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The Pro Se Criminal Defendant , Standby Counsel, and the Judge: A Proposal for Better-Defined Roles

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THE *PRO SE* CRIMINAL DEFENDANT, STANDBY COUNSEL, AND THE JUDGE: A PROPOSAL FOR BETTER-DEFINED ROLES

MARIE HIGGINS WILLIAMS

A lawyer who represents himself has a fool for a client.[1]

INTRODUCTION

Jack Kevorkian. Ted Kaczynski. Colin Ferguson. All three wanted to represent themselves in their criminal trials. All three ended up in prison. Although these three infamous criminal defendants are certainly not the only ones who have chosen to waive their right to counsel, their cases poignantly illustrate common problems in any criminal case in which the defendant represents himself.[2]

After lawyers successfully procured acquittals or mistrials on his four prior charges of assisted suicide, Dr. Jack Kevorkian decided to represent himself in his fifth trial.[3] Unlike the first four trials, though, this time the charge was murder.[4] Kevorkian's trial was unusually short because he was unable to present any witnesses in his defense; he "failed to convince the judge that his proposed witnesses were relevant."[5] Judge Jes-

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1. This common adage among lawyers is sometimes attributed to Abraham Lincoln.

2. For purposes of clarity, the criminal defendant will be referred to as "he" or "him" in the following comment. The standby counsel will be referred to as "she" or "her," because both the defendant and standby counsel will often be mentioned in the same sentence.

3. *See Verdict Important to Both Sides; Kevorkian's Guilt Called Significant for Euthanasia Issue*, CINCINNATI ENQ., Mar. 27, 1999, at A3, *available in* 1999 WL 9428716.

4. *See* Kevin Johnson, *New Trial, Greater Risks for Kevorkian*, USA TODAY, Mar. 22, 1999, at 3A, *available in* 1999 WL 6837465.

5. *Verdict Important to Both Sides*, *supra* note 3. Kevorkian did demonstrate, however, his "lack of legal skill as he asked legally impermissible questions." *Id.*

sica Cooper, presiding over the trial, implored Kevorkian to allow his lawyers to represent him, so they could present some kind of defense.[6] Kevorkian, however, refused to rely on counsel until he was convicted of second-degree murder. At that point, Kevorkian requested that the court allow his lawyers to represent him during the sentencing phase of the trial.[7] Judge Cooper expressed disbelief when she asked "Now?" before granting Kevorkian's request.[8] Kevorkian's former lawyer, Geoffrey Fieger, explained, "He wants to be a martyr. This is about focusing attention on himself."[9] He may have succeeded in focusing attention on himself, but Kevorkian certainly did not succeed in representing himself. The judge sentenced him to ten to fifteen years in prison.[10]

When the suspected "Unabomber," Theodore Kaczynski, was finally found and brought to trial, the judicial system had quite a foe on its hands. According to Judge Garland E. Burrell, Jr., who presided over the trial, Kaczynski did everything he could to delay his trial.[11] He contrived conflicts with his attorneys, staged a suicide attempt, and requested that he be permitted to represent himself.[12] Even though both the prosecution and the defense agreed that Kaczynski had the right to represent himself,[13] Burrell refused Kaczynski's request because he felt that Kaczynski only intended to delay the trial.[14] Some commentators consider that decision grounds for appeal.[15] The decision also prompted Kaczynski to enter a plea

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6. *See id.*
7. *See id.*
8. *See id.*
9. Johnson, *supra* note 4.
10. *See 'Dr. Death' Gets 10–15 Years*, NAT'L L.J., Apr. 26, 1999, at A6.
11. *See* Wayne Wilson, *Unabomber Gets Life Sentence*, SACRAMENTO BEE, May 5, 1998, at A1, *available in* 1998 WL 8821073.
12. *See id.* "The system has rarely, if ever, dealt with a client as brilliant yet troubled as Theodore Kaczynski—a 'mad genius' some legal observers call him." Cynthia Hubert & Denny Walsh, *Is Kaczynski Manipulating Legal System? Experts Disagree*, SACRAMENTO BEE, Jan. 11, 1998, at A1, *available in* 1998 WL 8803585. "His lawyers have said he is a paranoid schizophrenic. But Kaczynski almost certainly is competent [to represent himself] in the legal sense." *Id.*
13. *See* William Booth, *Both Sides Say Kaczynski May Represent Himself*, WASH. POST, Jan. 22, 1998, at A3. In fact, the lawyers agreed explicitly that "[Kaczynski's] request to [represent himself] was timely and not designed to cause delay." *Id.*
14. *See* Wilson, *supra* note 11.
15. *See* James P. Sweeney, *For Kaczynski, It Was Final Retreat*, SAN DIEGO UNION-TRIB., Jan. 25, 1998, at A3, *available in* 1998 WL 3988360.

bargain with the prosecutor—"if it wasn't going to be done his way, he wasn't interested."[16] As a result of the plea bargain, Kaczynski now faces life in prison.[17]

Colin Ferguson was accused of killing six passengers and wounding nineteen on the Long Island Railroad on December 7, 1993.[18] He decided to represent himself in his trial and explained to the jury in his opening statement, "There are 93 counts in the indictment only because it matches the year 1993 . . . . Had it been 1925, it would have been 25 counts."[19] His outrageous claims did not stop there, though. Ferguson unsuccessfully attempted to call a witness who would testify that the Central Intelligence Agency ("CIA") had kidnapped Ferguson, and that his behavior was controlled by a computer chip the CIA had planted in his brain.[20] He announced that "the Jewish Defense League was aware of a plot to kill him in jail and that the plot was linked to the prison killing of Wisconsin mass murderer Jeffrey Dahmer."[21] In his closing argument, Ferguson even argued that the nineteen survivors of the shooting had conspired with the police to frame him.[22] His courtroom antics infuriated legal experts, relatives of the victims, and the public.[23] His trial was referred to as a sham, a circus, and a charade.[24] Ferguson's former lawyer, Ronald

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16. *Id.* After Judge Burrell refused to allow Kaczynski to represent himself, Kaczynski "went quietly, confessing to each and every one of 16 attacks attributed to him." *Id.* "The societal dropout retreated again . . . to a jail cell where he'll spend the rest of his life." *Id.*

17. *See id.* Kaczynski's bout with the legal system, however, is not yet over. He is now claiming that he was coerced into pleading guilty, and is requesting that he be allowed to have a trial. *See Kaczynski Says Guilty Plea Coerced, Asks for Trial* (Jan. 18, 2000) <http://cnn.com/2000/US/01/18/unabomber.plea.ap/>.

18. *See* Stanley S. Arkin & Katherine E. Hargrove, *Justice Mocked When Madman Defends Himself*, L.A. TIMES, Feb. 12, 1995, at M1, *available in* 1995 WL 2014587. Ferguson's antics while representing himself caused one journalist to call his trial "a new warm-up act . . . for the morning hours before the kickoff of the O.J. Simpson trial." Dale Russakoff, *Letter from a Different Trial: Raising the Image of Lawyers by Proceeding Without Them*, WASH. POST, Feb. 3, 1995, at A2, *available in* 1995 WL 2076581.

19. Arkin & Hargrove, *supra* note 18 (alteration in original).

20. *See* Larry McShane, *Ferguson's Trial Antics May Set Stage for Appeal*, CHICAGO SUN-TIMES, Feb. 19, 1995, at 3, *available in* 1995 WL 6634765.

