] McKaskle v. Wiggins, 465 U.S. 168, 170-73 (1984) (describing how defendant frequently changed his mind regarding standby counsel's role).

[82] 933 F.2d 89 (1st Cir. 1991).

[83] Id. at 93; see also State v. Carrico, No. 38127-0-I, 1998 WL 372732, at *1 (Wash. Ct. App. July 6, 1998) (noting that defendant wanted to speak for himself but requested attorney to "prepare and do anything necessary to . . . assist . . . in anything preparing for [defendant's] defense").

fendant's accession to standby counsel's participation as a waiver of the right to self-representation.[84]

Although a defendant who cedes responsibility to standby counsel without objection merits no appellate relief,[85] the trial court should not necessarily enforce a waiver or restrict the defendant's self-representation at trial. The defendant in *United States v. Swinney*[86] argued unsuccessfully that the trial court denied his rights under *Faretta*.[87] After asserting his *Faretta* rights, the defendant allowed standby counsel to conduct the trial in front of the jury, starting with jury selection and opening statement.[88] The court permitted the defendant to argue issues to the court outside the presence of the jury for the first part of the trial, but eventually refused to allow him to represent himself at all.[89]

Nothing in the case suggests that the court warned the defendant that the hybrid representation tolerated in the first part of the trial was inconsistent with his assertion of his *Faretta* rights. Instead of finding that a defendant waived her right to proceed pro se, the court should either exercise its discretion to permit hybrid representation or advise the defendant that she may give up her right to self-representation if she conveys too many responsibilities to standby counsel. In addition, since the pro se defendant may drift unwittingly into this

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84 United States v. Heine, 920 F.2d 552, 555 (8th Cir. 1990) (holding that defendant waived right to self-representation by relying on standby counsel and by allowing standby counsel to cross-examine witnesses, review jury instructions, and give closing argument); United States v. Mills, 895 F.2d 897, 904 (2d Cir. 1990) (acknowledging argument that defendant waived aspects of his right to self-representation); Decker, supra note 72, at 531 (discussing how defendant may waive right to self-representation by impliedly and expressly agreeing to substantial participation of standby counsel).

85 See, e.g., *McKaskle*, 465 U.S. at 177 n.8 (noting that defendant who elects to represent herself cannot claim she received ineffective assistance of counsel). In *Heine*, the court rejected the defendant's argument that standby counsel Scott had exceeded his role and thereby violated the defendant's constitutional rights. The court concluded that:

> Heine impliedly waived his right to proceed *pro se* by acquiescing to Scott's increasingly active role at trial. Although early in the trial Heine indicated that he would not participate and that he did not want Scott to represent him, his later actions suggest otherwise. Heine conferred with Scott on several occasions and he stated that he wanted Scott to make the closing argument. In addition, as the trial progressed, Heine never objected to standby counsel's presence. In fact, late in the trial he stated that he wanted Scott's assistance in reviewing the suggested jury instructions. Heine also asked Scott to cross-examine a government witness.

Heine, 920 F.2d at 555.

86 970 F.2d 494 (8th Cir. 1992).

87 See id. at 498 (finding that trial court did not violate defendant's right to represent himself because defendant had waived right).

88 See id. (noting that defendant allowed standby counsel to take "lead position").

89 See id. (finding that defendant lost his right to self-representation by allowing standby counsel to take over defense).

situation, standby counsel should keep the record clear by ensuring either that the court does not treat the hybrid representation as a waiver or that the defendant makes the waiver decision knowingly.

D. The Reluctant Standby Counsel

Another problem evident in some of the reported cases is an ambiguity concerning the attorney's obligation to serve as standby counsel and her compensation. Courts sometimes appoint an unwilling attorney as standby counsel, and the objection to the assignment lies on the attorney's side rather than the defendant's. In some instances, the attorney's resistance reflects concern with the defendant's interests;[90] in others, it flows from self-interest. A lawyer who attempts to withdraw from representing a defendant who wishes to proceed pro se is often appointed by the court to act as standby counsel.[91] Although there is some division of authority concerning whether a court may order an unwilling attorney to act as standby counsel, most courts do exercise this power on statutory grounds. Moreover, the court's power to appoint standby counsel extends to either a public defender or private counsel.

Of course, the attorney assigned to serve as standby counsel should be compensated for her time. The compensation structure for standby counsel is similar to that for other defense attorneys; standby counsel for an indigent defendant is reimbursed with public funds, while nonindigent defendants must pay for any requested assistance. However, when a court appoints standby counsel over the objection of the defendant,[92] it should not be able to force a nonindigent defendant to pay for that counsel. In such cases, therefore, the obligation to pay for standby counsel's services may fall to the courts.

1. Public Defenders

The issue of whether an attorney may decline to serve or may withdraw as standby counsel arises most often when a public defender's office objects to the appointment. In determining whether a judge may appoint a public defender to act as standby counsel, courts examine the statute defining the duties of the public defender's office and consider the proper role of standby counsel.

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[90] See United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997) (noting that defense attorney argued that "continuing with the representation would be unethical and run contrary to his client's wishes").

[91] See cases cited supra note 44.

[92] See Faretta v. California, 422 U.S. 806, 835 n.46 (1975) (stating that court may appoint standby counsel over defendant's objections).

The statutory language does not necessarily yield a definitive answer. The California courts, for example, have taken somewhat divergent positions on the interpretation of the governing state law. In *Ligda v. Superior Court*,[93] the appellate court concluded that a trial court has statutory authority to order a public defender to act as standby counsel.[94] Rejecting the public defender's argument that the California public defender statute[95] and penal code[96] did not allow a court to appoint a public defender as standby counsel, the court determined that the statutes defined the duties of the public defender broadly enough to include service as standby counsel.[97] The court also found statutory authority to appoint a public defender as standby

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[93] 85 Cal. Rptr. 744 (Ct. App. 1970).

[94] See id. at 753. The appellate court observed that the county public defender had obtained a temporary restraining order to prevent the trial court from appointing defendant's former public defender as standby counsel. See id. at 749.

[95] California Government Code § 27706(a) provides:

> The public defender shall perform the following duties:
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> (a) Upon request of the defendant or upon order of the court, the public defender shall defend, without expense to the defendant, except as provided by Section 987.8 of the Penal Code, any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior or municipal courts at all stages of the proceedings, including the preliminary examination. The public defender shall, upon request, give counsel and advice to such person about any charge against the person upon which the public defender is conducting the defense, and shall prosecute all appeals to a higher court or courts of any person who has been convicted, where, in the opinion of the public defender, the appeal will or might reasonably be expected to result in the reversal or modification of the judgment of conviction.

Cal. Gov't Code § 27706(a) (West 2000).

[96] California Penal Code § 987(a) and (b) provide:

> (a) In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her.
>
> (b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him or her that he or she shall be represented by counsel at all stages of the preliminary and trial proceedings and that the representation is at his or her expense if he or she is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether he or she desires to employ counsel of his or her choice or to have counsel assigned, and allow him or her a reasonable time to send for his or her chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him or her. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel.

Cal. Penal Code § 987(a)-(b) (West 2000).

[97] See *Ligda*, 85 Cal. Rptr. at 752 (holding that public defender must defend any indigent defendant if ordered to do so by court).

counsel under the California Code of Civil Procedure,[98] which grants courts the power to control ministerial officers of the court.[99] The court in *Ligda* took the position that a public defender may withdraw from an assignment as standby counsel only if she can show that she "reels under a staggering workload."[100] By contrast, in *Littlefield v. Superior Court*,[101] a California court compared the role of standby counsel to that of an understudy in a play and concluded that the statute did not authorize a court to appoint a public defender to act as standby counsel because "standing by is not defending."[102] However, the most recent California decision on this issue followed *Ligda*, rejecting *Littlefield*'s narrow view of the role of standby counsel and comparing standby counsel to the director of a play.[103]

Like the California cases, other decisions considering the authority of a court to appoint a public defender as standby counsel turn both on the applicable public defender statute and on the court's view of standby counsel's role. Some courts have held that judges may compel unwilling public defenders to act as standby counsel,[104] while other courts have taken a narrower view. In *Harris v. State*,[105] for example, the Maryland court agreed with *Littlefield* and concluded that the Maryland statute does not authorize a trial court to appoint a public defender to act as standby counsel.[106] The court found that the responsibilities of standby counsel do not fall within the statutory cat-

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98 Section 128(a) of the California Code of Civil Procedure states: "Every court shall have the power to do all of the following: . . . (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto . . . ." Cal. Civ. Proc. Code § 128(a) (West 2000).

99 See *Ligda*, 85 Cal. Rptr. at 753. As a "ministerial officer of the court," the public defender does not have the power to reject a court's assignment. See id. at 754.

100 Id. at 754.

101 22 Cal. Rptr. 2d 659 (Ct. App. 1993).

102 Id. at 661. The court distinguished *Ligda* on the grounds that the public defender in *Ligda* initially volunteered to act as standby counsel for the defendant. See id.

103 See Brookner v. Superior Court, 76 Cal. Rptr. 2d 68, 73 (Ct. App. 1998) (holding that court can compel public defender to act as standby counsel).

104 See, e.g., Behr v. Bell, 665 So. 2d 1055, 1056 (Fla. 1996) (holding that trial court may appoint defender to serve as standby counsel for indigent, self-representing defendant); People v. Gibson, 556 N.E.2d 226, 232 (Ill. 1990) (holding that Illinois courts have statutory authority to compel public defender to act as standby counsel and rejecting argument that standby counsel does not act as attorney).

105 687 A.2d 970 (Md. 1997).

106 See id. at 977. Section 4 of the Maryland Public Defender Act provides:

> (a) It shall be the primary duty of the Public Defender to provide legal representation for any indigent defendant eligible for services under this article. Legal representation may be provided by the Public Defender, or, subject to the supervision of the Public Defender, by his deputy, by district public defenders, by assistant public defenders, or by panel attorneys as hereinafter provided for.

egories of providing "legal representation" and "constitutional guarantees of counsel" to indigent criminal defendants.[107]

Because standby counsel plays an important role in a pro se defendant's trial, the law should be clarified to authorize the public defender to assume that role whenever the pro se defendant is indigent or objects to the appointment of standby counsel. If not clear, statutes defining the duties of the public defender should be amended to authorize explicitly the assumption of that role. The pro se defendant generally should not be required to compensate the public defender. If, however, state law permits the court to assess a fee against a defendant who receives the services of the public defender, that authority should also be exercised when the defendant requests the appointment of standby counsel and would normally be required to pay for representation.[108] A pro se defendant who objects to the appointment of standby counsel should not be required to pay for the service of the attorney, and the court may rely on the public defender in such a situation.

2. *Private Counsel*

Although most discussions of a court's power to appoint unwilling standby counsel involve public defenders, some courts have considered the appointment of private counsel as standby counsel. In

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(b) Legal representation shall be provided indigent defendants or parties in the following proceedings:

(1) Any criminal or juvenile proceeding constitutionally requiring the presence of counsel prior to a presentment before a commissioner or judge.

(2) Criminal or juvenile proceedings, where the defendant is charged with a serious crime, before the District Court of Maryland, the various circuit courts within the State of Maryland, and the Court of Special Appeals.

(3) Post conviction proceedings under Article 27, Annotated Code of Maryland, when the defendant has a right to counsel pursuant to § 645A of that article.

(4) Any other proceeding where possible incarceration pursuant to a judicial commitment of individuals in institutions of a public or private nature may result.

(5) An involuntary termination of parental rights proceeding or a hearing under § 5-319 of the Family Law Article, if the party is entitled to Public Defender Representation under § 5-323 of the Family Law Article.

Md. Ann. Code art. 27A, § 4 (1993 & Supp. 1996).

107 See *Harris*, 687 A.2d at 976-77 (deciding that statute was concerned with types of representation that did not include standby counsel).

108 See, e.g., Mincey v. State, 684 So. 2d 236, 239 (Fla. Dist. Ct. App. 1996) (holding that trial court could direct defendant to pay fee for services of appointed standby counsel).

United States v. Bertoli,[109] the Court of Appeals for the Third Circuit held that a district court may compel an unwilling law firm to serve as standby counsel to a former nonindigent client who is proceeding pro se.[110] Because the law firm had represented the defendant before he elected to proceed pro se, the court found that the law firm had a duty to the court, as well as the client, to act as standby counsel.[111] The court held that, in determining whether to require an attorney to act as standby counsel, the trial court should consider several factors, including: (1) the stage at which the defendant decides to proceed pro se; (2) the complexity of the case; (3) the impact of a difficult or unprepared pro se defendant on her right and co-defendants' right to a fair and speedy trial; and (4) the negative impact of providing standby counsel services on the law firm or lawyer.[112] The court emphasized that it was imposing a "continuing obligation" on retained counsel rather than a "new and independent duty."[113] In defining exactly what services a law firm or attorney must provide as standby counsel, a court must weigh the benefits to the court and the pro se defendant against the burden imposed on standby counsel.[114] *Bertoli* establishes a reasonable rule that permits a court to compel private counsel to act as standby counsel, as long as the court does not abuse its discretion by imposing unreasonable requirements.

