JUDGING THE EFFECTIVENESS OF STANDBY COUNSEL: ARE THEY PHONE PSYCHICS? THEATRICAL UNDERSTUDIES? OR BOTH?

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ABSTRACT

Trial judges are increasingly appointing standby counsel to defendants in capital and serious felony cases who become dissatisfied with the effectiveness of their appointed counsel and who request to represent themselves. These pro se defendants in turn often appeal their convictions claiming ineffectiveness of standby counsel. This Article discusses the current confusion among courts regarding a variety of standby counsel issues, including the right to appointment of standby counsel, their proper role, whether defendants may bring ineffectiveness claims based on their neglect or omissions, and the standards by which to evaluate such claims where courts permit them. An argument is made for recognition of pro se defendants' Sixth Amendment right to have the effective "assistance" of counsel—short of full representation—to ensure they receive a fair trial. The proposal includes a right to effectiveness review using the same Strickland v. Washington test that is applicable to

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I. INTRODUCTION

When a court appoints standby counsel to a pro se defendant in a serious felony or capital case, by what standard is counsel’s performance to be measured? Is it to be determined on the basis of their assigned role as specified by the court? Is that role to be a limited one, similar to a phone psychic who waits to be contacted by her customers from time to time for advice? Or, is it a much broader role, like that played by a theatrical understudy who must be ready to take over an actor’s role, if necessary, because the show must go on? Or, is it both?

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1 State v. Richards, 552 N.W.2d 197, 205 (Minn. 1996) (holding that standby counsel’s performance should be judged for competence, but not by the usual Strickland standard for defense counsel, and declining to announce what that standard is).

We must consider two questions: first, whether a criminal defendant has an absolute right to reclaim his right to counsel, having once relinquished it, and, second, whether Richards was denied the effective assistance of counsel, in this case standby counsel? Central to this inquiry is the nature of the role of standby 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...
Pro se defendants already have a Sixth Amendment claim for denial of the right of self-representation\(^2\) if standby counsel excessively interferes with the defense to the extent that the defendant loses control over his defense, and the jury no longer perceives the defendant as self-represented.\(^3\) But what if standby counsel is neglectful or fails to act during the course of the prosecution, the result of which had a reasonable likelihood of affecting the outcome of the trial? Does the pro se defendant under those circumstances also have a Sixth Amendment ineffectiveness-of-counsel claim?

Increasing public defender caseloads nationwide post-*Gideon*\(^4\) have prompted calls for increased funding for indigent defense.\(^5\) As a

\[\text{understudy, ready to step into the trial should the primary actor, the defendant, be for any reason unable to continue?}\]

*Id.*

\(^2\) *Faretta v. California*, 422 U.S. 806, 832 (1975) (finding the Sixth Amendment right to assistance of counsel includes a corollary right of self-representation).


\(^4\) *Gideon v. Wainright*, 372 U.S. 335, 344 (1963) (finding the Sixth Amendment requires counsel to be appointed for indigent defendants in felony cases; the right is fundamental, and is thereby incorporated into the meaning of the Due Process Clause of the Fourteenth Amendment).

\(^5\) Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis And Rulings, Push Back Against a Tide of Cases*, *N.Y. Times*, February 19, 2014, at A10 (“Chronically understaffed and reeling from caseloads several times larger than those managed by private lawyers, public defenders here [St. Louis and Miami] and in many parts of the country have started trying to force legislators to respond,” and have engaged in “case refusal” to avoid constitutional and legal ethics claims against them). Ten years before that article, the ABA conducted hearings on the quality of indigent defense across the country, and came to the following conclusions:

> Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

*Id.; See also* ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* iv (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf. Surprisingly, no reference is made in that report to standby (or advisory) counsel as a method of providing the assistance of counsel. *See also* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *BLUE RIBBON ADVISORY COMMITTEE ON INDIGENT DEFENSE SERVICES*, *FINAL REPORT* (1996), reprinted on NLADA web site as *CRISIS IN
consequence, an increasing number of defendants are claiming dissatisfaction with appointed counsel, and are exercising their Sixth Amendment right to represent themselves. Individual courts' statistics on pro se criminal defense are unavailable. But the anecdotal evidence of indigent defendants' dissatisfaction with appointed counsel, the many well-recognized dysfunctional indigent defense systems, and the growing number of appellate claims involving self-representation and (separately) ineffectiveness of counsel, point to the need to broadly examine the nature of the work of standby counsel.