21. *Id.*

22. *See id.*

23. *See id.*

24. *See id.* Ferguson consistently referred to himself in the third person as "Mr. Ferguson, the defendant." *See* Geraldine Baum, *Courtroom of the Frightening and Surreal Law*, L.A. TIMES, Feb. 10, 1995, at E1, *available in* 1995 WL

Kuby, commented: "Instead of a trial about mental illness, we're having a trial that is an exercise in mental illness."[25] Ferguson was sentenced to two hundred years in prison.[26]

It has been said that the decision to represent oneself is "an invitation to disaster."[27] Yet criminal defendants in the United States request to represent themselves in an estimated fifty trials per year.[28] There are numerous anecdotal tales of the problems that such decisions can cause for both the judicial system and the defendant himself.[29] As illustrated by the cases of Kevorkian, Kaczynski, and Ferguson, defendants who choose to represent themselves may be inept to do so, may intend only to delay their trial, or may make a mockery of the legal system. Yet these are not problems that the judicial system can solve by eliminating the option of self-representation. The Sixth Amendment to the Constitution not only guarantees a criminal

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2014078. He claimed that he was a "political prisoner," and that he was being prosecuted because he was black—he claimed that a white man committed the murders. *See id.* He also said that "his legal advisers were trying to kill him if not make him blind so he couldn't identify the real killer." *Id.* At one point, it was even predicted that Ferguson would take the stand in his own defense—by "get[ting] off the witness stand, ask[ing] the empty chair a question, referring to himself in the third person and then jump[ing] into the chair [to answer the question]." *Id.*

25. Russakoff, *supra* note 18 (citation omitted). Ferguson refused to accept the assistance of three different teams of lawyers who had recommended that he plead insanity, even after a defense psychiatrist found him to be paranoid and delusional. *See id.*

26. *See Today's News*, N.Y. L.J., Apr. 6, 1998. Ferguson later asked one of the defense lawyers that he had fired, William Kunstler, to appeal, "focusing on whether the defendant [Ferguson] was mentally fit to represent himself and whether the judge erred in allowing him to do so." McShane, *supra* note 20. The jury verdict was affirmed on appeal. *See* People v. Ferguson, 670 N.Y.S.2d 327 (N.Y. App. Div. 1998). "[T]he defendant's decision not to pursue an insanity defense does not, in and of itself, indicate incompetence." *Id.* at 328.

27. *See* Anne E. Kornblut & Mac Daniel, *Accused Defies the Adage with Own Defense*, BOSTON GLOBE, Oct. 21, 1998, at A1 (citation omitted).

28. *See* Angie Cannon, *Desire for Self-Representation Not Uncommon*, ORANGE CTY. REG., Jan. 9, 1998, at A6, *available in* 1998 WL 2606818. "Robert Fogelnest, the past president of the National Association of Criminal Defense Attorneys, said requests such as Kaczynski's [to represent himself] probably occurred in some 50 trials last year." *Id.*

29. *See, e.g.*, *Court of Appeals Says Molester Got Fair Trial*, SEATTLE TIMES, July 8, 1998, at B2, *available in* 1998 WL 3161307 (describing how Franklin Carrico represented himself in his criminal trial, referring to himself as an ambassador from heaven, calling the judge's chambers a "synagogue of Satan," and the judge a "black-robed priest of Satan").

defendant the right to "Assistance of Counsel for his defence,"[30] it also gives a criminal defendant the constitutional right to represent himself.[31] The Supreme Court, in *Faretta v. California*,[32] held that a criminal defendant cannot be forced to accept the assistance of counsel, notwithstanding his lack of legal education.[33] Thus, another solution is needed for the problems that often arise in the context of criminal self-representation.

To solve some of the problems associated with self-representation, judges sometimes appoint "standby counsel" for the *pro se* criminal defendant at the beginning of his trial.[34] Standby counsel generally sits at the defense table with the *pro se* defendant. She provides legal advice to him, without actually presenting his defense.[35] Judges also appoint standby counsel just in case the defendant, during the course of his trial, recants his decision to represent himself. A judge must find that the defendant has voluntarily and intelligently waived his right to counsel before the defendant will be permit-

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30. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

31. *See* Faretta v. California, 422 U.S. 806, 807 (1975).

> [T]he question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

Id.

32. 422 U.S. 806 (1975).

33. *See id.* at 807.

34. *See id.* at 834–35 n.46.

35. The role of standby counsel has been described by the Supreme Court as "steer[ing] a defendant through the basic procedures of trial." McKaskle v. Wiggins, 465 U.S. 168, 184 (1984). In terms of professional responsibility, an attorney appointed as standby counsel must be conscious of the contours of the defendant's right to represent himself under *Faretta*. "[The] unsolicited participation of standby counsel [is] restricted in two ways." JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 2:14, at 54 (2d ed. 1996). Standby counsel must be sure that she allows the defendant to "preserve actual control over the case he chooses to present to the jury," and she must not "destroy the jury's perception that the defendant is representing himself." *McKaskle*, 465 U.S. at 178; *see also* HALL, *supra*, § 2:14.

ted to represent himself.[36] During the course of the trial, however, the judge may find that the defendant has relinquished his waiver of counsel,[37] or the defendant himself may request to proceed with counsel. At that point, the judge faces the difficult task of deciding whether to grant a continuance while a defense lawyer is brought into the trial, or to risk reversal by denying the defendant his Sixth Amendment right to counsel. Standby counsel thus aids the defendant who may have little or no legal knowledge, and prevents a difficult decision by the judge; however, the practice of appointing standby counsel also presents its own problems. Some of the problems associated with both self-representation and with standby counsel, as well as suggested solutions, are addressed in this comment.

Part I of this comment explains the development of the right of self-representation and how that right is intertwined with the Sixth Amendment right to counsel. Part II examines the justifications for standby counsel and identifies some of the problems that arise in criminal proceedings when the judge appoints standby counsel. Part III argues that the current practice regarding standby counsel is inadequate and proposes guidelines that standby counsel and judges should follow in any case in which the defendant chooses to represent himself. These guidelines, if followed, would better define the roles of the judge and standby counsel. Finally, Part IV enumerates statistics regarding how often criminal defendants actually choose to represent themselves, and, more interestingly, examines why they choose to do so. This glimpse at the psyche of the defendant and the increasing prevalence of self-representation makes it clear that the better-defined roles for trial judges and standby counsel outlined in this comment are indeed timely.

I. DEVELOPMENT OF THE RIGHT OF SELF-REPRESENTATION

The right to represent oneself in a criminal trial does not appear in the text of the Constitution. Today, however, courts recognize that the right to self-representation is a personal

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36. *See Faretta*, 422 U.S. at 835.

37. *See id.* at 834–35 n.46. A judge can terminate the defendant's self-representation if, for example, the defendant "deliberately engages in serious and obstructionist misconduct." *Id.*

constitutional one.[38] The development of this right began before the founding of the United States, and the right has become a constitutional mandate in federal and state trials during the last sixty years.[39] The nature of the right is complex. On one hand, the American legal system aspires to provide every criminal defendant with a fair trial by providing legal counsel to those who cannot afford it.[40] On the other hand, the system tries to maintain the values of self-reliance and individuality by allowing defendants to present their own defenses.[41] These two laudable goals, however, often conflict with one another.

A. *Pre*-Faretta

Before the Supreme Court decided *Faretta v. California*,[42] a defendant in a state criminal trial had to rely on state law when asserting the right to represent himself. Thirty-four states, however, include the right to represent oneself in their constitutions,[43] two protect the right through their case law,[44]

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38. *See id.* at 807.

39. The right of self-representation was recognized as a correlative right to the Sixth Amendment right to assistance of counsel in 1942, when the Court decided *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). Then, in 1975, the Court held that this right, like the Sixth Amendment right to counsel, applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* Faretta v. California, 422 U.S. 806 (1975). Thus, a criminal defendant is "entitled to be the master of his own fate." McShane, *supra* note 20 (citation omitted).

40. *See* Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

41. *See Faretta*, 422 U.S. at 833–34.

42. 422 U.S. 806 (1975).