When a private attorney is appointed standby counsel for an indigent defendant, the attorney should be paid by the government. In some cases, the courts have appointed standby counsel for the indigent defendant under the Criminal Justice Act (CJA)[115] or compara-

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109 994 F.2d 1002 (3d Cir. 1993).

110 See id. at 1017. The court relied on an earlier decision that held that a district court may compel an attorney acting as local counsel to take over as lead counsel in the middle of a complex criminal trial when the regular attorney becomes ill. See id. (citing United States v. Accetturo, 842 F.2d 1408, 1414-15 (3d Cir. 1988)).

111 See id. (finding that appointment of standby counsel ensures that defendant receives fair trial and promotes trial court's interest in efficient trial).

112 See id. at 1018.

113 Id. at 1016 (noting that law firm had already appeared for the defendant). The court nevertheless held that the trial court abused its discretion in requiring the specific attorneys to be present in the courtroom and forcing the law firm to provide standby counsel for depositions in the Cayman Islands. See id. at 1021-22.

114 See id. at 1027 (recommending that trial court balance needs of court, attorneys, and defendant in deciding services standby counsel must provide).

115 Section 3006A(a) of the Criminal Justice Act (CJA) provides:

> CHOICE OF PLAN.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation . . . .

18 U.S.C. § 3006A (1994).

ble state authority.[116] In *United States v. Salemo*,[117] however, the Court of Appeals for the Ninth Circuit held that the CJA does not authorize payment of advisory or standby counsel requested by an indigent.[118] The court reasoned that standby counsel does not fall within the language of the CJA, which authorizes compensation only for an attorney appointed to represent a defendant.[119] *Salemo* addressed only compensation for standby counsel requested by the defendant and merely upheld the trial court's refusal to appoint and compensate standby counsel. The argument for payment of standby counsel under the CJA is stronger when the trial court imposes standby counsel on the pro se defendant. In that situation, it is unfair to impose the cost of representation on either a defendant who did not seek assistance or on an attorney who was called into service.

Even when the court is willing to pay standby counsel, a question may arise concerning the scope of services for which standby counsel should be paid. In *Alexander v. Superior Court*,[120] the court balked at paying standby counsel for her work on an appeal for which the defendant had other counsel.[121] While that aspect of standby counsel's work was improper, the trial court also questioned additional work standby counsel had performed, stating that her work for the pro se defendant "operated as a subterfuge on the court by allowing defendant in propria persona privileges, while at the same time allowing him to be represented by an attorney."[122] The confusion in this case underscores the importance of clarifying standby counsel's role and maintaining communication between standby counsel and the court regarding the functions to be performed by standby counsel.

Unlike an indigent defendant, a nonindigent defendant who requests or assents to the appointment of standby counsel will pay for

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116 See, e.g., United States v. Vlahos, No. 95-1484, 1996 WL 459937, at *3 (7th Cir. Aug. 8, 1996) (rejecting defendant's argument that his Sixth Amendment right to counsel was violated and finding that defendant received standby counsel under CJA once he submitted required financial affidavit); United States v. Mills, 895 F.2d 897, 899-900 (2d Cir. 1990) (noting that trial judge appointed CJA attorney as standby counsel for defendant); United States v. Campbell, 874 F.2d 838, 847 (1st Cir. 1989) (stating that trial judge approved use of government funds to pay standby counsel since defendant had become indigent); State v. Lehman, 403 N.W.2d 438, 449 (Wis. 1987) (upholding order to county to pay standby counsel appointed to assist indigent defendant).

117 81 F.3d 1453 (9th Cir. 1996).

118 See id. at 1460 (holding that defendant was not entitled to appointment of advisory counsel under CJA).

119 See id. ("[The CJA] does not authorize a district court to compensate advisory counsel requested by a defendant who has waived his right to representation by counsel.").

120 27 Cal. Rptr. 2d 732, 736-37 (Ct. App. 1994).

121 See id. at 736-37 (discussing advisory counsel's billing procedures).

122 Id.

those services herself.[123] When the trial court assigns private counsel as standby to an unwilling nonindigent defendant, however, the government should absorb the cost of compensation.[124] The appointment of standby counsel benefits the court as well as the defendant. Standby counsel, rather than the judge, can explain courtroom protocol to the pro se defendant and minimize the inefficiency and disruptions of a layperson presenting her own case.[125] As courts derive substantial benefit from appointing standby counsel, they should bear the cost of forcing attorneys on nonindigent defendants.

No court has directly addressed how to compensate standby counsel forced upon a nonindigent defendant. In *Bertoli*, the law firm objected to its appointment as standby counsel and argued that the district court could neither order it to provide free standby counsel services to the nonindigent defendant nor compel that defendant to pay for unwanted standby counsel.[126] The court of appeals held that the district court inappropriately ordered the law firm to provide standby counsel services without compensation.[127] Instead, the court ruled that the law firm could attempt to seek compensation from the defendant or the government after the trial.[128] In seeking compensation after the trial, the law firm could raise the same arguments that it used in fighting the district court's order: namely, that acting as standby counsel to a nonindigent defendant without payment violated the Thirteenth Amendment's prohibition against involuntary servitude and the Due Process, Takings, and Equal Protection Clauses of the Fifth Amendment.[129] The court also acknowledged that Sixth

123 See, e.g., United States v. Campbell, 874 F.2d 838, 847 (1st Cir. 1989) (holding that, until becoming indigent, defendant was responsible for paying standby counsel); State v. Richards, 463 N.W.2d 499, 499 (Minn. 1990) (ordering that, if he retained standby counsel, pro se defendant would have to reimburse state for its expenditures on appointed standby counsel); State v. Slattery, 571 A.2d 1314, 1321-22 (N.J. Super. Ct. App. Div. 1990) (recommending that if defendant waives counsel, trial court should consider appointment of standby counsel and make "appropriate provisions for counsel's compensation"); see also Mincey v. State, 684 So. 2d 236, 239 (Fla. Dist. Ct. App. 1996) (holding that under Florida statute, court was permitted to assess attorney's fee against pro se defendant who had qualified for public defender and had requested standby counsel).

124 Cf. Pearson, supra note 11, at 714 n.139 (recommending that courts absorb cost of appointing standby counsel for all pro se defendants).

125 See United States v. Bertoli, 994 F.2d 1002, 1018-19 (3d Cir. 1993) (discussing functions of standby counsel).

126 See id. at 1005.

127 See id. at 1024 (finding it premature to decide whether law firm would suffer constitutional violation if not compensated for standby counsel services).

128 See id. at 1024-25.

129 See id. at 1022-24.

Amendment issues would arise if the district court ordered the defendant to pay for standby counsel appointed over his objections.[130]

These four problems complicate the task of standby counsel. Standby counsel must often assist a defendant who did not want to represent herself and is struggling to do so. Too often, the reluctant pro se defendant is standby counsel's estranged former client. The attorney designated to serve as standby counsel may also be reluctant, and it may be unclear whether or how she will be compensated for her service. Thus, the relationship between the pro se defendant and standby counsel often starts tenuously. Then, as the case proceeds, the defendant may shift responsibility to standby counsel, further complicating their relationship. A clearer definition of standby counsel's role and responsibilities would assist the attorneys placed in this ambiguous position, improve their performance, and provide fairer trials to pro se defendants.

III
THE ROLE OF STANDBY COUNSEL

Once appointed as standby counsel, the attorney must determine how to proceed. The problems outlined above underscore the importance of defining the role of standby counsel more clearly. The law, however, gives little affirmative guidance to standby counsel: Judicial decisions, rules of professional responsibility, and standards promulgated by the American Bar Association provide minimal insight into the role of standby counsel.[131] Although the state rules of criminal

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[130] See id. at 1024 n.14 ("Bertoli's rights as pro se defendant would be at issue were we to consider on the merits whether the district court could compel him to compensate standby counsel appointed for the court's convenience against his wishes.").

[131] The ABA Standards for Criminal Justice address standby counsel only in the commentary to standard 5-8.2, merely stating that "the court may appoint standby counsel to assist when called upon by the defendant." ABA Standards for Criminal Justice: Providing Defense Services Standard 5-8.2 commentary at 106 (3d ed. 1990) (internal quotation marks omitted). The Restatement of the Law Governing Lawyers addresses the appointment and role of standby counsel only in the comments to section 26. See Restatement (Third) of the Law Governing Lawyers § 26 cmt. g (Proposed Final Draft No. 1, 1996) (briefly discussing creation by appointment of attorney-client relationship).

Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997), provides a disturbing window into the era before Gideon v. Wainwright, 372 U.S. 335 (1963), when standby counsel was the only help offered the defendant and the function of standby counsel was clear. Childress challenged the severity of his sentence, which rested on two burglary convictions dating from the late 1940s, long before defendants were accorded a constitutional right to counsel in state proceedings. See *Childress*, 103 F.3d at 1223. In each case, Childress was given a court-appointed attorney to comply with a state law requiring counsel for the purpose of waiving the defendant's right to a jury trial, and in each case he pleaded guilty. See id. Under this clearly delineated standby scheme, the unassisted defendant conducted any pretrial factual and legal investigation and negotiated with the prosecutor; then, just as the

procedure typically provide for appointment of standby counsel, they too give little or no direction concerning what is expected of standby counsel.[132] Indeed, courts that appoint standby counsel express diametrically opposed understandings of the role—some direct standby counsel only to be available and provide advice if the defendant seeks it,[133] while others expect standby counsel to be sufficiently prepared to assume representation of the defendant if the defendant abandons pro se representation.[134]

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defendant was about to plead guilty, counsel was provided and would confer briefly with the defendant, merely to confirm the defendant's intention to plead guilty. See id. at 1223-24. The lawyer's role at an end, the plea would be entered. The court concluded that the procedure violated the defendant's Sixth Amendment rights because it effectively denied him counsel altogether. See id. at 1232. The court also emphasized that the role of standby counsel is so different from that of the defendant's attorney ("full-fledged defense counsel") that standby counsel cannot satisfy the constitutional obligation to provide assistance of counsel. See id. at 1231 (concluding that standby counsel does not qualify as counsel under Sixth Amendment).

[132] See, e.g., N.D. Ga. R. app. D(IV) ("The judge or magistrate may appoint standby counsel to assist a person who is financially eligible but waives representation if the court determines that assistance of counsel is necessary to the person's defense or to protect the integrity and insure the continuity of the judicial proceedings."); Ala. R. Crim. P. 6.1 ("When a defendant waives the right to counsel, the court may appoint an attorney to advise the defendant during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified."); Mass. Sup. Jud. Ct. R. 3:10 ("Notwithstanding a party's waiver of counsel, the judge may assign counsel in accordance with this rule to be available to assist the party in the course of the proceedings."); Mo. 2d Cir. Ct. R. 67.4 (recommending that trial court appoint standby counsel "to assist the defendant when called upon and to call the judges [sic] attention to matters favorable to the accused" especially in long or difficult cases with multiple defendants); Pa. R. Crim. P. 318(d) (stating that standby counsel may be appointed and "shall attend the proceedings and shall be available to the defendant for consultation and advice"). Some courts provide more information on the role of standby counsel. See, e.g., Conn. Sup. Ct. Crim. R. § 964 (allowing standby counsel to advise defendant but only upon defendant's request and to call court's attention to "matters favorable to the defendant" if defendant does not object); Minn. R. Crim. P. 5.02 (requiring court to state on record whether advisory counsel was appointed "because of its concerns about fairness of the process" or "due to its concerns about delays in completing the trial because of the potential disruption by the defendant or because of the complexity or length of the trial"). The federal rules do not mention standby counsel. See Fed. R. Crim. P. 44 (acknowledging that defendant may waive assistance of counsel).

[133] See, e.g., United States v. Mullen, 32 F.3d 891, 894 (4th Cir. 1994) (reporting that trial court required standby counsel to sit in first row, to be available for consultation, and not to offer advice unless asked); United States v. Mills, 895 F.2d 897, 900 (2d Cir. 1990) (upholding trial court's instruction to defendant that standby counsel was "merely in court for [defendant] to consult and nothing else").

[134] See, e.g., United States v. Studley, 892 F.2d 518, 522-23 (7th Cir. 1989) (affirming trial court's rejection of standby counsel's request for continuance because he should have been ready to take over defense); United States v. Turnbull, 888 F.2d 636, 637 (9th Cir. 1989) (noting that trial court appointed standby counsel to help defendant take over defense if necessary); Commonwealth v. Johnson, 676 N.E.2d 1123, 1124-25 (Mass. 1997) (reporting that trial court assumed no continuance necessary when defendant asked to be represented on trial date and standby counsel was not prepared to proceed); Howard v.

Most commentators address the limitations on standby counsel in reaction to the holding in *McKaskle v. Wiggins* that overactive standby counsel can violate the defendant's constitutional right to self-representation.[135] The American Bar Association, for example, details the "obligations of hybrid and standby counsel" as follows:

> (a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
>
> (b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.[136]

This guideline cautions standby counsel not to intrude on the defendant's constitutionally protected self-representation and alerts her to the importance both of the defendant's requests for assistance, and of judicially imposed limitations. Otherwise, however, the standard provides no guidance.

State, 701 So. 2d 274, 285 (Miss. 1997) (characterizing role of standby counsel as including "the necessity of preparing as adequately as possible to assume a more active role in the trial, should the need arise").