Currently, law and practice in federal and state courts reflect great confusion as to the nature of standby counsel's role, in general—in the sense of what every standby counsel should do at a minimum—and specifically in a given case. There is little uniformity by way of an applicable legal standard, if there is one at all, to judge the performance of standby counsel. Courts are divided on these questions, so this Article is intended to illuminate and organize the issues arising from standby counsel appointment. It also argues that in every case in which counsel might have been appointed, pro se defendants have a constitutional right to effective standby counsel upon request. The argument is based on the Sixth, the Fifth, and Fourteenth Amendment Due Process Clauses, and international human rights law, supported by lawyers' professional standards, judicial ethics, and legal ethics.

Part II of the Article describes the two leading Supreme Court of the United States decisions concerning standby counsel, Faretta v. California.

Criminal Justice, available at http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon#crisis:

There is a crisis in defender services. Historically underfunded, the strain on the indigent defense component of the criminal justice system has been exacerbated by the federal government's declared "war on drugs" fought with a zero tolerance policy that promotes the criminalization of more behavior and Draconian penalties (such as "three strikes" and mandatory sentencing laws). While drug war pressures have resulted in increasing sums of money to fund courts, prosecution, police and corrections, criminal defense spending remains almost negligible in comparison. This failure to fairly fund the indigent defense component of the criminal justice "eco-system" has resulted in "overburdened public defenders, the incarceration of the innocent, court docket delays, prison overcrowding, and the release of violent offenders into the community."

Id. (citing Klein and Spangenberg, The Indigent Defense Crisis 25 (1993)). See also Amy Bach, Ordinary Injustice: How America Holds Court (2009) (documenting, inter alia, cases of injustice caused by inadequate indigent defense in Georgia, New York, Mississippi, and Illinois).


Faretta, 422 U.S. at 806.
and McKaskle v. Wiggins. Additional references to standby counsel made by the Court in other decisions are also noted. The Court in these decisions made appointment of standby counsel a discretionary matter for trial judges, but created confusion by vaguely describing standby counsel’s role, and by leaving the impression that defendants may not challenge counsel’s effectiveness. Criteria for standby counsel appointment established in court rules and case law are described.

Part III describes courts’ use of different terms for what is generally referred to as standby counsel, and how these designations affect the scope of standby counsel’s participation in a given case. The differing perceptions of courts of the fundamental role of standby counsel—as assisting courts versus pro se defendants—are discussed, as are the limits some courts and court rules impose on counsel’s participation.

Part IV reviews the issues relating to a pro se defendant’s right to bring claims of ineffectiveness of standby counsel. It describes the split among courts regarding whether ineffectiveness claims may be brought, and—where permitted—the different standards and scope of review for such claims. A majority of courts bar such claims, but some apply the Strickland test established for defense counsel’s effectiveness, and other tests, to standby counsel. Illustrative examples of ineffectiveness claims made against standby counsel based on neglect or omissions are then presented.

In Part V, this Article argues for recognition of a pro se defendant’s Sixth Amendment right to effective assistance of standby counsel. Waiver of one’s right to counsel does not ipso facto constitute a waiver of legal assistance. The common law roots of the right to have the “Assistance of Counsel” serve as a precedent and the foundation for the appointment of effective standby counsel. A critical analysis is then presented of many courts’ erroneous extension of the bar against pro se defendants’ claims of self-effectiveness to claims of standby counsel’s ineffectiveness. Further support for recognition of the right to effective standby counsel under the Due Process Clause, international human rights law, and other international law principles is then presented.

Part VI reviews the principles relating to standby counsel found in lawyers’ professional standards established by the ABA Standards for Criminal Justice, the Uniform Rules of Criminal Procedure, and the ALI Restatement (Third) of the Law Governing Lawyers. This is followed by an examination of judicial and legal ethical duties relevant to standby

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8 McKaskle, 465 U.S. at 168.
counsel found in the ABA’s Model Code of Judicial Ethics and Model Rules of Professional Responsibility. These principles—which make no exception for standby counsel, and provide little guidance regarding their proper role—contain many references to lawyers’ responsibilities and requisite level of reasonable competence.