43. *See* ALA. CONST. art. I, § 6 ("in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either"); ARIZ. CONST. art. II, § 24 ("the accused shall have the right to appear and defend in person, and by counsel"); ARK. CONST. art. II, § 10 ("the accused shall enjoy the right . . . to be heard by himself and his counsel"); COLO. CONST. art. II, § 16 ("the accused shall have the right to appear and defend in person and by counsel"); CONN. CONST. art. I, § 8 ("the accused shall have a right to be heard by himself and by counsel"); DEL. CONST. art. I, § 7 ("the accused hath a right to be heard by himself or herself and his or her counsel"); FLA. CONST. art. I, § 16 ("the accused shall . . . have the right . . . to be heard in person, by counsel or both"); IDAHO CONST. art. I, § 13 ("the party accused shall have the right . . . to appear and defend in person and with counsel"); ILL. CONST. art. 1, § 8 ("the accused shall have the right to appear and defend in person and by counsel"); IND. CONST. art. 1, § 13 ("the accused shall have the right . . . to be heard by himself and counsel"); KY. CONST. Bill of Rights § 11 ("the accused has the right to be heard by himself and counsel"); ME. CONST. art. I, § 6 ("the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused"); MASS. CONST. pt. 1, art.

and one protects the right statutorily.[45] The federal government has guaranteed the right to represent oneself in a federal trial since the Judiciary Act of 1789.[46] The Supreme Court made self-representation in federal trials a constitutional guarantee in *Adams v. United States ex rel. McCann*,[47] noting that "[w]hat were contrived as protections for the accused

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XII ("every subject shall have a right . . . to be fully heard in his defence by himself, or his counsel, at his election"); MISS. CONST. art. III, § 26 ("the accused shall have a right to be heard by himself or counsel, or both"); MO. CONST. art. I, § 18(a) ("the accused shall have the right to appear and defend, in person and by counsel"); MONT. CONST. art. II, § 24 ("the accused shall have the right to appear and defend in person and by counsel"); NEB. CONST. art. I, § 11 ("the accused shall have the right to appear and defend in person or by counsel"); NEV. CONST. art. I, § 8 ("the party accused shall be allowed to appear and defend in person, and with counsel"); N.H. CONST. pt. 1, art. 15 ("Every subject shall have a right . . . to be fully heard in his defense, by himself, and counsel."); N.M. CONST. art. II, § 14 ("the accused shall have the right to appear and defend himself in person, and by counsel"); N.Y. CONST. art. I, § 6 ("the party accused shall be allowed to appear and defend in person and with counsel"); N.D. CONST. art. I, § 12 ("the party accused shall have the right . . . to appear and defend in person and with counsel"); OHIO CONST. art. I, § 10 ("the party accused shall be allowed to appear and defend in person and with counsel"); OKLA. CONST. art. II, § 20 ("the accused . . . shall have the right to be heard by himself and counsel"); OR. CONST. art. I, § 11 ("the accused shall have the right . . . to be heard by himself and counsel"); PA. CONST. art. I, § 9 ("the accused hath a right to be heard by himself and his counsel"); S.C. CONST. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."); S.D. CONST. art. VI, § 7 ("the accused shall have the right to defend in person and by counsel"); TENN. CONST. art. I, § 9 ("the accused hath the right to be heard by himself and his counsel"); TEX. CONST. art. I, § 10 ("the accused . . . shall have the right of being heard by himself or counsel, or both"); UTAH CONST. art. I, § 12 ("the accused shall have the right to appear and defend in person and by counsel"); VT. CONST. ch. 1, art. 10 ("a person hath a right to be heard by oneself and by counsel"); WASH. CONST. art. I, § 22 ("the accused shall have the right to appear and defend in person, or by counsel"); WIS. CONST. art. I, § 7 ("the accused shall enjoy the right to be heard by himself and counsel").

44. *See* People v. Haddad, 11 N.W.2d 240, 241 (Mich. 1943) ("The defendant had the right to appear and defend himself against the accusation."); Zasada v. State, 89 A.2d 45, 47 (N.J. Super. Ct. App. Div. 1952) ("A defendant in a criminal prosecution may choose to conduct his own defense and waive his right to counsel.").

45. *See* N.C. GEN. STAT. § 1-11 (1998) ("A party may appear either in person or by attorney in actions or proceedings in which he is interested."); *see also* State v. Pritchard, 41 S.E.2d 287, 287 (N.C. 1947) ("The defendant insisted on trying his own case, which he had a right to do under the statute.").

46. *See Faretta*, 422 U.S. at 812–13. The right was also codified: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654 (1994).

47. 317 U.S. 269 (1942). "The Constitution does not force a lawyer upon a defendant." *Id.* at 279.

should not be turned into fetters."[48] Thus, even before *Faretta*, the right of self-representation was relatively well protected throughout the country.

B. *Constitutionalizing the Right*

When the Supreme Court announced its decision in *Faretta v. California*[49] on June 30, 1975, the right of self-representation at the state level was finally given constitutional stature. Defendant Anthony Pasquall Faretta was charged with grand theft in Los Angeles, and a public defender was appointed to represent him at his arraignment.[50] Faretta subsequently requested to represent himself on a date well before his trial.[51] The trial judge questioned Faretta about his education and legal history, and discovered that Faretta had previously represented himself in a criminal trial.[52] As a result of this questioning, the trial judge preliminarily ruled that Faretta would be allowed to represent himself.[53] Several weeks later, however, the judge held another hearing to inquire into Faretta's ability to represent himself.[54] After questioning Faretta about the hearsay rule and state law concerning the challenge of potential jurors, the judge ruled that "Faretta had not made an intelligent and knowing waiver of his right to the assistance of counsel, and . . . that Faretta had no constitutional right to conduct his own defense."[55] Consequently, Faretta was represented by a public defender throughout his trial and was found guilty of the crime charged.[56] After the California Court of Appeals affirmed the conviction and the California Supreme Court denied review,[57] both without opinions, the Supreme Court granted certiorari to hear Faretta's appeal.[58]

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48. *Id.*
49. 422 U.S. 806 (1975).
50. *See id.* at 807.
51. *See id.*
52. *See id.*
53. *See id.* at 808.
54. *See id.*
55. *Id.* at 809–10.
56. *See id.* at 811.
57. *See id.*
58. *See* Faretta v. California, 415 U.S. 975 (1974).

In reversing the California courts, the Supreme Court, in a six to three decision, first noted the federal government's long history of guaranteeing a criminal defendant the right to represent himself.[59] Additionally, the Court pointed out that nearly all of the states already allowed a defendant the right to self-representation in a criminal case.[60] The Court then proceeded to consider whether the Sixth Amendment and the implications thereof should apply to the states. It had previously recognized in *Adams* that "the Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'"[61] The Court reasoned that the rights codified in the Sixth Amendment are basic to the American adversarial criminal justice system.[62] Consequently, the Court held that all of the rights guaranteed and implied by the Sixth Amendment are part of "due process of law," and thus applicable through the Fourteenth Amendment to state judicial proceedings.[63]

The Court thereafter examined English common law,[64] highlighting the point that English courts had never forced a criminal defendant to accept the services of counsel at his trial.[65] Furthermore, "the insistence upon a right of self-representation [in the American colonies] was, if anything, more fervent than in England."[66] Because of the colonists' principles of self-reliance and distrust of English lawyers, it was not until the end of the eighteenth century that judges even began to allow counsel to assist the accused.[67] The Court found no examples of a colonial court forcing counsel upon a criminal defendant.[68] In fact, even after counsel was permitted to assist the criminal defendant, self-representation remained the general practice.[69] Thus, the spirit of the Sixth Amend-

59. *See Faretta*, 422 U.S. at 812–13. "In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation." *Id.*

60. *See id.* at 813; *supra* notes 43–45 and accompanying text.

61. *Faretta*, 422 U.S. at 814 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)); *see also supra* note 47 and accompanying text.

62. *See Faretta*, 422 U.S. at 818.

63. *See id.*

64. *See id.* at 821–26.

65. *See id.* at 825–26.

66. *Id.* at 826.

67. *See id.* at 826–27.

68. *See id.* at 828.

69. *See id.*

ment, the history of criminal procedure, and the fact that allowing self-representation was already a widely-accepted practice all supported the Court's conclusion that the Constitution grants criminal defendants the right to represent themselves in state trials.