135 See Charles H. Whitebread & Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts § 31.04 (3d ed. 1993) (emphasizing that Court in *McKaskle* "could not reach a consensus as to the propriety of further actions [beyond a minimal role] by standby counsel"); Karen A. Krisher, *Jones v. Barnes*, the Sixth, and the Fourteenth Amendments: Whose Appeal Is It, Anyway?, 47 Ohio St. L.J. 179, 193 (1986) (characterizing *McKaskle* as a case "concerned [with] the limits placed upon the role of appointed counsel"). In United States v. Willie, 941 F.2d 1384 (10th Cir. 1991), the trial court's admonition to the defendant and standby counsel (Ms. Storch) reflects an excessive concern with imposing limitations on the role of standby counsel. The court informed the defendant:

> I would encourage you to make as much use of Ms. Storch as you can. Ms. Storch is a highly competent lawyer.
>
> However, she's not permitted to help you unless you ask her for help. Because if she volunteers help, then it's possible that on appeal that might—as I said before, that by a lawyer volunteering assistance without the defendant seeking it, that can be a deprivation of your right to self-representation.

Id. at 1389 n.4.

136 ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-3.9 (3d ed. 1993); see also The American Bar Association Standards Relating to the Administration of Criminal Justice Standard 6-3.7 (2d ed. Tentative Draft 1978), which provides:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

While courts must respect the pro se defendant's constitutional right to self-representation, the actions of standby counsel rarely approach the boundary set forth in *McKaskle*.[137] Indeed, the Supreme Court accepted an active role for standby counsel when it explicitly rejected the appellate court's holding that standby counsel "is 'to be seen, but not heard.'"[138] Too often, however, standby counsel fails to provide the assistance that the Court's decision in *McKaskle* permits.

The confusion in defining the role of standby counsel flows in part from the courts' perception that standby counsel serves the court's purpose rather than the defendant's.[139] In approving the use of standby counsel in *Faretta*, the Court primarily contemplated the need for an attorney to take over representation of a pro se defendant,[140] and it focused on the trial court's need to control a disruptive pro se defendant rather than the protection of a defendant unable to mount an appropriate defense.[141] In addition, courts occasionally satisfy an obligation to allow an incarcerated pro se defendant access to legal materials by appointing standby counsel to serve as a conduit.[142] When the court appoints standby counsel for its own convenience, it

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137 See, e.g., United States v. Walsh, 742 F.2d 1006, 1007 (6th Cir. 1984) (finding that standby counsel's participation did not threaten jury's perception that defendant was representing himself or jeopardize defendant's control of defense); State v. Hutch, 861 P.2d 11, 20-21 (Haw. 1993) (holding that defendant maintained actual control and addressed jury freely); State v. Hart, 569 N.W.2d 451, 456 (N.D. 1997) (rejecting argument under *McKaskle*).

138 McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (quoting Wiggins v. Estelle, 681 F.2d 266, 273 (5th Cir. 1982)).

139 See Mayberry v. Pennsylvania, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring) (advocating appointing standby counsel to help keep trial orderly and take over if defendant cannot continue pro se); United States v. Taylor, 933 F.2d 307, 312-13 n.3 (5th Cir. 1991) (discussing how standby counsel can free trial court of need to instruct pro se defendant on rules of evidence and procedure); United States v. Spencer, 439 F.2d 1047, 1050 (2d Cir. 1971) (reporting that trial court explained that standby counsel could take over if defendant relinquished pro se status midtrial and could help defendant at trial); Harris v. State, 687 A.2d 970, 974 (Md. 1997) (recognizing that standby counsel can be appointed to help court maintain control over trial); State v. Thomas, 484 S.E.2d 368, 371 (N.C. 1997) (Whichard, J., dissenting) (discussing standby counsel's dual role of helping court and defendant); State v. Walters, No. 98-3136-CR, 1999 WL 203690, at *3 (Wis. Ct. App. Apr. 13, 1999) (noting that appointment of standby counsel is for court's convenience); Decker, supra note 72, at 530 (noting that standby counsel can help court as well as defendant).

140 See Faretta v. California, 422 U.S. 806, 834 n.46 (1975); see also Byrtus, supra note 26, at 228 (asserting that term "standby counsel" refers only to counsel who observes proceedings and stands ready to take over if defendant loses pro se status).

141 See *Faretta*, 422 U.S. 806 at 834 n.46. This concern is reflected in rules providing for the appointment of standby counsel. See, e.g., N.D. Ga. R. app. D(IV) (allowing courts to appoint standby counsel "to protect the integrity and insure the continuity of the judicial proceedings"); Minn. R. Crim. P. 5.02 (requiring judge to state on record if concern with delay or disruption prompted appointment of standby counsel).

142 See United States v. Knox, 950 F.2d 516, 519-20 (8th Cir. 1991).

provides no useful direction for standby counsel's responsibility to the defendant.

Some courts and commentators have tried to encapsulate the role of standby counsel. The Court of Appeals for the Fifth Circuit described standby counsel as an "observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense,"[143] while in the Tenth Circuit, standby counsel is expected to "consult, make some objections, help with the admission and admissibility of exhibits, and make some motions."[144] A district court articulated one view of the differing roles of the attorney for the client and standby counsel:

> There are critical differences between the two roles. Specifically, an appointed counsel is acting as the attorney for a client and is responsible for all filings, memoranda, and motion practice. Unlike appointed counsel, standby counsel is merely available to the self-represented individual who chooses to go before the court as his own attorney. A court may appoint a standby counsel in the interest of protecting a pro se litigant from inadvertently and critically jeopardizing his or her position before the Court. Therefore, it is within the court's discretion and the interest of justice that a standby counsel is appointed. In keeping with this critical distinction, the standby counsel can be provided or dismissed at the discretion of the court.[145]

Standby counsel has also been described as serving two roles—acting as a "safety net" by making sure the defendant receives a fair trial, and assisting the court by allowing the trial to proceed without delays.[146] One commentator suggested that there are three forms of standby counsel:

> Counsel may literally stand by to take over in case the defendant loses the right to self-representation, in which case the attorney need only be present in the courtroom. Alternatively, counsel may serve as a resource, consulting with the client outside of the court-

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143 *Taylor*, 933 F.2d at 313; see also Childress v. Johnson, 103 F.3d 1221, 1231 (5th Cir. 1997) (citing *Taylor* approvingly). The Court of Appeals for the Second Circuit similarly noted that "a standby counsel's duties are considerably more limited than the obligations of retained or appointed counsel." United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (rejecting claim of ineffective assistance of counsel).

144 United States v. McDermott, 64 F.3d 1448, 1453 (10th Cir. 1995).

145 United States v. Vlahos, 884 F. Supp. 261, 264 (N.D. Ill. 1995), aff'd, 95 F.3d 1154 (7th Cir. 1996).

146 See, e.g., United States v. Bertoli, 994 F.2d 1002, 1018-19 (3d Cir. 1993) (discussing two purposes of standby counsel: to insure defendant has fair trial and to allow trial court to conduct trial efficiently); State v. Ortisi, 706 A.2d 300, 308-09 (N.J. Super. Ct. App. Div. 1998) (citing *Bertoli* dual purpose proposition).

> room or seated at the client's side, available for assistance. The most extreme form of advisory counsel is known as co-counsel or hybrid representation, where both defendant and counsel participate in jury selection, statements and questioning.[147]

He then concluded, however, that only a passive standby counsel is consistent with the defendant's rights under *Faretta*.[148]

The visions of standby counsel expressed in these sources fail to recognize the range of functions standby counsel may perform. Moreover, these sources ascribe too little importance and too few responsibilities to standby counsel. More active participation by standby counsel may reduce the possibility that the pro se defendant will run afoul of the rules of court or that unfairness will result from the defendant's ineptitude. A clearer definition of standby counsel's role, which places greater responsibility on standby counsel, would benefit the courts, pro se defendants, and the attorneys acting as standby counsel. In some cases, defendants appear confused about the role of standby counsel, and, in others, standby counsel does not comprehend its obligations. The courts and bar should agree on the usual role of standby counsel. If the trial court circumscribes the role of standby counsel, it should clearly state the limitations to the defendant during the waiver colloquy and to the attorney assigned as standby counsel.[149]

Moreover, any limitations should correspond with the courts' expectations for standby counsel. Courts often expect standby counsel to take over for the pro se defendant but limit standby counsel's involvement in the proceedings. This expectation is incongruous with limitations on the responsibility of standby counsel. Although the defendant does not have an absolute right to retract the Sixth Amendment waiver when self-representation becomes uncomfortable,[150] justice may require permitting the defendant to relinquish control to standby counsel. The *Faretta* Court contemplated this possibility when it recognized that the trial court might appoint standby counsel

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147 Pearson, supra note 11, at 713.

148 See id. at 716 (noting that "the more passive form of involvement . . . would provide the information a defendant lacks, while preserving the trial court's flexibility").

149 See People v. Smith, 619 N.E.2d 799, 806-07 (Ill. App. Ct. 1993) (holding that court had sufficiently informed defendant of standby counsel's limited role at time of waiver and distinguishing case in which defendant had not been adequately informed).

150 See United States v. Gellis, Nos. 89-5025, 89-5084, 1990 WL 139341, at *6 (4th Cir. Sept. 25, 1990) (upholding trial court's refusal to grant defendant's request to be represented by standby counsel following defendant's decision to proceed pro se); State v. Richards, 552 N.W.2d 197, 206 (Minn. 1996) (finding that trial court did not err by refusing defendant's request to waive his right to self-representation). But see United States v. Proctor, 166 F.3d 396, 400-01 (1st Cir. 1999) (remanding because trial court declined to allow defendant to withdraw waiver and obtain representation without proper inquiry).

without interfering with the defendant's right to self-representation.[151] Both the court and standby counsel should anticipate this option and act accordingly. For example, in *State v. Parson*,[152] a Minnesota court concluded that standby counsel cannot fulfill the expected function unless she is present at all court proceedings.[153] Standby counsel who does not attend the proceedings is in no position to take over the case or to provide appropriate advice. Even a presence in the courtroom may not be sufficient to fulfill this function; if standby counsel is to be ready to provide competent advice or take over the trial, standby counsel's role must go beyond mere presence as an interested observer.[154]

If not explicitly limited, standby counsel's role is broader than the courts often assume. Instead of acting as a neutral or marginally involved participant, standby counsel must strive to bring the role as close to the traditional role of counsel as possible. Although the representation does not precisely fit the traditional model, an attorney assigned to act as standby counsel becomes part of the defendant's team.

Standby counsel's role will vary throughout a criminal proceeding. The strength of the defendant's interest in controlling and being perceived as controlling the case will differ at each stage, and countervailing considerations may overcome this interest at certain points. The limitations on standby counsel's role are most significant at trial when the adversarial process is being played out in the presence of the factfinder. Before trial, however, standby counsel can play a significant part in preparing the defense and assisting on pretrial motions. If the defendant's competency to stand trial is questionable, then standby counsel must take on the role of lead counsel; the trial court cannot accept the defendant's waiver of the right to assistance of counsel until it finds the defendant competent. Similarly, in the posttrial phase, standby counsel may assume a larger role in assembling and presenting information pertinent to sentencing. The following sections explore these stages of the proceeding in greater depth.

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151 Faretta v. California, 422 U.S. 806, 835 n.46 (1975) (noting that standby counsel will "be available to represent the accused in the event that termination of the defendant's self-representation is necessary").

152 457 N.W.2d 261 (Minn. Ct. App. 1990).

153 Id. at 263 (holding prospectively that standby counsel must be physically present in courtroom).

154 But see Pearson, supra note 11, at 713 (suggesting that if court wants standby counsel to take over at any time, standby counsel "need only be present in the courtroom").

A. Competency Hearings

A hearing on a would-be pro se defendant's competency to stand trial presents a special challenge to the court and to the assigned attorney. Since a proffered waiver of assistance of counsel should not be valid unless the defendant is competent, the court needs to resolve the question of competency before allowing the defendant to represent herself (with or without the assistance of standby counsel).[155] As a result, even if the court assigns counsel only standby status, the attorney should assume full responsibility for representing the would-be pro se defendant at this stage.

The Supreme Court defined the standard of competency in *Dusky v. United States*[156] as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[157] Although this standard defines as incompetent only a severely impaired defendant, a substantial number of defendants are found incompetent each year.[158] Trying an incompetent accused is a violation of due process,[159] and the Court has emphasized that the trial court has an obligation to explore the defendant's competency if information known to the court casts doubt upon the defendant's competence.[160] In *Godinez v. Moran*,[161] the Court held that the standard for competency to waive assistance of counsel is identical to the standard for competency to stand trial.[162]

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155 See United States v. Leggett, Nos. 92-4269, 93-3882, 92-4270, 92-4362, 1994 WL 171441, at *2 (6th Cir. May 5, 1994) (finding defendant's rights not violated where standby counsel took active role in competency hearing).

156 362 U.S. 402 (1960).

157 Id. at 402.

158 See, e.g., Bruce J. Winick, Restructuring Competency to Stand Trial, 32 UCLA L. Rev. 921, 928-33 (1985) (examining statistics of competency evaluations).

159 See Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (noting that trial of incompetent violates due process); Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (stating that prohibiting trials of incompetent defendants is "fundamental to an adversary system of justice"); Pate v. Robinson, 383 U.S. 375, 378 (1966) (recognizing that conviction of incompetent violates due process).

160 See *Drope*, 420 U.S. at 176-80 (holding that trial court should have investigated defendant's competence to stand trial); *Pate*, 383 U.S. at 385-86 (concluding that there was sufficient evidence before trial court indicating that defendant was entitled to competency hearing).

161 509 U.S. 389 (1993).

162 See id. at 399-402. *Godinez* has been criticized for setting too low a standard for self-representation, which requires a higher level of function than mere participation in a trial where a defense attorney shoulders the major responsibility. See Michael L. Perlin, "Dignity Was the First to Leave": *Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants, 14 Behav. Sci. & L. 61, 62-71 (1996) (critiquing Supreme Court's decision that competency to waive counsel and to stand trial are to be determined by same standard); see also Alan R. Felthous, The Right to Represent Oneself Incompe-

Therefore, the trial court should not accept a waiver of assistance of counsel without first determining the competency of the defendant.

Although some commentators have argued that a court facing a possibly incompetent defendant who seeks to proceed pro se encounters a "Catch 22,"[163] the issue is not as intractable as that term suggests. The court can only accept a proffered waiver that it determines to be knowing and voluntary, and this conclusion depends on the competency of the defendant. Therefore, when the defendant's competence is in question, the defendant should not be allowed to represent herself until the court resolves that question and receives a valid waiver. The competency hearing becomes part of the waiver process, and the determination of competency is a condition precedent to an effective waiver of counsel.[164]

This position is supported by the Court's holding in *Pate v. Robinson*.[165] In *Pate*, the Court rejected the notion that the defendant could waive a competency defense and deemed it "contradictory" to argue that a possibly incompetent defendant could give a valid waiver.[166] Similarly, the Sixth Amendment right to counsel should not be waived without the determination of competency essential to ensure that the waiver is knowing and voluntary. While some constitutional rights, like *Faretta* rights, can be lost through the failure to invoke them, the Court has enforced the requirement that key trial rights, such as the right to assistance of counsel, cannot be lost without a knowing and

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tently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez, 18 Mental & Physical Disability L. Rep. 105, 107-10 (1994) (discussing *Godinez*). Some states apply a higher standard of competency before accepting a waiver of the right to counsel. See, e.g., State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997) (holding that Wisconsin law imposes a higher standard). A strict application of *Faretta*, however, would render this unconstitutional. Because *Faretta* establishes the right to waive assistance of counsel as a protected aspect of the Sixth Amendment, the states should not be permitted to interfere with the exercise of that right by imposing higher barriers to waiver. See *Klessig*, 564 N.W.2d at 725-26 (Abrahamson, J., concurring). But see Felthous, supra, at 109 (asserting that states may set higher standards for competency determinations).

163 See Decker, supra note 72, at 569 (characterizing fitness hearings as "Catch 22"); Stacey A. Giulianti, Comment, The Right to Proceed *Pro Se* at Competency Hearings: Practical Solutions to a Constitutional Catch-22, 47 U. Miami. L. Rev. 883, 884-87 (1993) (discussing catch-22 situation facing court when it questions competency of defendant who wishes to proceed pro se).

164 See United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) (holding that trial court erred in permitting defendant to appear without counsel before his competency to stand trial was settled); Appel v. Horn, No. CIV.A.97-2809, 1999 WL 323805, at *15-*16 (E.D. Pa. May 21, 1999) (holding that defendant was deprived of counsel at critical stage because appointed attorneys' failure to represent him actively at competency hearing deprived him of "meaningful adversarial testing" of competency).

165 383 U.S. 375 (1966).

166 See id. at 384.

voluntary waiver.[167] Courts that permit self-representation before determining competency overlook the centrality of that preliminary determination to the validity of a waiver and overplay the rights recognized in *Faretta*.[168]

Nevertheless, the court should not entirely disregard the defendant's attempt to invoke the right to self-representation at the competency hearing. The best course is to allow a hybrid arrangement for this phase of the proceeding, assigning counsel to represent the defendant but also permitting the defendant to take an active role in the competency proceedings. In such an arrangement, the court can assure proper testing of the evidence and airing of the issues, while giving the defendant a voice in the proceeding.

Even if the defendant objects to being found incompetent, counsel should advocate for an evaluation of the defendant's competency. Numerous commentators have written about the dilemma faced by the defense attorney representing a marginally competent accused and the harm that a determination of competency can cause the defendant.[169] By raising the question of the client's competency, the attorney triggers an evaluation process that may not work to the defendant's benefit. Resolution of the criminal charges is delayed, and the defendant may receive little or no treatment for the mental condition impairing competency.[170] This prospect dissuades some de-

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167 See Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938) (holding that courts make presumption against waiver of fundamental constitutional right of assistance of counsel).

168 See, e.g., State v. Thomas, 484 S.E.2d 368, 370 (N.C. 1997) (holding over dissent that standby counsel's action contrary to defendant's wishes prior to competency determination violated defendant's constitutional right to self-representation).

169 See Robert A. Burt & Norval Morris, A Proposal for the Abolition of the Incompetency Plea, 40 U. Chi. L. Rev. 66, 75 (1972) (arguing that trial of incompetent may be less unfair than prolonged commitment); Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?, 1988 Wis. L. Rev. 65, 67 (resolving dilemma by proposing defense attorneys make case-by-case determinations regarding competency concerns and discussing relevant factors); Winick, supra note 158, at 938-49 (discussing toll of incompetency process on defendant); see also United States v. Boigegrain, 155 F.3d 1181, 1187-88 (10th Cir. 1998) (discussing conflict confronted by defense attorney when client is unwilling to have question of competency raised); State v. Bartlett, 898 P.2d 98, 101 (Mont. 1995) (concluding that standby counsel may raise question of competency even over defendant's objection and that trial court must grant examination as matter of right); ABA Standards for Criminal Justice Standard 7-4.2(c) (2d ed. Supp. II 1986) (requiring defense attorney to raise competency issue upon good faith doubt of defendant's competency).

170 See, e.g., Uphoff, supra note 169, at 71-72 (claiming that defendant who is committed often receives little treatment and may lose right to fair trial); Winick, supra note 158, at 933-43 (discussing drawbacks of competency evaluation process including lack of treatment, indefinite commitment, and deferment of bail). In minor cases, the competency evaluation process may result in "a far greater deprivation of [the defendant's] liberty than if [the defendant] were convicted of the crime with which he is charged." Uphoff, supra note 169, at 72; see also Winick, supra note 158, at 941-42 (noting that defendants accused

fense attorneys from raising the question of the client's competency.[171] Although it may be ineffective assistance of counsel not to raise or pursue zealously a claim of incompetency to stand trial, some defense attorneys take that course,[172] and some defendants have argued that it is ineffective assistance to raise the question of competency against the defendant's preference.[173]

The ambivalence that attaches to the decision whether to raise the question of the client's competency dissolves when the client expresses a desire to proceed pro se. At least in serious cases, defense counsel should raise, and the court should explore, the question of competency if any concern exists.[174] First, while any defendant risks

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of minor crimes can spend more time in hospital as incompetent than if they are found guilty and fined or sentenced to probation).

171 See Uphoff, supra note 169, at 72 (recognizing that many defense lawyers will fail to raise competency issue because it may hurt defendant). Professor Bruce Winick advocates allowing a defendant to waive the competency requirement or allowing the defense attorney to tender the waiver on behalf of the client. See Winick, supra note 158, at 959 (arguing that either defendant or defendant's lawyers should be allowed to waive competency). Professor Winick also argues that the defendant need not be competent to waive the right to competency, a proposition central to his proposal that defendants be permitted to elect to go to trial even if incompetent. See id. ("[W]e could presume that the defendant is competent, if he is able to articulate clearly and unequivocally his desire to go to trial or plead guilty."). That proposition has been criticized as inconsistent with constitutional requirements and contrary to the interests of society. See Richard J. Bonnie, The Competency of Criminal Defendants: Beyond *Dusky* and *Drope*, 47 U. Miami L. Rev. 539, 542-48 (1993) (discussing flaws in Winick's proposal). Moreover, even if Professor Winick's approach is appropriate for a represented defendant, it is not appropriate when the defendant seeks to represent herself. As Professor Winick comments in discussing its development, the competency requirement developed at a time when the defendant was forced to appear without counsel in serious cases and therefore "it was imperative that the defendant be competent, because he conducted his own defense." Winick, supra note 158, at 953. Professor Winick also notes, in support of his argument for waiver of the competency requirement, that when a defendant of questionable competence agrees to submit to trial, the concurrence of counsel assures the court that the decision reflects an appropriate assessment of the defendant's interests. See Bruce J. Winick, Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie, 85 J. Crim. L. & Criminology 571, 586 (1995) ("Counsel's acquiescence provides reasonable assurance that accuracy in adjudication will not be frustrated."). When a defendant asks to proceed pro se, the court can no longer assume that counsel speaks for the defendant or is closely in touch with the defendant's interests.

172 See, e.g., Williamson v. Ward, 110 F.3d 1508, 1523 (10th Cir. 1997) (finding ineffective assistance of counsel in failure to investigate and raise competency); Bouchillon v. Collins, 907 F.2d 589, 597-98 (5th Cir. 1990) (same); see also *Boigegrain*, 155 F.3d at 1188 (noting that defense attorney has professional duty to raise question of competency if appropriate).

173 See, e.g., *Boigegrain*, 155 F.3d at 1187 (rejecting defendant's argument that counsel's introduction of competency concerns over defendant's objection amounted to ineffective assistance of counsel).

174 In raising the question, counsel must avoid compromising the confidentiality of the relationship. There will usually be indications outside those contained in confidential communications that raise questions regarding competency.

unfair results when representing herself, a defendant who is at best marginally competent is even more vulnerable. The pro se defendant is responsible for making and carrying out all decisions in the case, including the myriad tactical decisions that normally fall to the attorney. The possibly incompetent pro se defendant is more likely to become confused by the proceedings, to make ill-advised decisions, or to overlook the need for a decision altogether.[175] Second, if the competency evaluation is accompanied by mental health treatment, the defendant's mental condition may improve and the defendant may decide not to proceed pro se. Therefore, whenever a defendant seeks to proceed pro se, defense counsel should raise the issue if there is any doubt concerning her competency. The court, in turn, should not accept a waiver until after it determines the defendant's competency.

At this stage, then, the defendant must be represented by counsel, not merely assisted by standby counsel.[176] In some respects, this unwanted attorney's role should be easier than the role of standby counsel when the defendant represents herself. The question of competency can be explored without the cooperation of an unwilling client. Counsel can ask the court to consider the issue,[177] as well as independently conduct an investigation into the defendant's mental state.[178] In the competency hearing itself, counsel can challenge and test the prosecution's evidence of competency. By maintaining an ad-

175 In addition, pro se representation creates greater opportunity for a defendant to injure her case by exhibiting strange behavior in front of the jury. In extreme cases, such as Godinez v. Moran, 509 U.S. 389 (1993), the defendant's mental impairment precipitates a self-destructive use of the criminal justice system. In *Godinez*, the defendant, who exhibited signs of serious mental health problems, was found to be competent, decided to represent himself because he "opposed all efforts to mount a defense," pleaded guilty to three counts of murder, and was sentenced to death after a hearing in which he presented no mitigating evidence. See id. at 409-12 (Blackmun, J., dissenting) (summarizing facts of case); see also State v. LeGrande, 487 S.E.2d 727, 730 (N.C. 1997) (discussing how pro se defendant berated jurors during capital sentencing hearing, calling them "antichrists" and telling them they could "pull the switch and let the good times roll").

176 But see United States v. Leggett, Nos. 92-4269, 93-3882, 92-4270, 92-4362, 1994 WL 171441, at *2 (6th Cir. May 5, 1994) (holding that defendant was adequately represented at competency hearing where standby counsel took active role).

177 See, e.g., State v. Rich, 484 S.E.2d 394, 400 (N.C. 1997) (noting that standby counsel questioned defendant's competence and asked court to review mental health records). But see State v. Thomas, 484 S.E.2d 368, 370 (N.C. 1997) (holding that standby counsel exceeded authority granted by statute when they filed motion seeking to litigate defendant's capacity to waive right to counsel).

178 For example, counsel can interview potential witnesses, such as family members, coworkers, or teachers, who have personal knowledge of the defendant's behavior and beliefs. Counsel may also obtain the defendant's health, employment, school, and prison records, all of which cast light on the defendant's mental functioning. In addition, counsel can provide pertinent information to the experts evaluating the defendant to avoid an assessment influenced solely by the prosecution.

versarial balance, counsel helps the court make an accurate determination of the defendant's fitness to stand trial and reduces the risk of an incompetent defendant proceeding to trial pro se.