The Court did note the apparent contradiction between the right of self-representation and previous Supreme Court holdings, which precluded conviction or imprisonment of an accused without the assistance of counsel.[70] However, the Court explained: "[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want."[71] Despite recognizing that most defendants would fare better with the assistance of counsel,[72] the Court decided that the choice of whether to retain counsel or represent oneself is a choice that must be respected as a personal constitutional right.[73] Thus, forcing Faretta to accept state-appointed counsel was a deprivation of his constitutional right of self-representation.[74] Faretta's conviction was vacated, and the case was remanded back to the state courts.[75]

C. *Invoking and Relinquishing the Right of Self-Representation*

Since *Faretta*, a criminal defendant has both the Sixth Amendment right to counsel at his trial and the correlative

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70. *See id.* at 832. The Court here is referring to its holdings in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and similar cases, in which it was emphasized that "the help of a lawyer is essential to assure the defendant a fair trial." *Faretta*, 422 U.S. at 832–33. The contradiction is that, if the assistance of a lawyer is essential to a fair trial, then the defendant who represents himself will assuredly receive an unfair trial.

71. *Faretta*, 422 U.S. at 833.

72. *See id.* at 834. The Court does note, however, that "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." *Id.* The Supreme Court, as does the author of this comment, assumes in its discussion of the right of self-representation that the criminal defendant is neither a lawyer, nor possesses any substantial legal training. In the case of a criminal defendant who is a lawyer or possesses legal education, many of the concerns regarding self-representation may be eliminated. On the other hand, though, not every lawyer is familiar with criminal procedure.

73. *See id.*

74. *See id.* at 836.

75. *See id.*

constitutional right to represent himself at his trial. As a denial of either right may be reversible error,[76] courts walk the fine line of preserving both rights simultaneously. Furthermore, the defendant who chooses to represent himself loses certain protections of the system.[77] Consequently, in an attempt to define the line between the right to assistance of counsel and the right of self-representation, and to preserve the fairness of trial proceedings, courts have developed a detailed and exacting test for determining when a defendant has effectively waived his right to counsel and invoked his right of self-representation.

The requirements to waive the right to counsel are generally as follows: the waiver must be voluntary;[78] there must be an unequivocal, express waiver of the right;[79] the waiver must be knowing and intelligent;[80] the waiver must appear in the record;[81] and the defendant must be mentally able to make an effective waiver.[82] The requirements that the waiver be both voluntary and express are intended to ensure that the defen-

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76. For the proposition that an erroneous denial of the right of self-representation requires automatic reversal, see, for example, *Bittaker v. Enomoto*, 587 F.2d 400 (9th Cir. 1978). *But see* State v. Kirby, 254 N.W.2d 424 (Neb. 1977) (applying a harmless error test to find that an erroneous denial of the right of self-representation did not require reversal). For the proposition that an erroneous grant of the right of self-representation requires automatic reversal, see, for example, *Hsu v. United States*, 392 A.2d 972 (D.C. Ct. App. 1978). *But see* Oliver v. State, 918 S.W.2d 690 (Ark. 1996) (applying a harmless error standard). For the proposition that an erroneous denial of the right to counsel requires automatic reversal, see *Gideon v. Wainwright*, 372 U.S. 335 (1963).

77. *See Faretta*, 422 U.S. at 835.

78. *See, e.g.*, People v. Crandell, 760 P.2d 423, 436 (Cal. 1988) (finding the defendant's decision to represent himself voluntary, despite the fact that the decision was made only after the court found no conflict of interest with the public defender and refused to appoint alternate counsel); Williams v. State, 337 So. 2d 846, 847 (Fla. Dist. Ct. App. 1976) ("[T]he court should have conducted an inquiry to see if appellant was making an intelligent and voluntary decision.").

79. *See* Howard v. State, 697 So. 2d 415, 428 (Miss. 1997).

80. *See, e.g.*, *Faretta*, 422 U.S. at 835 ("the accused must knowingly and intelligently" waive his right to counsel) (internal quotation marks omitted); Barnes v. State, 528 S.W.2d 370, 373 (Ark. 1975) ("[A]n accused's waiver of his right to counsel [must] be knowingly and intelligently made.").

81. *See, e.g.*, *In re* Kevin G., 709 P.2d 1315, 1317 (Cal. 1985) ("an express, knowing and intelligent waiver must appear in the record") (internal quotation marks omitted).

82. *See, e.g.*, State v. Hartford, 636 P.2d 1204, 1206–07 (Ariz. 1981) (finding the defendant's waiver of his right to counsel valid, because a hearing on mental competency had found him competent to represent himself).

dant does not unintentionally lose his right to counsel.[83] The knowing and intelligent requirement has generally been interpreted to require a judge to inform the defendant seeking to proceed *pro se* of the many procedural complications of representing oneself, that he will be given no special treatment, and that waiving counsel is generally unwise.[84] The waiver should appear in the record so that a reviewing court can examine the colloquy between the defendant and the judge to determine whether the requirements of an effective waiver of assistance of counsel have been met.[85]

The requirement of mental competence ensures that the defendant understands the charges against him, the solemnity of the proceedings, and the possible result of a conviction.[86] In federal court, the standard of mental competence for a defendant to waive counsel is the same standard employed in determining whether he is competent to stand trial.[87] Some state

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83. *See, e.g., Faretta*, 422 U.S. at 834. "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.*

84. *See, e.g., Ex parte* Ford, 515 So. 2d 48 (Ala. 1987).

> When Ford informed the court that he wanted to represent himself, the judge conducted a colloquy with him that covered 20 pages in the record. During this colloquy, the judge discussed Ford's rights and discussed in detail each phase of the trial from the jury selection through the penalty phase. The court explained the advantages of having an attorney and how having an attorney could possibly make a difference in the outcome of the trial. The court also told Ford:
>
> > I want it made known to you and I want you to fully understand and I want it clearly in the record that I, as the trial judge in this case, am recommending to you that you not proceed in this case representing yourself. To do so would be foolhardy, in my opinion, and I want you to understand that.
>
> It is clear, from the record, that the trial court carefully and completely explained the possible ramifications of representing oneself in a criminal proceeding.

Id. at 50; *see also* Else v. State, 555 P.2d 1210 (Alaska 1976).

> [T]he trial court urged Else to accept an attorney at public expense, and continued the hearing to provide Else an opportunity to consult with the public defender who was assigned to his case, in spite of Else's threatened refusal to talk to him. The trial court told Else: "In all the cases I've seen you're always better off with an attorney."

Id. at 1212.

85. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.5(c), at 498–99 (1985).

86. *See* State v. Williams, 621 P.2d 423, 428–29 (Kan. 1980).

87. *See* Godinez v. Moran, 509 U.S. 389, 399 (1993).

courts, however, require a higher level of competency than that required for the defendant merely to stand trial.[88] In order to determine whether a defendant is competent to represent himself, a judge may order a psychological examination. The judge can also observe the defendant's mental state for herself in the course of a conversation with the defendant.[89] Despite small differences in the application of these requirements, though, it is clear that all courts require a thorough hearing and a searching inquiry regarding whether a defendant has effectively waived his right to counsel and is undertaking to represent himself. The judicial system does not take the waiver of counsel, like the waiver of any other personal constitutional right, lightly.[90]

Once the defendant has invoked his right of self-representation, he still may later relinquish the right. This is because the right is not absolute, even after it is successfully invoked.[91] The defendant can request to relinquish his waiver of counsel,[92] or his actions at trial may lead the judge to conclude that he has relinquished such waiver.[93] Should a defendant request standby counsel's assistance after relinquishing his waiver of counsel, some courts have held that the refusal to

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88. *See, e.g.*, State v. Hartford, 636 P.2d 1204 (Ariz. 1981) (holding that competency to stand trial is a lesser standard than competency to waive assistance of counsel).

89. To decide whether a defendant will be allowed to represent himself, the judge and defendant have extensive conversations. Appellate courts require "a 'penetrating and comprehensive inquiry,' including an interchange with the defendant that produces more than passive 'yes' and 'no' responses." LAFAVE & ISRAEL, *supra* note 85, § 11.5(c), at 498.

90. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *See id.* at 464 (internal citations omitted).

91. *See* discussion *supra* note 37.