However, when the question of competency only arises after the court has accepted an apparently valid waiver, the court cannot appoint counsel over the defendant's objections without reconsidering the defendant's competence. The involvement of a defense attorney may violate the defendant's rights.[179] If concern over the competence of the pro se defendant develops, the issue should be raised, whether by counsel or the court, and the court should then hold a competency hearing. At that hearing, standby counsel should assume the larger role discussed above. If the court determines that the defendant is competent, standby counsel will then revert to the usual, more limited role.[180]

B. Pretrial

The pretrial stage is critical to an effective defense. Motions must be filed, discovery material reviewed, an investigation conducted, legal research performed, and strategy planned. A pro se defendant "flying solo" can make irreparable mistakes by failing to pursue appropriate investigation or forfeiting the opportunity to raise legal claims.[181] Courts can improve the fairness of pro se proceedings by appointing standby counsel to support the defendant's pretrial preparation and assuring that standby counsel understands the importance of this function.

Standby counsel should be encouraged to take an active role in pretrial proceedings.[182] The factual investigation, legal research, and preliminary motions that provide the groundwork for a fair trial depend on an understanding of the substantive charges and defenses, as

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179 See, e.g., *Thomas*, 484 S.E.2d at 370 (finding that standby counsel's motion questioning pro se defendant's competency interfered with defendant's right to self-representation).

180 Unfortunately, standby counsel can take only limited action when she believes that the pro se defendant was impaired at the time of the offense and should raise an insanity or diminished capacity defense. Having asserted the right to self-representation, the pro se defendant controls the decision over what defenses to raise. Standby counsel can encourage the defendant to present a defense but is foreclosed from taking other action unless the defendant agrees.

181 The Federal Rules of Criminal Procedure, for example, provide that some issues are waived if not raised before trial. See, e.g., Fed. R. Crim. P. 12(b), (f) (failure to raise defenses or objections prior to trial constitutes waiver); Fed. R. Crim. P. 12.2 (defense of insanity must be raised prior to trial).

182 In United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971), the court advised district courts to appoint standby counsel "to meet with the prosecuting attorney, to see that discovery procedures are followed and necessary motions are made, [and] to confer with the defendant." Id. at 1051.

well as the governing procedural rules, including the rules of evidence that will determine the admissibility of favorable and unfavorable evidence at trial. Although some pro se defendants are capable of undertaking pretrial preparation without standby counsel as a resource, many are not. For that reason, standby counsel should be available for consultation at the defendant's request, as active standby counsel will explore factual investigation and legal options that the defendant might overlook on her own. Even if the defendant does not seek help from standby counsel before trial, standby counsel should initiate contact and offer her assistance. Only if the defendant rejects standby counsel's offers of assistance has the professional obligation of standby counsel been satisfied.

The concerns that underlie *McKaskle* and restrict standby counsel's conduct at trial are not factors at this stage.[183] The perception of self-representation is not a concern until the factfinder is in place to observe the conduct of the case.[184] In addition, during the pretrial stage, the defendant can simply override any tactical choices with which she disagrees. Encouraging active participation by standby counsel before trial, therefore, presents no risk to the defendant's constitutional rights[185] and will enhance the likelihood of a just proceeding.

Unfortunately, both courts and attorneys often view standby counsel's pretrial role too narrowly. In some cases, the courts expect standby counsel merely to act as a conduit of legal information for a confined pro se defendant during the pretrial stage,[186] satisfying the

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183 In *McKaskle*, the Court noted that "[p]articipation by standby counsel outside the presence of the jury engages only the first of [the] two limitations [—the pro se defendant's right to actual control and to be perceived as controlling the case]." McKaskle v. Wiggins, 465 U.S. 168, 178-79 (1984).

184 See id. at 179 (holding that standby counsel's participation outside presence of jury does not engage issue of jury's perception that defendant represents self); Francis C. Sullivan, Developments in the Law, Criminal Trial Procedure, 45 La. L. Rev. 263, 274-75 (1984) (noting that standby counsel may assume more active role outside presence of jury).

185 See *McKaskle*, 465 U.S. at 179 (holding that:

> *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the pro se defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the pro se defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.);

State v. Hutch, 861 P.2d 11, 20 (Haw. 1993) (holding standby counsel's participation constitutional where, in proceedings outside the jury's presence, defendant was allowed to address court and court resolved disagreements in defendant's favor). But see State v. Thomas, 484 S.E.2d 368, 370 (N.C. 1997) (holding that trial court violated defendant's right to self-representation by allowing standby counsel to advocate position over defendant's objections).

186 The pro se defendant may have a right of access to legal materials that is sometimes satisfied by having standby counsel assemble the research and deliver it to the defendant.

requirement that the defendant have access to legal materials.[187] Similarly, some standby counsel confine their responsibilities narrowly before trial. Consider, for instance, standby counsel's response to a request for assistance from a pro se defendant being held in solitary confinement:

> [P]lease be advised that responsibilities here to clients I actually represent preclude my coming to Otisville to assist you in my assigned capacity as your "legal advisor." As I understand that assignment, I am to be available in court during the trial, should you have any questions about the proceedings, and I will be. By electing to appear pro se you are responsible for your own preparation.[188]

Although the court did not view standby counsel's conduct as a violation of the defendant's Sixth Amendment rights, the court was appropriately concerned that a failure to release the defendant from confinement impeded his ability to prepare his defense.[189]

At the same time, standby counsel should guard the defendant's *Faretta* rights. One issue that arises pretrial, as well as at trial, is the court's or prosecutor's insistence that standby counsel, rather than the pro se defendant, be treated as the lawyer in the case. In *United States v. Seybold,*[190] for example, the trial court disregarded the defendant's request that he receive the discovery materials from the prosecution and instead ordered the prosecution to deliver them to standby counsel, who was then to relay them to the defendant.[191] Access to the

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See, e.g., United States v. Pina, 844 F.2d 1, 6 (1st Cir. 1988) (noting that counsel was appointed to provide material for defense); United States v. Beckwith, 987 F. Supp. 1345, 1348 (D. Utah 1997) (stating that defendant who has standby counsel normally has no complaint if not allowed personal access to library). But see United States v. Smith, 907 F.2d 42, 45-46 (6th Cir. 1990) (affirming conviction of pro se defendant who had neither standby counsel nor access to law library). See generally Decker, supra note 72, at 535-36 (discussing defendant's access to legal materials through standby counsel).

187 See, e.g., Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding that prison authorities must provide inmates who are preparing legal papers with access to law library or assistance from legally trained people); United States v. West, 557 F.2d 151, 152-53 (8th Cir. 1977) (rejecting defendant's claim that government did not provide him with adequate access to legal materials because defendant had standby counsel to obtain legal information and opportunity to telephone witnesses); Rowbottom v. State, 938 S.W.2d 224, 226 (Ark. 1997) (finding standby counsel adequate substitute for law library access); see also Lewis v. Casey, 518 U.S. 343 (1996) (construing *Bounds* with respect to standing of class members not injured by lack of access to prison libraries). But see United States v. Chapman, 954 F.2d 1352, 1362 (7th Cir. 1992) (holding that if court offers pro se defendant assistance of counsel, defendant has no right to insist on access to law library); *Pina*, 844 F.2d at 5 n.1 (same).

188 Tate v. Wood, 963 F.2d 20, 22 (2d Cir. 1992).

189 See id. (remanding for evidentiary hearing on surrounding circumstances to determine whether defendant's rights were violated).

190 979 F.2d 582 (7th Cir. 1992).

191 See id. at 584 (describing how defendant was to receive discovery materials).

discovery material was complicated because the defendant was detained in a correctional center awaiting trial.[192] Then, as the case progressed toward trial, the court held several status hearings in the defendant's absence, relying on standby counsel to represent the defendant.[193] This practice undermines the constitutional protection of the defendant's dignity and autonomy guaranteed by *Faretta* and *McKaskle*. Standby counsel should advocate for the pro se defendant's role as attorney at this stage as well as other stages of the proceeding. By resisting the tendency of the court and prosecution to deal with standby counsel rather than the defendant, standby counsel may reinforce the defendant's *Faretta* rights.

C. Trial

Ideally, standby counsel should actively guide the defendant through the procedures of the trial. To fulfill this obligation, standby counsel should not wait for the defendant to seek assistance, but should identify hurdles, inform the defendant, and help the defendant surmount them.[194] *McKaskle* establishes limits on standby counsel's participation, but within that constitutional limit, courts should encourage, not restrict, assistance from standby counsel.

In *McKaskle*, the Court held that standby counsel must not unduly interfere with the perception that the defendant is acting as the defense attorney in the case.[195] *McKaskle* does not, however, prohibit standby counsel from acting at all in front of the jury. The Court stated that the defendant's rights are not violated "when standby counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete," or "when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure."[196] Moreover, *McKaskle* specifically states that standby counsel may assist the defendant with the mechanics of trial even if it "somewhat undermines" the defendant's appearance of control over the defense.[197] It is notable that no court has

192 See id. (discussing conflicts with prison authorities regarding delivery of tapes).

193 See id. The court failed to address defendant's Sixth Amendment claim because it held that defendant waived the claim when he pleaded guilty. See id. at 585-86.

194 See Pearson, supra note 11, at 715-16 (recommending that standby counsel "function as an advisor, providing [defendant] with sufficient knowledge to make intelligent choices").

195 See McKaskle v. Wiggins, 465 U.S. 168, 181-83 (1984).

196 Id. at 183.

197 Id. at 184.

determined that standby counsel's actions at trial have violated the defendant's right to self-representation.

However, trial courts often restrict standby counsel's role and prohibit appropriate assistance. Although the restrictions generally fall within the trial court's discretion and, therefore, withstand legal scrutiny, they reduce the likelihood of a fair trial.[198] It is inappropriate, even if not contrary to the law, for a court to impose standby counsel on a pro se defendant for its own convenience but then limit the utility of standby counsel by restricting her participation. For instance, in *United States v. Lawrence*,[199] the trial court restricted standby counsel's advice to "procedural matters," limiting standby counsel's ability to help the defendant with the substance of the defense case.[200] The court thereby elevated its interest in an orderly trial over the defendant's—and society's—interest in a fair one.

In some cases, standby counsel fails to represent the defendant's position at all. In *Howard v. State*,[201] for example, the defendant asked standby counsel to argue a motion requesting that standby counsel be permitted to give the closing argument.[202] However, standby counsel expressed such strong reservations about his ability to make the argument on short notice that the court denied the request.[203] Similarly, in *State v. Canedo-Astorga*,[204] standby counsel undermined the pro se defendant's request for standby counsel to take over full responsibility when he argued for a continuance of the trial until he could get up to speed; the court refused the request and required the defendant to proceed pro se.[205] Standby counsel owes the defendant a duty of loyalty and zealous representation, and, when the pro se defendant authorizes standby counsel to act as counsel, counsel should advance the defendant's interests accordingly.

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198 See United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998) (holding that defendant's Sixth Amendment rights were not violated by trial court's order restricting standby counsel's advice to procedural matters), cert. denied, 526 U.S. 1031 (1999); Molino v. DuBois, 848 F. Supp. 11, 12-14 (D. Mass. 1994) (holding that trial court did not err in refusing to permit standby counsel to prompt defendant to make objections, question witnesses, draft motions, or talk at sidebar conferences); People v. Smith, 619 N.E.2d 799, 806-07 (Ill. App. Ct. 1993) (upholding trial court's denial of defendant's request for help from standby counsel in drafting motions); State v. Rosales, 521 N.W.2d 385, 390-92 (Neb. Ct. App. 1994) (finding that trial court did not err in telling defendant that standby counsel would not file motions, conduct research, or investigate case for defendant).

199 161 F.3d 250 (4th Cir. 1998).

200 See id. at 253.

201 701 So. 2d 274 (Miss. 1997).

202 See id. at 284 (noting that defendant asked standby counsel to take more active role in trial).

203 See id. at 284-85 (discussing standby counsel's reluctance to make closing argument).

204 903 P.2d 500 (Wash. Ct. App. 1995).

205 See id. at 503.

The courts should permit, and standby counsel should provide, the maximum assistance consistent with the limits imposed by *McKaskle*. Unless the defendant declines, standby counsel should prompt the defendant to object. In addition, as the pro se defendant may not understand the importance of creating a record at trial for a possible appeal, standby counsel should provide the educated ear and eye to ensure that the record contains the necessary information for the courts to entertain the defendant's postconviction arguments.[206] Creating a record for appeal need not interfere with the defendant's right to actual control; counsel should simply ensure that legal arguments not specifically abandoned by the defendant remain appealable. By raising issues, even over the defendant's objection, standby counsel enhances the likelihood that the defendant will understand the legal or tactical positions advanced. In deference to the defendant's constitutional right to be perceived as controlling the defense, the trial court should permit standby counsel to raise legal issues outside the presence of the jury as long as the court gives the final word to the defendant. Standby counsel can thereby protect the defendant's interest without intruding on the defendant's *Faretta* rights.

Standby counsel must also act as the defendant's champion by arguing against any action by the trial court or prosecution that marginalizes the defendant's role as an attorney. In a number of cases, for example, the trial court excluded the pro se defendant from sidebar conferences, allowing only standby counsel to be present.[207] Unless the exclusion is sufficiently justified,[208] it may violate the de-

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[206] United States v. Wilson, 962 F.2d 621 (7th Cir. 1992), illustrates the importance of giving the pro se defendant technical support. In *Wilson*, the defendant moved to suppress a revolver. See id. at 625. Although the trial court stated it would hold a hearing after jury selection, the court never held the hearing and never ruled on the defendant's motion. See id. On appeal, the court held that the defendant had waived the issue by failing to press it at trial and affirmed the conviction. See id. Standby counsel should have alerted the defendant to the risk of waiver and helped the defendant keep track of the court's action on the motion to suppress.

[207] See United States v. McDermott, 64 F.3d 1448, 1451 (10th Cir. 1995) (reporting that trial court ruled pro se defendant could not participate in bench conferences, jury instruction conference, and other "purely legal matters"); Oses v. Commonwealth, 961 F.2d 985, 986 (1st Cir. 1992) (noting that pro se defendant was excluded from "over seventy bench or lobby conferences"); United States v. Mills, 895 F.2d 897, 905 (2d Cir. 1990) (affirming defendant's conviction despite trial court's exclusion of defendant from sidebar conferences); see also State v. Thomas, No. 36968-7-I, 1997 WL 288599, at *2 (Wash. Ct. App. May 27, 1997) (finding harmless error for trial court to meet with standby counsel and prosecutor in defendant's absence).

[208] See Savage v. Estelle, 924 F.2d 1459, 1459 (9th Cir. 1990) (upholding restrictions in light of defendant's extreme speech impediment); People v. Nevitt, 619 N.Y.S.2d 6, 7 (App. Div. 1994) (holding that, given defendant's prior behavior, trial court properly excluded him from sidebar conferences with potential jurors); see also David C. Donehue, Note, *Peters v. Gunn*: Should the Illiterate Defendant Have a Right to Self-Representation?, 57

fendant's *Faretta* rights and undermine her self-representation by forcing counsel to assume a role much greater than that consistent with her role as standby counsel.[209] Standby counsel should advocate for the defendant, resisting the removal of lawyering functions from the defendant unless the defendant clearly accedes on the record. If, however, the court legitimately forecloses the defendant from conducting specific aspects of the trial, standby counsel should assume those functions. For example, in *State v. Carrico*,[210] the pro se defendant was charged with child rape.[211] The trial court refused to allow him to cross-examine the child witnesses, insisting instead that the defendant write out questions to be asked by someone else.[212] Eventually, the court assigned that task to standby counsel.[213] In *Savage v. Estelle*,[214] the trial court did not allow the defendant seeking to represent himself to conduct voir dire, examine witnesses, or argue before the jury because of his speech impediment.[215] In such cases, standby counsel should support the defendant's request to act pro se, but should perform the designated functions once the trial court has ruled.

Occasionally, standby counsel represents a pro se defendant who chooses to be absent for portions of the proceeding.[216] In those cases,

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U. Pitt. L. Rev. 211, 225-28 (1995) (discussing whether illiterate defendant should be permitted to proceed pro se with assistance of standby counsel).

209 See, e.g., *McDermott*, 64 F.3d at 1452-54 (granting defendant new trial because exclusion from numerous bench conferences violated his right to self-representation); *Oses*, 961 F.2d at 986 (same); Snowden v. State, 672 A.2d 1017, 1020-22 (Del. 1996) (same).

210 No. 38127-0-I, 1998 WL 372732 (Wash. Ct. App. July 6, 1998).

211 See id. at *1.

212 See id. (holding that trial court did not violate defendant's right to self-representation by requiring him to submit written questions to standby counsel for cross-examination of child witnesses).

213 The defendant continued to object to this process and the trial court eventually held that he had waived his right to cross-examine the witness. See id. at *6; cf. Fields v. Murray, 49 F.3d 1024, 1036 (4th Cir. 1995) (rejecting claim that trial court's refusal to permit defendant to act as own counsel to cross-examine young victims of alleged sexual offenses violated defendant's Sixth Amendment rights); State v. Estabrook, 842 P.2d 1001, 1004-06 (Wash. Ct. App. 1993) (holding that trial court did not violate defendant's right to self-representation by refusing to allow defendant to cross-examine child victim of sexual abuse but instead required defendant to submit questions to judge who then questioned victim). See generally Julie A. Anderson, Comment, The Sixth Amendment: Protecting Defendants' Rights at the Expense of Child Victims, 30 J. Marshall L. Rev. 767 (1997) (discussing whether pro se defendants should be permitted to examine child victims); William F. Lane, Note, Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: *Field v. Murray*, 74 N.C. L. Rev. 863 (1996) (same).

214 924 F.2d 1459 (9th Cir. 1990).

215 See id. at 1461 (discussing limitations that trial court placed on pro se defendant).

216 See, e.g., Johnson v. State, 507 A.2d 1134, 1139-40 (Md. Ct. Spec. App. 1986) (noting that defendant voluntarily absented himself from courtroom); *Carrico*, 1998 WL 372732, at *6 (same); Decker, supra note 72, at 536-37 (arguing that standby counsel can aid absent defendant); cf. Russaw v. State, 572 So. 2d 1288, 1294 (Ala. Crim. App. 1990) (describing how defendant declined to participate).

standby counsel should ask the court to revisit the defendant's waiver of the Sixth Amendment right to assistance of counsel[217] and should inform the court that standby counsel is ready to assume representation if the defendant no longer chooses to proceed pro se.[218] If the defendant persists in representing herself and does not specifically give contrary orders,[219] standby counsel should attempt to protect the record, argue issues of unfairness outside the presence of the jury, and seek permission from the defendant and the court to assume responsibility for some portions of the trial.

D. Sentencing

Standby counsel's role changes somewhat at sentencing. The defendant's interest in self-representation is less weighty once the jury finds her guilty.[220] At this stage, as at the competency hearing, standby counsel can serve the court and protect the public interest in fair sentencing. The court has an independent interest in knowing whether mitigating facts exist. The court should not impose an inappropriately harsh sentence on the pro se defendant out of ignorance of mitigating factors. To do so would transform the justice system into the tool of the self-destructive defendant.[221] Standby counsel therefore owes the sentencing court a duty to present appropriate mitigating information to counterbalance the prosecution's presentation and to supplement the probation office's report.

In *United States v. Day*,[222] the Court of Appeals for the Eighth Circuit described the role of counsel at sentencing as different from that at trial in that "[s]entencing hearings demand much less special-

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217 But see *Carrico*, 1998 WL 372732, at *1, *6 (enforcing defendant's waiver and declining to revisit questions of waiver and competency despite defendant's reference to judge as "a black robed priest of Satan" and claim that judge was undermining defense).

218 In *Carrico*, standby counsel advocated to allow a representative to whom the defendant had given power of attorney to conduct the defense in his absence. See id. at *7.

219 See, e.g., State v. Ortisi, 706 A.2d 300, 304 (N.J. Super. Ct. App. Div. 1998) (reporting that, before leaving courtroom, pro se defendant directed standby counsel not to raise objections or question witnesses but only to take notes on proceedings).

220 See Martinez v. Court of Appeal, 120 S. Ct. 684, 691 (2000) ("The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict.").

221 See Godinez v. Moran, 509 U.S. 389, 416-17 (1993) (Blackmun, J., dissenting) (characterizing defendant's attempts to waive counsel, plead guilty to capital murder, and present no mitigating evidence as "volunteer[ing] himself for execution"); Appel v. Horn, No. CIV.A.97-2809, 1999 WL 323805, at *16 (E.D. Pa. May 21, 1999) ("The unconstitutional deprivation of counsel at Appel's competency hearing infected all later stages of his prosecution and rendered all subsequent proceedings against him void."). See generally Eric Rieder, Note, The Right of Self-Representation in the Capital Case, 85 Colum. L. Rev. 130, 148-54 (1985) (arguing that state's interest in just sentence outweighs defendant's interest in self-representation at sentencing in capital case).

222 998 F.2d 622 (8th Cir. 1993).

ized knowledge than trials."[223] Thus, standby counsel's role at sentencing will not involve the same level of guidance concerning courtroom etiquette and procedural rules. Standby counsel's function may therefore seem less important to the courts, given their preeminent concern with the orderly flow of courtroom proceedings. That is not to say, however, that standby counsel plays an insignificant role or has no responsibilities at sentencing. Standby counsel must continue to protect the defendant's interests as well as support the defendant's self-representation effort.

Standby counsel should shoulder significant responsibility for assembling information that will influence the sentencing decision of the judge or jury. In the era of sentencing guidelines, sentencing decisions are driven by determinations that the pro se defendant will not readily recognize. As a result, standby counsel should help the defendant present favorable information and contest factual disagreements that bear on the sentence. Further, standby counsel should conduct the appropriate investigation,[224] even without the defendant's cooperation. Standby counsel can present information to the court without endangering the defendant's *Faretta* rights. If the court concludes that standby counsel is advancing a position inconsistent with the defendant's, the court may respect the defendant's actual control and disregard counsel's argument.

Standby counsel may also help exclude damaging information. For example, standby counsel may protect against the use of prior convictions to enhance the sentence. Standby counsel can evaluate the validity of the defendant's prior convictions, even without relying heavily on the defendant's cooperation. By examining the record or inquiring of those involved in the prior case, standby counsel may discover that the defendant was unrepresented at a prior conviction, that the court accepted an invalid guilty plea, or that some legal impediment bars the conviction.[225]

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[223] Id. at 626.

[224] The pro se defendant is in a poor position to gather testimony providing a personal assessment or background facts that could influence the sentence; psychological barriers make the defendant's own investigation of her psycho-social history problematic. Standby counsel, however, can interview family members and gather school and other institutional records that may reflect mitigating circumstances. See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835-41 (1994) (stressing importance of defense counsel's role in gathering proper information to represent defendants adequately); Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 340-41 (1993) (emphasizing importance of constructing "complete social history" in every capital case and describing process for defense attorney).

[225] See Childress v. Johnson, 103 F.3d 1221, 1221 (5th Cir. 1997) (reversing district court's denial of defendant's petition for writ of habeas corpus because defendant lacked

Some avenues, however, will be closed to standby counsel whose pro se client is uncooperative or self-destructive. Most important, standby counsel is not likely to be able to obtain authorization to appoint experts.[226] The motion for authorization would have to come from the defendant; the court is unlikely to wrest control from the defendant and grant a motion over her objection. In addition, mental health experts in particular may rely heavily on the defendant's participation in an evaluative process, and that participation is unlikely if the pro se defendant resists the investigation. Standby counsel can try to persuade, but cannot force, the defendant to cooperate.

Capital sentencing poses special problems. In a number of cases, pro se defendants have sought out the death penalty.[227] In *People v. Bloom*,[228] the defendant asked to represent himself at the capital sentencing hearing in order to "help the prosecution obtain a death verdict."[229] The defendant instructed standby counsel not to present any witnesses, and standby counsel agreed simply to provide procedural advice as the defendant successfully pursued his effort to receive the death penalty.[230] Although the California court affirmed the defendant's conviction and death sentence, emphasizing that some defendants rationally prefer death to life imprisonment without parole,[231] the fact that the defendant later challenged the sentence belies this assertion.[232] The social harm inflicted by improperly imposed capital punishment warrants requiring the search for and presentation of mitigating evidence in every capital case.[233] If the defendant opposes introducing mitigating evidence at the sentencing hearing, a court that fears a *McKaskle* violation can appoint an attorney, other than standby counsel, who will act on the court's behalf, not the defendant's, to present mitigating information.

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counsel at earlier trial); see also White, supra note 224, at 344-45 (discussing avenues of investigation in capital cases).

226 See id. at 342-44 (discussing expert defense witnesses in capital cases).

227 See, e.g., Godinez v. Moran, 509 U.S. 389, 392 (1993) (noting that defendant waived right of counsel at trial in order to plead guilty to capital offense); Appel v. Horn, No. Civ.A.97-2809, 1999 WL 323805, at *1, *13 (E.D. Pa. May 21, 1999) (observing that defendant waived right to counsel midway through trial and requested death penalty); People v. Bloom, 774 P.2d 698, 715-16 (Cal. 1989) (noting that defendant may self-represent even if seeking death penalty).

228 774 P.2d 698 (Cal. 1989).

229 Id. at 709-10.

230 See id. at 710.

231 See id. at 715 (affirming defendant's conviction and death sentence).

232 See Bloom v. Vasquez, 840 F. Supp. 1362 (C.D. Cal. 1993) (denying petition for writ of habeas corpus), rev'd sub nom. Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997).

233 See, e.g., *Bloom*, 774 P.2d at 724-30 (Mosk, J., concurring in part and dissenting in part) (arguing that pro se defendant should not have been permitted to assist prosecution in obtaining death penalty).

Finally, some pro se defendants, once convicted, request representation for sentencing.[234] This possibility also mandates that standby counsel prepare for the sentencing phase. If unprepared, standby counsel may force the court to choose between granting a continuance or denying the defendant's request and forcing the defendant to continue pro se. In *State v. Reed*,[235] for example, standby counsel had not prepared for the capital sentencing hearing, and the court required the defendant to continue pro se.[236] If standby counsel had prepared, the hearing might have been more balanced.

As the foregoing discussion reflects, standby counsel's role varies somewhat depending on the stage of the proceeding. At no stage, however, is the role appropriately defined as mere presence. Standby counsel must, at every stage, actively support the defendant by investigating the facts and the law, identifying possible defenses, and suggesting steps to be taken by the defendant. If the court holds a competency hearing, standby counsel must step out of that more limited role and assume full responsibility; the defendant cannot waive her Sixth Amendment right to assistance of counsel until the question of competency is resolved. Counsel's other pretrial preparation should be extensive enough to help the defendant identify and file appropriate motions, and arrive at trial as well prepared as possible. During trial, of course, standby counsel must continue to be as involved as possible without infringing the defendant's right to actual control of the case and to the appearance of control in the presence of the factfinder. Finally, if the defendant is convicted and therefore faces sentencing, standby counsel should assume responsibility for identifying mitigating evidence.