92. *See, e.g.*, State v. Franklin, 854 S.W.2d 438, 444–45 (Mo. Ct. App. 1993) (recounting how the defendant requested to waive his right of self-representation, and thus once again be represented by counsel, after the trial court denied his motion for a continuance).

93. A judge can end a defendant's self-representation if the defendant repeatedly ignores the judge's instructions and disrupts the trial proceedings. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 342 (1970) (responding to the Court of Appeals' decision that the Sixth Amendment requires that a *pro se* defendant always be allowed to represent himself and even be present in the courtroom, in spite of vile and abusive language: "We cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial.").

provide counsel is reversible error.[94] Many other courts, however, have held that it is not an abuse of discretion for the trial court to refuse to appoint counsel if the judge determines that the defendant's request for counsel is intended to delay the trial.[95] While the Supreme Court has yet to speak on the issue, the conflicting state court opinions suggest that a trial judge who denies a defendant's request for counsel once his waiver of counsel has been relinquished is risking reversal. Caught between the defendant's right to counsel and the need for judicial efficiency, a trial judge faces a difficult decision indeed. These are precisely the kinds of situations in which standby counsel should be present and ready to take over the defense.

II. STANDBY COUNSEL

As mentioned above, it is possible for *pro se* defendants to voluntarily or involuntarily relinquish their right of self-representation during the course of a trial. To deal with such situations, judges have developed the approach of appointing standby counsel.[96] As a defendant may know very little, if anything, about the legal system, he stands to benefit from the technical expertise of the standby counsel. Furthermore, judges often require standby counsel to be present at every stage of the proceeding. If the defendant does relinquish his waiver of counsel during the trial and requests assistance from counsel, standby counsel can automatically take over the defense. In this manner, appointing standby counsel has become a tool that can be used by the trial judge to increase judicial ef-

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94. *See, e.g.*, United States v. Pollani, 146 F.3d 269, 273 (5th Cir. 1998) ("In the present case, . . . there are no circumstances which justify the district court's refusal to allow [an attorney] to represent [the defendant].").

95. *See, e.g.*, People v. Elliott, 139 Cal. Rptr. 205, 210 (Cal. Ct. App. 1977) ("once defendant [proceeds] to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him"); Johnson v. State, 507 A.2d 1134, 1148 (Md. Ct. Spec. App. 1986) ("the trial judge did not abuse his discretion when he declined to appoint counsel for appellant during his voluntary absence from the courtroom and chose instead to rely on stand-by counsel"); Commonwealth v. Jackson, 383 N.E.2d 835, 839 (Mass. 1978) ("The judge did not abuse his discretion in turning down the defendant's request made [on the day of trial]."); *see also supra* notes 11–14 and accompanying text (discussing Kaczynski's delay tactics).

96. *See* Faretta v. California, 422 U.S. 806, 834–35 n.46 (1975).

ficiency, impartiality, and fairness, while allowing the defendant to exercise either of his constitutional rights.

A. The Justifications for Standby Counsel

Courts consistently have held that a trial judge may appoint standby counsel, even over the objection of the defendant, without depriving the defendant of his right of self-representation.[97] Defendants, however, do not have a right to standby counsel.[98] Thus, although this comment suggests appointing standby counsel in all trials,[99] it is not reversible error for a judge to decline to appoint standby counsel.[100] Furthermore, judges must ensure that standby counsel understands that the defendant is representing himself. If standby counsel is too active in "helping" the defendant, her assistance may deprive the defendant of his right to represent himself.[101]

1. Policy Justifications

Judges appoint standby counsel for many reasons. One reason for appointing standby counsel is that courts everywhere have recognized that defendants should not be allowed to use their right of self-representation as a delay tactic.[102] The cunning criminal defendant may waive his right to counsel and proceed *pro se*, all the while planning to relinquish his waiver at trial.[103] When the defendant relinquishes his waiver and requests counsel, he knows that most judges will provide him

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97. *See, e.g.*, Jones v. State, 449 So. 2d 253, 257 (Fla. 1984), *rev'd on other grounds*, 740 So. 2d 520 (Fla. 1999). "We do not view the appointment of standby counsel over defendant's objection as interposing counsel between defendant and his sixth amendment right to self-representation." *Jones*, 449 So. 2d at 257.

98. *See, e.g.*, *Ex parte* Ford, 515 So. 2d 48, 51 (Ala. 1987).

99. *See infra* Part III.A.

100. One instance in which a judge may decline to appoint standby counsel is when the defendant is an attorney. While it may be awkward for an attorney to represent himself in a criminal proceeding, the concerns that inform the appointment of standby counsel for most *pro se* defendants are not present when the defendant has formal legal training. He will know the rules of evidence and how trial proceedings work. Additionally, the attorney defendant, more than anyone else, should be aware of the difficulties involved in trials.

101. *See* discussion of *McKaskle v. Wiggins*, 465 U.S. 168 (1984), *infra* note 111.

102. *See supra* note 95 and accompanying text.

103. Again, consider how Kaczynski attempted to delay his trial. *See supra* notes 11–14 and accompanying text.

with that counsel. He also knows that his counsel will have to be brought up to speed on his defense, and the judge will likely grant a continuance for her to prepare for trial.[104] So, while the legal system would like to ensure a fair trial for the criminal defendant, the right of self-representation is not license for the defendant to abuse the dignity of the courtroom.[105] Appointing standby counsel is thus a preemptive strike that a trial judge may take to prevent the defendant from abusing the legal process. This move on the part of the judge increases efficiency within the legal system by eliminating delays the *pro se* defendant may attempt to cause.

Perhaps the most compelling justification for the practice of appointing standby counsel is that the defendant generally has not received a legal education. He is not familiar with trial procedures, the rules of evidence, or many fundamental principles of law. If standby counsel is made available to the defendant, he can obtain advice about representing himself. Such advice helps the defendant exercise his right of self-representation more effectively and begins to level the playing field in the courtroom.

A judge may also choose to appoint standby counsel to assist a defendant of questionable mental or emotional fortitude. Some defendants are in the problematic state of being sufficiently competent to stand trial and even able to waive the right to counsel,[106] but clearly incompetent to undertake effective self-representation.[107] Despite this lack of ability, the trial judge must allow such a defendant to represent himself if he waives his right to counsel voluntarily, knowingly, and intelligently. Thus, by appointing standby counsel in situations in which the defendant probably will not be able to present any

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104. Whether to grant a continuance is also within the sound discretion of the trial judge. If the judge finds that the defendant has relinquished his right of self-representation and requested a continuance only to delay the trial, he or she may refuse, without violating any of the defendant's rights, to grant a continuance. *See, e.g.*, Cooper v. State, 879 S.W.2d 405, 409 (Ark. 1994).

105. *See* Faretta v. California, 422 U.S. 806, 834–35 n.46 (1975).

106. It is unclear whether these standards are in fact the same. *See supra* notes 82, 87–89 and accompanying text. Regardless of which standard is applied, the standard to assert the right of self-representation is very low indeed, considering the complexities of the criminal justice system.

107. This situation may arise when, for example, the defendant is mentally competent to stand trial, but illiterate, or faces some other hindrance to presenting his own defense.

meaningful defense, a trial judge can maintain the fairness of the judicial process.[108]

2. Systemic Justifications

Many cases have held that the judge has an obligation to inform the *pro se* defendant of his right to avoid self-incrimination[109] and of certain procedural rules.[110] This harms the judge's ability to appear impartial because the judge may be viewed as helping the defendant present his case. Although imposing these requirements maintains some semblance of fairness with respect to the *pro se* defendant, the legal system sacrifices its appearance of impartiality while attempting to secure fairness. A judge who appoints standby counsel thus preserves the appearance of judicial impartiality. Standby counsel can inform the defendant of his right not to incriminate himself, of the procedural and substantive rules involved in his case, and of anything else the defendant may want or need to know. In such a situation, the judge will not have to help the defendant with his case. This impartiality is important for several reasons. It is important that the jury see the impartial nature of justice, in which they are being asked to participate. It is important that the judge avoid the conflicts of interest that may arise if he is supposed to make decisions neutrally while simultaneously informing the defendant of the law. And finally, it is important that the defendant and the prosecuting attorney both have an impartial tribunal before which they can present their cases. That is the nature of the legal system.