IV
INEFFECTIVE ASSISTANCE

Pro se defendants sometimes complain that standby counsel rendered ineffective assistance of counsel, violating the defendant's constitutional rights. This argument encounters two barriers. First, the courts do not permit the pro se defendant to complain of her own ineptitude, so ineffective assistance of counsel is generally not a

234 See, e.g., United States v. Taylor, 933 F.2d 307, 309 (5th Cir. 1991) (noting that defendant attempted to withdraw waiver of counsel after conviction and holding that trial court should have accepted withdrawal of waiver); State v. Reed, 503 S.E.2d 747, 748 (S.C. 1998) (describing defendant's attempt to change his relationship with standby counsel at beginning of penalty phase, when defendant wanted to give opening statement and then have standby counsel continue).

235 503 S.E.2d 747 (S.C. 1998).

236 See id. at 751 (upholding trial court's decision to deny defendant's request for counsel).

ground for relief after pro se representation.[237] The second problem lies in the constitutional status—or lack of constitutional status, to be more exact—of standby counsel. The defendant cannot elect to waive assistance of counsel and then insist on receiving assistance of standby counsel.[238] The courts have difficulty accepting the proposition that a defendant who has no constitutional right to the assistance of standby counsel can complain if that assistance, granted by the trial court as a discretionary act, fails to meet some minimum standard.[239]

Although the United States Supreme Court has not addressed this question, the Court has rejected ineffective assistance of counsel arguments in other contexts. In *Wainwright v. Torna*,[240] the defendant claimed ineffective assistance when his attorney missed the filing deadline for a writ of certiorari to the Florida Supreme Court.[241] The Court held that, since there is no constitutional right to counsel for discretionary state review, the defendant "could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."[242] Similarly, in *Coleman v. Thompson*,[243] the petitioner complained of ineffective assistance of counsel in postconviction review.[244] The Court concluded that the defendant bears the risk of attorney error in postconviction review, because the defendant has no constitutional right to counsel at that stage.[245] This prece-

237 See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (stating that pro se defendant cannot claim that self-representation was ineffective assistance of counsel). Some have argued that the trial court must protect against a trial that is unfair due to defendant's self-representation. See Chused, supra note 26, at 676-77 (recommending that trial court should protect pro se defendant who is likely to try case in farcical manner, mentally incapable of deciding waiver issues, absent from courtroom, gagged, or extremely inarticulate). However, the courts have not adopted this view.

238 See United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997) (rejecting defendant's claim that trial court was required to appoint standby counsel).

239 See United States v. Mikolajczyk, 137 F.3d 237, 246 (5th Cir. 1998) (concluding that standby counsel's failure to assist defendant was unlikely to violate defendant's Sixth Amendment rights because defendant had no right to standby counsel); United States v. Schmidt, 105 F.3d 82, 89-91 (2d Cir. 1997) (holding that defendant who proceeded pro se cannot hold standby counsel accountable for conviction); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (holding that assistance defendant received was not deficient, even assuming he was entitled to effective assistance); State v. Oliphant, 702 A.2d 1206, 1212-13 (Conn. App. Ct. 1997) (holding that pro se defendant had waived right to counsel and therefore had no right to effective assistance).

240 455 U.S. 586 (1982).

241 See id. at 586-87.

242 Id. at 587-88.

243 501 U.S. 722 (1991).

244 See id. at 755 (noting that defendant claimed he received ineffective assistance of counsel during trial, sentencing, and appeal).

245 See id. at 755-57 (finding that any attorney error that led to default in state court cannot constitute excuse default in federal habeas corpus because defendant had no right to counsel to pursue his appeal in state habeas corpus); see also Pennsylvania v. Finley, 481

dent should not be extended to cases in which a pro se defendant alleges an injury caused by the incompetence of standby counsel. In at least some circumstances, standby counsel's assistance should be evaluated under the standards for effective assistance of counsel and should provide a basis for relief.

Torna and *Coleman* do not settle the question of relief based on standby counsel's incompetence. In both *Torna* and *Coleman*, the attorney's alleged error occurred at a stage of the proceeding where the Sixth Amendment does not apply and, further, did not implicate the due process guarantee of a fundamentally fair trial. Unlike the aspects of representation addressed in those cases, either the conduct of standby counsel or the interaction of standby counsel and the pro se defendant may render the trial itself unfair. Moreover, both occur at a stage where the courts recognize the right to counsel as protecting the fairness of the proceeding. In pro se cases, the fairness of the proceeding is already threatened by the defendant's election to represent herself. Trial courts often encourage pro se defendants to turn to standby counsel for advice and assistance; they inform the defendant that standby counsel is an available resource, particularly on questions of substantive law and courtroom procedure. Arguably, by encouraging that reliance, the courts create a due process right not present in *Torna* or *Coleman*. The courts should therefore offer a remedy when the defendant relies on standby counsel and standby counsel fails to meet standards of competence, thereby injuring the defendant.

Some courts have held that a pro se defendant may claim ineffective assistance of standby counsel within the limited range of duties allocated to standby counsel. In *People v. Bloom*,[246] the California Supreme Court suggested that a defendant might be able to show ineffective assistance by demonstrating that standby "counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel."[247] In *People v. Doane*,[248] the California appellate court concluded that the duties of standby counsel extend only to "giving legal advice and assistance to a defendant who has the control and responsibility for his own defense," and, given that limited

U.S. 551, 557 (1987) ("Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right.").

246 774 P.2d 698 (Cal. 1989).

247 Id. at 718; see also Ali v. United States, 581 A.2d 368, 380 (D.C. 1990) (holding that pro se defendant could assert ineffective assistance of counsel claim challenging standby counsel's competency "'within the limited scope of duties assigned to or assumed by counsel'" (quoting *Bloom*, 774 P.2d at 718)).

248 246 Cal. Rptr. 366 (Ct. App. 1988).

role, standby counsel need only be available and offer reasonably competent advice.[249] When the conduct complained of is outside standby counsel's circumscribed duties, however, the courts generally will not entertain a claim of ineffective assistance.[250] In *State v. Randall*,[251] for example, the court rejected an ineffective assistance of counsel argument based on the trial court's ruling that standby counsel could not give a closing argument in addition to the defendant's; the proposed closing argument went beyond the standby counsel's duties.[252]

The courts should be more receptive to claims of ineffective assistance of standby counsel relating to conduct within standby counsel's duties and should evaluate claims of incompetence of standby counsel under the constitutional standard for effective assistance of counsel established in *Strickland v. Washington*.[253] In *Strickland*, the Court elaborated a two-prong test. First, the defendant must demonstrate that counsel's performance fell outside the broad range of rea-

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249 See id. at 372 (finding that standard for standby counsel's effectiveness must reflect her small role).

250 See, e.g., Moore v. State, 235 S.E.2d 577, 578 (Ga. Ct. App. 1977) (rejecting defendant's ineffective assistance argument and noting that standby counsel was merely to provide procedural information if defendant asked); Estelle v. State, 558 So. 2d 843, 847 (Miss. 1990) (noting that standby counsel "was without authority, discretion or control" and therefore rejected claim of ineffective assistance); State v. Thomas, 417 S.E.2d 473, 478 (N.C. 1992) (stating that under North Carolina statute restricting role of standby counsel, defendant could not establish ineffective assistance outside limited duties assigned to standby counsel).

251 530 S.W.2d 407 (Mo. Ct. App. 1975).

252 See id. at 409-10 (finding that trial court did not err in refusing to allow standby counsel to make closing argument).

253 466 U.S. 668 (1984). See generally Kirchmeier, supra note 48 (discussing constitutional right to effective assistance of counsel); Klein, supra note 17, at 633-38 (recognizing practical difficulties of enforcing right).

The Supreme Court has also recognized that a claim of ineffective assistance may rest on a conflict of interest. Although ineffective assistance claims based on conflict of interest seem less likely to arise in pro se cases, it is clear that the trial court should not appoint as standby counsel an attorney who may labor under a conflict of interest. If the court does so, the defendant's complaint should be evaluated under Cuyler v. Sullivan, 446 U.S. 335 (1980). The defendant must show that standby counsel had an actual conflict of interest and that the defendant was adversely affected by that conflict. See id. at 350. Another possible scenario is that the defendant or standby counsel suggests to the trial court that a conflict of interest may exist. In State v. McDonald, 979 P.2d 857 (Wash. Ct. App. 1999), review granted, 994 P.2d 846 (Wash. 2000), for example, the parties raised possible conflict of interest, see id. at 859, but the trial court neglected to conduct an inquiry, see id. at 861. As in cases where the defendant is represented, the conviction should be reversed if the question of conflict was raised and the trial court did not inquire into it. See *Cuyler*, 446 U.S. at 346 (requiring courts to investigate timely claims of conflict of interest) (citing Holloway v. Arkansas, 435 U.S. 475, 484-91 (1978) (reversing defendants' convictions because trial court's failure to investigate counsel's claims of conflict of interest deprived defendants of their right to effective assistance of counsel)).

sonably competent representation.[254] Not only is the range of acceptable performance broad, but special deference is normally given to the tactical judgments of the attorney.[255] Second, the defendant must establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[256] Although the *Strickland* test is extremely difficult to satisfy, it provides a vehicle for obtaining relief from egregious and harmful errors committed by defense counsel.[257] The same process should be available in some cases to pro se defendants who claim to have been injured by the incompetence of standby counsel.[258]

The pro se cases most clearly suitable for *Strickland* analysis are those in which standby counsel has taken affirmative action that the defendant claims was incompetent and prejudicial. The advice of standby counsel should be subject to the same constitutional standard as counsel charged with representing the defendant.[259] For example, if standby counsel provides legal advice that is wrong and the defendant is injured by being misled, the defendant should receive the same

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254 See *Strickland*, 466 U.S. at 687-91.

255 See id. at 689-91 (requiring courts to presume that counsel's questionable actions were reasonable trial strategy).

256 Id. at 694. The court must ask whether the attorney's incompetence generates doubt concerning the reliability of the outcome. See id. at 695.

257 *Strickland* has been criticized as permitting too much poor representation to go unremedied. See Bright, supra note 224, at 1837-40 (illustrating catastrophic consequences of poor representation in capital cases); Kirchmeier, supra note 48, at 438-40 (cataloging criticisms made of *Strickland*); Klein, supra note 17, at 640-45 (arguing that *Strickland* undermines right to effective counsel).

258 In State v. Richards, 552 N.W.2d 197, 207 (Minn. 1996), the Minnesota court opined that the conduct of standby counsel may be governed by some standard of ineffectiveness different from that defined in *Strickland*, but declined to discuss what that standard might be.

Another type of ineffective assistance claim may arise when the attorney's pretrial preparation and interaction with the defendant are so wanting that the defendant is compelled to proceed pro se. See, e.g., Howard v. State, 701 So. 2d 274, 278 (Miss. 1997) (describing counsel's failure to conduct appropriate investigation and file appropriate pretrial motions). If the attorney is ineffective in the pretrial stage, the defendant should be viewed as suffering presumptive prejudice if the result of counsel's failing is pro se representation. This claim could be raised in a large number of cases, but the courts are skeptical. If we have any concern with the fairness of the system, however, the courts should be willing to consider the possibility that the defendant who appears on the day of trial complaining that counsel has not prepared adequately and winds up representing herself as a result may have correctly appraised the attorney's level of preparedness in the first place and should not be penalized for having done so.

259 See Chused, supra note 26, at 674 (remarking that "ineffective assistance rules should apply to measure the competency of [standby] counsel's performance, however slight his role"); Pearson, supra note 11, at 716 (arguing that pro se defendant who relies on erroneous advice of standby counsel should receive same standard of review as represented defendant).

relief as a defendant injured by the incompetence of trial counsel. When standby counsel is assigned specific functions, *Strickland* should apply to the performance of those duties. In some cases, for instance, the trial court specifically directs standby counsel to draft the jury instructions for the defendant.[260] If incompetent and prejudicial, the attorney's performance of that task should provide grounds for relief under *Strickland*. Similarly, when standby counsel assumes responsibility for certain functions, *Strickland* should apply.[261] In *United States v. Wilson*,[262] for example, although the defendant filed a motion to suppress a revolver and the trial court did not rule on the motion, standby counsel stated affirmatively to the court that the defendant had no objection to admitting the revolver.[263] This affirmative and arguably incompetent action of standby counsel should be evaluated as possible ineffective assistance.