B. The Problems Involved with Standby Counsel

Although appointing standby counsel will likely increase judicial efficiency, fairness, and impartiality, standby counsel is not a perfect solution. One problem with appointing standby

108. At least, as much fairness as is possible when someone completely untrained in the practice of law, and of questionable mental fortitude, is allowed to represent himself.

109. *See, e.g.*, People v. Solomos, 148 Cal. Rptr. 248, 253 (Cal. Ct. App. 1978) (finding that the trial court erred when it allowed the *pro se* defendant to testify on his own behalf, without first advising him of his Fifth Amendment right to avoid self-incrimination).

110. *See* Bellevue v. Acrey, 691 P.2d 957, 962 (Wash. 1984).

counsel for the *pro se* defendant is that the defendant frequently feels that his right to represent himself is being infringed.[111] Although standby counsel is supposed to assist in the defense only when the defendant requests such assistance, many well-intentioned attorneys simply cannot sit idly by while the *pro se* defendant makes mistakes.[112] So not only may the defendant feel that he is being deprived of his right of self-representation, he may in fact be deprived of this right if his standby counsel interferes too much.

Another problem is the way in which the individual who functions as standby counsel is selected. Often, the attorney appointed to act as standby counsel is an attorney the defendant previously has fired.[113] Thus, animosity between standby counsel and the defendant is commonplace. Sometimes, standby counsel has refused to assist the defendant in procedural aspects of his case, such as refusing to subpoena witnesses.[114] When such situations arise, the defendant may be deprived of his right to a fair trial.

The third, and the most difficult, problem with standby counsel is that the defendant may attempt to craft some form of

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111. *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168 (1984). In *McKaskle*, the *pro se* defendant seemingly could not make up his mind regarding whether he wanted the assistance of counsel or not. *See id.* at 170–73. Two months before trial he requested counsel; then, during pretrial proceedings, he decided to proceed *pro se*. *See id.* at 171–72. Once trial began, however, the defendant interrupted his own questioning of witnesses on at least two occasions in order to confer with his standby counsel. *See id.* at 172. He also had his standby counsel present his opening statement to the jury. *See id.* Faced with these facts and the defendant's claim that his defense was "impaired by the distracting, intrusive, and unsolicited participation of [standby] counsel throughout the trial," *id.* at 176, the Court held that "the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury," *id.* at 178, and that "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.* However, the Court found that the facts in Wiggins's case were such that standby counsel did not infringe upon his right to represent himself. *See id.* at 187–88.

112. *See generally id. passim.* Standby counsel often express frustration at having to watch the criminal defendant refuse to cross-examine witnesses or fail to make important points. *See, e.g.*, Lynda Gorov, *Kaczynski as Counsel: Parallel Cases Are Rare*, BOSTON GLOBE, Jan. 12, 1998, at A1, *available in* 1998 WL 9111974.

113. For example, Colin Ferguson fired Ronald Kuby as his defense lawyer. Kuby, though, remained at the defense table as an adviser—until Ferguson fired him as "adviser" as well. *See* Russakoff, *supra* note 18.

114. *See, e.g.*, State v. Connelly, 700 A.2d 694, 707 (Conn. App. Ct. 1997) (noting that standby counsel initially refused to subpoena a witness that the defendant requested).

"hybrid representation."[115] That is, a defendant will soon realize that cross-examining witnesses or dealing with an expert witness is a difficult task, and may wish for standby counsel to assist with such tasks. It is a rare case, however, when the defendant will relinquish all control of his case when he recognizes such difficulties. Instead, the defendant will often wish to use the assistance of counsel, while still asserting his right of self-representation. He will ask standby counsel to perform one task, and then will want her to step back into the role of advisor again.[116] This leads to both practical and legal problems.

Practically, hybrid representation leads to confusion among all parties involved. The judge is uncertain how much he should permit standby counsel to participate, knowing that too much interference by standby counsel could result in an overturned conviction.[117] The jury is perhaps the most vulnerable to confusion in such a situation. Very few jurors realize that a defendant has a right to represent himself, nor do they understand the role of standby counsel. Not knowing what exactly is going on, other than that the trial seems to be a confusing mess, it is highly likely that a jury will draw a negative inference against the defendant from the fact that he is presenting parts of his own case.

Legally, there is much disagreement over the effect of hybrid representation on the status of the defendant's waiver of counsel. Some courts have held that, as soon as a defendant requests the assistance of standby counsel, he has relinquished his waiver of counsel and has waived his right to self-representation completely.[118] The Supreme Court, however,

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115. *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168 (1984). While the term "hybrid representation" is not used in *McKaskle* itself, the interaction between the defendant and standby counsel is a prime example of how problematic hybrid representation can be. *See supra* note 111. Technically, any time standby counsel is appointed, the situation could be called hybrid representation, because both the defendant and the attorney may work on the case. The *pro se* defendant changing his mind regarding whether he wants standby counsel to assist on a minute-to-minute basis leads to confusion regarding who is doing the representation, and also makes it more difficult for the judge to ensure that the defendant's constitutional rights are observed. *See id.*

116. *See id.*

117. *See id.*

118. *See, e.g.*, Smith v. State, 588 A.2d 305, 306 (Me. 1991) (noting that once the defendant requested his standby counsel to take over plea negotiations on his behalf, he waived his right to represent himself).

has held that, in certain situations, even extensive activity on the part of standby counsel may neither relinquish a waiver of counsel, nor interfere with the defendant's right to represent himself.[119] Case law is thus inapposite regarding how active standby counsel can be without infringing the right of the defendant to represent himself. Situations in which the defendant contends that the assistance of standby counsel has violated his constitutional rights typically require highly fact-specific analyses.[120] Thus, neither the trial judge nor standby counsel have any clear picture of the extent to which standby counsel is permitted to take an active role in the defense. Without such standards, the approach to appointing and using standby counsel is non-uniform at best, haphazard at worst.

III. PROPOSED GUIDELINES

In light of the foregoing problems that frequently arise when a defendant represents himself, more clearly defined roles are needed for standby counsel and trial judges. The following suggestions will further the goals of judicial efficiency, impartiality, and fairness, while still protecting the constitutional rights of the criminal defendant. Judges in various jurisdictions already use some of these guidelines. However, because of the variance of practices among different jurisdictions, and even among different judges in the same jurisdiction, a *pro se* defendant and his standby counsel often do not know what to expect at trial.

A. Mandatory Standby Counsel

The argument that standby counsel should be mandatory whenever the *pro se* defendant would be entitled to Sixth

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119. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984). In that case, the defendant did request the assistance of standby counsel at certain points. However, standby counsel found it difficult to not act as an advocate in such a situation, and often volunteered assistance not requested by the defendant. Despite the fact that it appeared that the defendant lost control of his trial, the Supreme Court found that the defendant's right of self-representation was not violated. *See id.*

120. For an explanation of the circumstances under which standby counsel's actions infringe the defendant's rights under *Faretta*, see the discussion *supra* note 35.

Amendment counsel[121] is far from revolutionary. Others have previously addressed the benefits of supplying an attorney to act in an advisory capacity to the *pro se* defendant.[122] Fairness in legal proceedings is the most compelling justification for the mandatory appointment of standby counsel.

The law is well settled that a defendant cannot appeal a conviction on the basis of ineffective assistance of counsel if he voluntarily, knowingly, and intelligently waives his right to counsel, and represents himself.[123] Yet most *pro se* defendants simply are not acquainted with the intricacies of trial. One extreme example of errors by a *pro se* defendant is the Idaho murder trial of Faron Earl Lovelace. During the course of his trial, Lovelace told the jurors that his shooting of the victim was "premeditated, coldblooded murder."[124] He admitted the prosecution's case and then appealed his conviction on the basis of ineffective assistance of counsel.[125] Despite his obvious inadequacies as an attorney, Lovelace continues to represent himself through his appeals.[126] Providing standby counsel to assist every *pro se* defendant would solve such problems by educating the defendant on basic rules of law. This increased knowledge on the part of the defendant would provide justification for the rule that prevents the *pro se* defendant from appealing a conviction on the basis of ineffective assistance of counsel.