Most allegations of ineffective standby counsel, however, involve sins of omission. Standby counsel will give no affirmatively incorrect advice but will fail to alert the defendant to some legal proposition or procedural trap. For example, standby counsel will fail to mention a possible defense or line of investigation that could be pursued or to inform the defendant that she should file a motion to suppress.[264] These cases are more troublesome. To consider claims of ineffectiveness in these cases may appear to impose a duty on standby counsel inconsistent with the defendant's right of self-representation. Nevertheless, even in these instances, the courts should consider the possibility of ineffective assistance. When standby counsel actively advises a pro se defendant, the defendant is encouraged to rely on standby counsel. If that reliance is fostered, the interests of the trial court and of society are served because the trial is likely to be more orderly and fair. If, however, that reliance misleads and ultimately injures the defendant, rendering the trial less fair, the law should provide redress. In *Henley v. State*,[265] standby counsel assisted the defendant during trial, but neither he nor the defendant moved for a directed verdict at

260 See, e.g., United States v. Studley, 892 F.2d 518, 521 (7th Cir. 1989) (noting that trial court ordered standby counsel to prepare jury instructions).

261 See cases cited supra notes 74-76.

262 962 F.2d 621 (7th Cir. 1992).

263 See id. at 625 (noting that defendant remained silent when standby counsel said he had no objection to admission of revolver).

264 See People v. Tuler, 630 N.E.2d 1287, 1289 (Ill. App. Ct. 1994) (noting that standby counsel did not suggest that defendant proceed unprepared even though defendant's preparation was hampered by lockdown at correctional facility).

265 729 So. 2d 232 (Miss. 1998).

the close of the prosecution's case.[266] The court stated that this failure would constitute incompetence of counsel under *Strickland*, but since the issue was moot, the court did not engage in extensive discussion of the claim.[267] In *People v. Brockman*,[268] standby counsel provided advice before trial but neglected to tell the defendant that he must file a pretrial notice of alibi with information relating to his alibi witnesses, and as a result, the defendant was limited in his ability to present his alibi.[269] In *Strozier v. Newsome*,[270] standby counsel neither advised the pro se defendant that his prior convictions might be admissible to impeach him if he testified,[271] nor helped him obtain a ruling on their admissibility.[272] Such omissions should be scrutinized under *Strickland*.

Another peculiarity of ineffective assistance analysis in standby counsel cases bears mentioning. The cases defining ineffective assistance in the conventional context recognize that an attorney may reasonably choose not to investigate. That issue plays out differently when considering the conduct of standby counsel. Even if the defendant is conducting the investigation, standby counsel should explore the case to determine whether the defendant is missing key factual information and to assess the application of law to the facts. Moreover, if the pro se defendant is incarcerated, then standby counsel must investigate. The defendant cannot pursue the necessary investigation, and standby counsel cannot argue that tactical reasons weigh against the need to investigate, since standby counsel does not make tactical decisions.

If courts will not extend protection to all pro se defendants who rely on standby counsel, they should at least extend it to jailed defendants who have chosen to represent themselves. A jailed defendant is particularly vulnerable to the failings of standby counsel. If standby counsel does not provide adequate support, the defendant may be left

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266 See id. at 238 (mentioning that neither defendant nor standby counsel moved for directed verdict "[d]espite the insufficiency of the evidence").

267 See id. at 242 (finding ineffective assistance issue moot because grand larceny conviction was already reversed).

268 632 N.E.2d 615 (Ill. App. Ct. 1994).

269 See id. at 620 (concluding that defendant had not demonstrated prejudice).

270 926 F.2d 1100 (11th Cir. 1991).

271 See id. at 1103 (noting that defendant had been unaware that his prior convictions could be used).

272 See id. at 1108 (concluding that defendant had validly waived his right to counsel and not addressing possibility of ineffectiveness of standby counsel); Ellis v. State, No. 05-92-01640-CR, 1996 WL 14107, at *3 (Tex. Ct. App. Jan. 9, 1996) (affirming conviction even though defendant complained that standby counsel had not advised him how to preserve issue for appeal).

without basic legal resources to prepare her defense.[273] The jailed pro se defendant may also rely on standby counsel to provide legal research or even to convey discovery material. In *Scott v. Heath*,[274] standby counsel, whose principal responsibility was to provide access to legal research, did not provide the defendant any cases until the day before trial, and even then provided incomplete information.[275] If the conduct of standby counsel in these cases falls below the standard of reasonable professional performance, it should be evaluated as ineffective assistance of standby counsel.

To advocate that the courts entertain these claims is far from advocating that the defendants all deserve relief. Even if the courts accept in theory that ineffectiveness of standby counsel can warrant relief, a defendant pressing such a claim faces two substantial hurdles. First, the pro se defendant acts as lead counsel and is assumed responsible for all decisions unless there is proof to the contrary.[276] The defendant thus faces a significant evidentiary challenge. In *People v. Baghai-Kermani*,[277] for example, the court quickly rejected the defendant's claim that standby counsel's ineffectiveness led to the introduction of harmful defense evidence.[278] Since the defendant had not demonstrated that standby counsel played an unusual role in the decision to present the evidence, the court assumed that responsibility lay with the pro se defendant himself.[279] In *People v. Doane*,[280] the court

273 See, e.g., United States v. Proctor, 166 F.3d 396, 400 (1st Cir. 1999) (reporting that defendant told court his jury instructions "had been seized by jail officials"); Barham v. Powell, 895 F.2d 19, 20-21 (1st Cir. 1990) (outlining difficulty confronted by incarcerated defendant); People v. Tuler, 630 N.E.2d 1287, 1289 (Ill. App. Ct. 1994) (reporting that defendant claimed correctional center had been on lockdown for week prior to trial, denying him access to law library, copy machine, and other resources); State v. Cooley, 468 N.W.2d 833, 835 (Iowa Ct. App. 1991) (noting that to comply with court order granting pro se defendant access to legal materials prison officials had to place him in isolation cell); State v. Bradfield, 973 S.W.2d 937, 943 (Tenn. Crim. App. 1997) (reporting that court informed pro se defendant who was unable to discover who was prosecuting case because he was prohibited from making phone calls that this was problem of self-representation).

274 No. 88-6031, 1989 WL 134596 (4th Cir. Oct. 27, 1989).

275 See id. at *1 (noting that standby counsel was late in providing defendant with legal materials).

276 See, e.g., Carter v. State, 512 N.E.2d 158, 158 (Ind. 1987) (holding that pro se defendant cannot claim ineffective assistance because he represented himself and managed activities of standby counsel); People v. Baghai-Kermani, 644 N.E.2d 1004, 1008 (N.Y. 1994) ("[I]t must be assumed in the absence of contrary evidence that defendant was the one who made the critical strategic decisions . . . .").

277 644 N.E.2d 1004 (N.Y. 1994).

278 See id. at 1008.

279 See id. at 1008-09 (stating that, given standby counsel's usually limited role, court will assume that defendant is responsible for strategic decisions); see also Pearson, supra note 11, at 717 (arguing that standby counsel should maintain careful record of actions).

280 246 Cal. Rptr. 366 (Ct. App. 1988).

concluded that because the duties of standby counsel extend only to "giving legal advice and assistance to a defendant who has the control and responsibility for his own defense," prejudice would rarely flow from a failure of standby counsel; the defendant controls strategy and presentation.[281] The court also suggested that if standby counsel's unavailability provided the basis for claiming incompetence, then the defendant must raise the problem at trial.[282]

Like an ordinary *Strickland* inquiry, the evaluation of the attorney's performance will turn on the defendant's own conduct. Therefore, if the defendant rejected standby counsel's efforts to provide guidance on procedural matters, the responsibility lies with her and standby counsel cannot be deemed ineffective. If the defendant prevents or discourages standby counsel from undertaking certain action or assumes responsibility for the action, the defendant cannot then complain that standby counsel's conduct was incompetent.[283] In *People v. Bloom*, the court remarked that the defendant cannot rely on standby counsel's failure to perform an act "within the scope of duties the defendant voluntarily undertook to perform personally at trial."[284] The defendant cannot complain when standby counsel complies with the defendant's directives.[285]

Second, as in any ineffective assistance case, the defendant must demonstrate prejudice.[286] When the court asks whether the result would probably have been different but for the failure of standby counsel, should the court compare the outcome to the likely result in a case where the pro se defendant had no standby counsel and flew entirely solo, or should the court evaluate the likely result had standby counsel performed appropriately? Clearly, if courts take the first approach, asking if the defendant would have been better off with no

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281 Id. at 372 (concluding that ineffective assistance of advisory counsel will "almost never" deny defendant fair trial).

282 See id. at 373 ("By failing to bring to the court's attention his advisory counsel's recalcitrance, the defendant makes a tactical decision to waive assistance and advice from advisory counsel.").

283 See Chused, supra note 26, at 659 ("Appellate courts are highly unlikely to reverse a conviction for any reason related to the 'prejudice' caused by defendants who boldly told their lawyers what to do.").

284 774 P.2d 698, 718 (Cal. 1989).

285 See State v. Richards, 552 N.W.2d 197, 207 (Minn. 1996) (rejecting ineffective assistance claim where pro se defendant denied standby counsel access to voluminous discovery materials); see also United States v. Johnson, 585 F.2d 374, 376 (8th Cir. 1978) (denying claim of ineffective assistance after finding that defendant rejected standby counsel's offers of assistance).

286 See, e.g., Allen v. Johnson, No. CIV.A.3:96-CV-3441G, 1998 WL 684229, at *2 (N.D. Tex. Sept. 25, 1998) (concluding that defendant could not claim ineffective assistance of standby counsel because he did not show that standby counsel's performance prejudiced his defense); People v. Brockman, 632 N.E.2d 615, 620 (Ill. App. Ct. 1994) (same).

help whatsoever, prejudice becomes virtually impossible to establish. Instead, when standby counsel was assigned and performed incompetently, the courts should ask whether the result would probably have been different had standby counsel performed competently. Any other approach would fail to treat standby counsel's incompetence—the basis for the ineffective assistance claim—as a factor in the prejudice evaluation.

Even though relief will be difficult to obtain, it is important to consider the allegation that standby counsel was incompetent and that the incompetence injured the defendant. In *United States v. Cochrane*,[287] the court rejected summarily the defendant's argument that standby counsel had been ineffective.[288] The court stated, "[t]he obscure and convoluted form of his motions and lack of proper citations of law . . . were [defendant's] own responsibility."[289] The court should have required further exploration, even though the facts discovered might have failed to support the defendant's claim of ineffectiveness. Whatever else is expected, standby counsel unquestionably serves as an advisor on matters of legal procedure, form, and research. If the defendant consults with standby counsel and standby counsel fails to offer adequate legal advice, then standby counsel fails to provide the assistance reasonably to be expected. That failure should be held up to legal scrutiny.

The reluctance of appellate courts to hold standby counsel to the standard enunciated may flow in part from fear that trial courts would appoint standby counsel in fewer cases if standby counsel's conduct could give rise to a constitutional challenge. Trial courts may become reluctant to appoint standby counsel for fear of generating additional appellate issues. However, trial courts will continue to appoint standby counsel even if they recognize that deficient performance may generate grounds for relief. Courts often appoint standby counsel out of self-interest. Therefore, one may assume that the courts will continue to view standby counsel as an asset despite possible challenges based on standby counsel's performance. Assignment of standby counsel enhances the fairness of the proceedings and provides some protection against the problems injected by self-representation. Moreover, knowing that the conduct of standby counsel may provide grounds for appellate relief may encourage the trial court either to demand a higher level of support from standby counsel or to curtail

287 985 F.2d 1027 (9th Cir. 1993).
288 See id. at 1029-30.
289 Id. at 1029.

explicitly standby counsel's responsibility. Either course of action could improve the trial of pro se cases.

CONCLUSION

Although the constitutional right to self-representation can coexist with active involvement of standby counsel, the courts (as directors of standby counsel) and standby counsel themselves have not maximized their role in preserving the fairness of proceedings in which defendants proceed pro se. The problems identified in this Article will not be solved by a judicial decision or act of the legislature. To a large degree, they must be addressed by trial courts and defense attorneys, who must work together to enhance and clarify the role of standby counsel. As the Mississippi Supreme Court observed:

> [T]he role of appointed counsel often becomes blurred when counsel is requested to remain and assist the defendant who wishes to carry out his own defense. However, if each party will zealously fulfill their role, we can ensure that the trial courts are not placed in such an unenviable position in terms of the number of errors or potential errors, while at the same time honor the right to counsel and ensure confidence in the reliability, fairness, and outcome of such trials.[290]

This goal requires a cooperative effort.

First, courts should be more cautious about forcing reluctant defendants to proceed pro se, and, when a defendant does elect self-representation, the court should always appoint standby counsel. Standby counsel should be selected to provide as much support as possible to the pro se defendant; the court should not appoint as standby counsel an attorney with whom the defendant's relationship has already soured. Laws governing the functions of the public defender and compensation schemes for appointed counsel should be modified to encompass the role of standby counsel.

Second, the bar and the courts should demand more of standby counsel. The rules of professional responsibility should be read to impose on standby counsel the duty to support the pro se defendant, limited only by the understanding that the defendant controls all decisions and speaks for the defense unless the court specifically directs otherwise. Standby counsel should be expected to assume a role in investigating the facts and law of the case, preparing and presenting pretrial motions, helping the defendant present the case in court, and assembling and presenting information relevant to sentencing. If standby counsel is held to this higher standard, trials involving pro se

[290] Howard v. State, 701 So. 2d 274, 286 (Miss. 1997).

defendants will be more fair and courts will be able to substitute standby counsel for a defendant willing to relinquish self-representation during the trial.