Furthermore, trial judges would face no legal problems by appointing standby counsel for every defendant who chose to

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121. Sixth Amendment counsel is available at a "critical stage" of a criminal prosecution. *See* LAFAVE & ISRAEL, *supra* note 85, § 11.2(b), at 484. LaFave and Israel go on to explain many of the detailed contours of the right to counsel under the Sixth Amendment. Those intricacies are beyond the scope of this comment. *See generally id.* § 11.2.

122. *See* John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697 (1984); *see also* HALL, *supra* note 35, § 2:14, at 53 ("Standby counsel is the preferred, although not mandatory, practice.").

123. *See, e.g.*, Faretta v. California, 422 U.S. 806, 834–35 n.46 (1975) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"); Miller v. State, 560 P.2d 739, 741 (Wyo. 1977) ("Appellant cannot now assert error based upon his own obdurate behavior and insistence upon defending himself.").

124. *See Death Row Convict Continues Self-Representation in Appeals*, IDAHO STATESMAN, Aug. 11, 1998, at 8B, *available in* 1998 WL 16487708.

125. *See id.*

126. *See id.*

represent himself. The appointment of standby counsel has been upheld as a valid exercise of the discretion of the trial judge, even when the defendant objects to having standby counsel appointed.[127] Once the judge has appointed standby counsel, he will be under no obligation to educate the defendant on the law.[128] Judges often struggle with *pro se* defendants, attempting to walk the fine line between giving free legal advice and wasting court time.[129] Judge Richard Feder has expressed the frustration that many feel: "You know they're not asking the right questions .... [T]hat puts me in a peculiar situation."[130] By appointing standby counsel to assist the *pro se* defendant with legal issues, judges can thus avoid these peculiar situations and will have an easier task fulfilling their roles as impartial decision makers.

One of the most severe problems that mandatory standby counsel would eliminate is the unseemliness of allowing a defendant to cross-examine his victim. *Pro se* defendants in child abuse cases frequently are not allowed to cross-examine their child victims. For example, Franklin Carrico, in his Washington child molestation trial, was not allowed to question his victim directly.[131] Instead, he was required to submit his questions to the victim through a court-appointed standby defense attorney.[132] Carrico appealed his conviction in part because the judge refused to allow him to question his victim.[133] The Court of Appeals, however, held that requiring standby counsel to question the *pro se* defendant's victim did not violate his constitutional right of self-representation.[134] Cases involving child victims are not the only ones that present problems. The sight of Colin Ferguson parading up and down the courtroom and

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127. *See, e.g.*, Faretta v. California, 422 U.S. at 834–35 n.46 ("Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused."); Valdez v. State, 826 S.W.2d 778, 781–82 (Tex. App. 1992) ("[A]ppointment of such stand-by counsel does not violate a defendant's rights if the accused has actual control over his own defense and his appearance before the jury as a [*pro se*] defendant is not undermined.").

128. *See supra* Part II.A.2.

129. *See* Laura Parker & Gary Fields, *Do-It-Yourself Law Hits Courts*, USA TODAY, Jan. 22, 1999, at 3A.

130. *Id.*

131. *See Court of Appeals Says Molester Got Fair Trial*, *supra* note 29.

132. *See id.*

133. *See id.*

134. *See* State v. Carrico, No. 38127-0-I, 1998 WL 372732, at *1 (Wash. Ct. App. July 6, 1998).

cross-examining the nineteen survivors of his shooting rampage outraged observers.[135] Appointing standby counsel in every case and requiring standby counsel to question any victims of the alleged crime will prevent such moral outrage and ease the painful experience of the trial for victims or their families.

B. No Hybrid Representation

To help clarify the roles of all parties involved in the trial of the *pro se* defendant, no form of hybrid representation should be allowed, with two limited exceptions.[136] Hybrid representation only confuses many of the parties involved and prevents the establishment of clear roles for the parties involved.[137] Although hybrid representation is permissible,[138] the defendant neither has a right to hybrid representation,[139] nor does he have a right to serve as co-counsel with an attorney.[140] Because hybrid representation presents some of the most serious problems in cases in which the defendant is representing himself, and because it is not required, it simply should not be allowed.

Instead, there should be clear lines separating the role of standby counsel from the role of the *pro se* defendant. Once the defendant has waived his right to counsel, and while he is exercising his right to represent himself, standby counsel should not be permitted to address the court in the presence of the

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135. *See* McShane, *supra* note 20.

136. The term "hybrid representation," as used in this section, refers to the defendant's practice of alternating freely between representing himself and asking standby counsel to present part of his defense many times during his trial. Literally, there is frequently hybrid representation, since standby counsel may be asked to question the victim of the alleged crime. That sense of the term, though, is not the problematic one. *See also supra* notes 115–16 and accompanying text.

137. *See supra* notes 115–17 and accompanying text.

138. *See* Reliford v. People, 579 P.2d 1145, 1148 (Colo. 1978) (commending the appointment of standby counsel as a "fair and commendable practice"); *see also* Payne v. State, 367 A.2d 1010, 1017 (Del. 1976).

139. *See, e.g.*, State v. Tait, 387 So. 2d 338, 340 (Fla. 1980) (holding that the Florida constitution "does not embody a right of one accused of crime to representation both by counsel and by himself"); State v. Crouch, 268 S.E.2d 529, 534 (N.C. Ct. App. 1980) ("the right is alternative, and one has no right to appear both by himself and by counsel").

140. *See, e.g.*, State v. Porter, 281 S.E.2d 377, 383 (N.C. 1981) (finding that the trial court did not err when it refused the defendant's request to serve as co-counsel with his attorney).

jury.[141] The advice that the defendant may seek from standby counsel can be discussed in low voices at the counsel table, via written communication, or can be done in preparation for the trial and out of the presence of the jury. For example, in Ohio, James R. Taylor, Sr. defended himself against murder charges, and had two standby attorneys with whom he could consult during trial breaks.[142] In a manner such as this, a defendant is able to truly represent himself, with standby counsel acting as a silent technical advisor. The only exceptions to this bright-line rule should be when the defendant wishes to question the victim of his alleged crime, or when the defendant himself takes the stand.[143] In those cases, reasons of policy and practicality make it justifiable for standby counsel to conduct the questioning. This clear separation of roles allows the judge, standby counsel, and the *pro se* defendant to know precisely what actions counsel may take. At the same time, the members of the jury are less likely to be confused because they will not see both the defendant and standby counsel simultaneously present portions of the case.

Once the defendant has relinquished his right of self-representation, either directly or implicitly,[144] he should not be allowed to address the court again except through his attorney. The first time a defendant requests that standby counsel conduct the examination of a witness or argue a motion, he waives the right to represent himself.[145] At that point, standby counsel should assume the role of counsel for the defendant and present the defense to the best of her ability. By equating a defen-

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141. The only exceptions to this bright-line rule should be those instances when the *pro se* defendant wishes to question his alleged victim or when the defendant himself wants to testify. In such cases, standby counsel should question the witness without the defendant losing his right of self-representation.

142. *See* Margo Rutledge Kissell, *A Trying Experience; Taylor Murder Trial Off to Fitful Start*, DAYTON DAILY NEWS, Feb. 11, 1999, at 1A, *available in* 1999 WL 3952829. In Taylor's case, it is unclear whether he actually listened to his standby counsel. He was interrupted by the judge nine times during his seventeen-minute opening statement for inappropriate argument. *See id.*

143. *See* discussion *supra* Part III.A of the unseemliness of allowing a defendant to question his purported victim, particularly when the witness is a child victim of molestation; *supra* note 24 for an example of how ridiculous it would be for a defendant to question himself.

144. *See supra* note 93 and accompanying text.

145. Again, the two exceptions are when the trial judge requires standby counsel to question victims of the defendant's alleged crime or the defendant himself. *See supra* notes 131–35 and accompanying text.

dant's request for the assistance of standby counsel with the relinquishment of his waiver of counsel, the trial judge can ensure that everyone knows where he or she stands. The defendant has no right to act as co-counsel with his attorney, and he should not be allowed to act as co-counsel in any event. A defendant must either elect to exercise his Sixth Amendment right to counsel, or he must waive that right.

C. *Inform the Jury*

Whether or not the defendant ultimately relinquishes the waiver of his right to counsel, the jury in every criminal proceeding in which the defendant has proceeded *pro se* for any period of time should be given special instructions. The jury should be informed that the defendant has exercised his constitutional right to represent himself and that during that portion of the trial he was acting as his own attorney. This instruction serves two important ends. First, it lets the jury know that the defendant's actions in representing himself were legitimate legal proceedings and that self-representation is a right. Second, it aids the jury in determining what, out of everything they heard during the trial, is evidence. Although the jury is instructed that nothing a lawyer says is evidence, that instruction may be confusing when a party and potential witness is acting as a lawyer. Thus, educating jurors about what has occurred in the trial will assist them in reaching a fair verdict. A fair verdict in turn increases the legitimacy of the legal system.

IV. MAGNITUDE OF THE PROBLEMS

For those in the legal arena, it may seem inconceivable that many defendants would choose to represent themselves. Lawyers are more aware of the intricacies of trial practice than are average criminal defendants. One judge went so far as to admonish a prospective *pro se* criminal defendant on the topic: "If I was charged myself with spitting on the sidewalk, . . . I would hire myself an attorney."[146] Despite the hesitation of those in the legal arena to consider representing themselves, however, many litigants in both the civil and criminal divisions

146. Greg Gittrich, *Officer's Killer Gets 2nd Chance to Live*, L.A. DAILY NEWS, Mar. 18, 1999, at N1, *available in* 1999 WL 7018362.

of the trial courts choose to represent themselves every day. An examination of how often, and why, people choose to represent themselves illustrates that the phenomenon of self-representation is here to stay.

A. *Self-Representation is on the Rise*

"Once left to a handful of political dissidents and lawyer-haters, self-representation no longer is rare."[147] The precise number of people who represent themselves is somewhat hard to determine, because very few jurisdictions keep statistics regarding *pro se* litigants. One jurisdiction that did keep track of its *pro se* litigants, however, is Spokane County, Washington. In 1998, approximately 2500 people represented themselves in Spokane County, up from 2200 *pro se* litigants in 1997.[148] Those figures, however, include parties in both civil and criminal trials, and the bulk of the *pro se* litigants are in the civil arena.[149] In fact, judges in Spokane say that they see far fewer criminal than civil *pro se* lititgants.[150] "Most low-income people accused of a major crime take advantage of the law guaranteeing them a public defender."[151] Whatever the precise numbers, though, it is clear that "increasing numbers of Americans are going solo in every venue."[152] When discussing the drawbacks of self-representation, commentators love to quip: "A lawyer who represents himself has a fool for a client."[153] The Constitution, then, gives everyone a personal constitutional right to be a fool. And no matter how foolish self-representation may appear to lawyers, all indications point to an increasing trend of self-representation in every forum.

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147. Tom Sowa, *Rising to Their Own Defense: High Legal Bills Just One Reason for 'Pro Se' Cases*, SPOKESMAN REVIEW, Mar. 29, 1999, at A1, *available in* 1999 WL 6921087.

148. *See id.*

149. *See id.* The number of *pro se* litigants in the civil arena is shocking. Up to seventy percent of the family law cases in Spokane County involve at least one *pro se* litigant. *See id.* Judge Feder opines: "Anyone who represents themselves in a matrimonial case is performing brain surgery on himself.... I wouldn't recommend either one." Parker & Fields, *supra* note 129.

150. *See* Sowa, *supra* note 147.

151. *Id.*

152. Parker & Fields, *supra* note 129.

153. *See, e.g.*, David Segal, *Do-It-Yourself Lawyers Have Their Day in Court; Amateurs Making a Case for Self-Representation*, WASH. POST, Apr. 17, 1998, at A1, *available in* 1998 WL 2479577.

B. Why Represent Yourself?

There are many different reasons why any individual defendant may choose to represent himself. In the case of Jack Kevorkian, some speculated that he did not want to share the courtroom spotlight with an attorney.[154] Other criminal defendants simply do not have enough money to afford a lawyer, but have too much money to qualify for a public defender. One judge in Spokane County says that he began to see Middle America balk at high legal fees in the 1990s, and a corresponding increase in *pro se* litigants.[155] Some defendants seek to represent themselves because they do not "want to be at the mercy of more lawyers."[156] Other reasons given by *pro se* litigants for electing to represent themselves include not wanting to share settlements with their attorneys and being worried they will hire an incompetent or dishonest lawyer.[157] Still other defendants are influenced by television. Some watch too much "Judge Judy" and think it is easy to represent themselves.[158]

Circuit Judge Stuart Shiffman in Springfield, Illinois attributes the rise in self-representation to cameras in the courtroom.[159] "People see what goes on now, and they think to themselves, 'I can do that.'"[160] Some lawyers even agree with that attitude. Says Burton Liss, a Washington personal injury lawyer, "Let's face it, this isn't brain surgery."[161] Despite the fact that most lawyers consider self-representation an unwise decision, many people have personal reasons for choosing to represent themselves. Regardless of what motivates them, an increasing number of *pro se* defendants are going to be entering

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154. *See* Sowa, *supra* note 147.

155. *See id.* While this is offered as an explanation for the increase in civil *pro se* litigants, the rationale is also applicable to the criminal context. Admittedly, many criminal defendants will qualify for the assistance of a public defender and thus need not worry about paying their legal bills. More problematic, however, is the criminal defendant who makes too much money to qualify for a public defender, but does not have enough excess income to pay for a defense attorney.

156. *Death Row Convict Continues Self-Representation in Appeals*, *supra* note 124.

157. *See* Segal, *supra* note 153.

158. *See* Sowa, *supra* note 147.

159. *See* Parker & Fields, *supra* note 129.

160. *Id.*

161. Segal, *supra* note 153.

courtrooms all over the country in the years to come. Only by adopting guidelines such as those suggested above will judges be able to deal uniformly and adequately with the unusual problems presented by *pro se* defendants.

CONCLUSION

The Supreme Court has recognized that the right to self-representation is of constitutional magnitude in both federal and state courts. Although a trial judge need not advise a defendant of his right to represent himself, the judge is under an obligation to conduct a complete hearing on the matter if the defendant makes an unequivocal request to waive his right to counsel and represent himself. If the judge finds that the defendant has made a voluntary, knowing, and intelligent waiver of his Sixth Amendment right to counsel, the defendant may conduct his own defense. The defendant can relinquish this waiver, however, during the course of the trial, both voluntarily and involuntarily.

With all of the problems involving *pro se* defendants, it may seem easier to simply eliminate self-representation. Because *Faretta* recognized the right of self-representation as a personal constitutional right, however, elimination of the right is not possible. Instead of eliminating self-representation, the system needs strict guidelines that define the functions of the *pro se* defendant and his standby counsel. Judges should always appoint standby counsel in any case in which the defendant would be entitled to Sixth Amendment counsel. This will allow the judge to remain impartial during the trial. The *pro se* defendant should not be allowed to craft a form of hybrid representation. Instead, he should be forced to elect either counsel or self-representation. The jurors should be informed of the status of the *pro se* defendant so they will not draw a negative inference from his inexperience.

The phenomenon of self-representation is here to stay. As the option cannot be eliminated, the criminal justice system must take affirmative action to solve some of the problems associated with the *pro se* defendant. The guidelines suggested above do just that. By making standby counsel mandatory and establishing clear guidelines for the roles of all parties involved in a case in which a criminal defendant represents himself, trial judges can avoid some of the problems particular to the

pro se defendant, without sacrificing judicial efficiency, impartiality, or fairness.