Lastly, Part VII proposes elimination of the “advisory” and “hybrid” designations that have caused confusion in courts’ conceptions of standby counsel. The Strickland test applied to defense counsel should also be applied to standby counsel, given the trend toward an expanded role for standby counsel and recent developments in Supreme Court decisions regarding the effectiveness of defense counsel during plea bargaining. It also presents a proposed appointment order aimed at clarifying counsel’s role for the benefit of the court, the defendant, and counsel.

Part VII concludes that the Sixth Amendment right to “the Assistance” of counsel includes the right to effective standby counsel. Courts are increasingly using standby counsel and expanding their role to ensure trial fairness. This, coupled with the Supreme Court’s admonition that they must be ready to take over the defense if necessary, requires that their effectiveness be judged, and that it be judged by the same standard applicable to defense counsel.

II. APPOINTMENT OF STANDBY COUNSEL

A. SUPREME COURT RULINGS

1. Faretta v. California

In Faretta, a California state court defendant sought to represent himself, stating to the trial judge that he didn’t want to be represented by the public defender because he had a heavy caseload. The judge first granted Faretta leave to defend himself, but later reversed himself on grounds that the defendant had not made an intelligent and knowing waiver of his right to counsel. Finding that Faretta had no constitutional right to self-representation, the judge ordered the public defender to represent him, and denied his later request for leave to act as co-counsel. The judge also refused to permit Faretta to file any motions on his own

9 Faretta, 422 U.S. at 807.
10 Id. at 808–10.
11 Id. at 810.
behalf, and required that Faretta’s defense be conducted only through the public defender. The jury found Faretta guilty, and he was sentenced to prison. The California Court of Appeal affirmed, and the California Supreme Court denied review.

In a lengthy opinion, based largely upon historical evidence, the Supreme Court of the United States found that the right of self-representation “is thus necessarily implied by the structure of the [Sixth] Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” In reaching that conclusion, the court noted that the amendment:

speaks of the “assistance” of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplates that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

The Court noted that, during the Colonial period, the colonies also recognized the right to self-representation:

[The colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an “assistance” for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

The Court added in a footnote that “a State may—even over objection by the accused—appoint a ‘standby counsel’ 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.” In the same footnote, the Court cautioned that, “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.’”

2. McKaskle v. Wiggins

In the second leading case concerning standby counsel, the defendant Wiggins was being tried a second time for robbery after his first conviction and life sentence as a recidivist was reversed. At the second trial, Wiggins first waived his right to counsel, but then, upon his request, two attorneys were appointed to represent him. Wiggins changed his mind again and decided to proceed pro se, and the court, over his objection, appointed the same attorneys (Samples and Graham) to act as standby counsel. Before trial, Wiggins filed numerous pro se motions, conducted his own voir dire, and made his opening statement to the jury. He filed numerous motions during the trial, cross-examined prosecution

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18 Id. at 834 n.46 (emphasis added) (citing United States v. Dougherty, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972) (holding that the statutory right to proceed pro se may not be denied based on a groundless expectation of disruption). In Dougherty, the court commented as follows regarding the options available to a judge conducting a multi-defendant case where several elect to proceed pro se:

The energy and time toll on the trial judge, as fairness calls him to articulate ground rules and reasons that need not be explained to an experienced trial counsel, can be relieved, at least in part, by appointment of an amicus curiae to assist the defendant. If defendant refrains from intentionally obstructive tactics, amicus would be available to provide advice on procedure and strategy. The utility of an amicus appointment is dependent on explanation to and cooperation by defendant, and on understanding, too, that he may claim with some merit that his pro se rights include his right to appear before the jury in the status of one defending himself, and that this is defeated if a too conspicuous role is played by an attorney, unless it clearly appears to the jury that he does not have the status of defense counsel.

United States v. Dougherty, 473 F.2d 1113, 1124–25 (D.C. Cir. 1972) (footnotes omitted). Note the court’s use of the term amicus curiae to refer to what is more modernly called standby counsel. See infra note 367, and accompanying text (discussing the various meanings of the term amicus curiae). Standby counsel, advisory counsel, amicus curiae are used interchangeably by courts, and are predominantly appointed for indigent defendants. But, courts have the inherent power and “limited discretion” to order private counsel to serve in that capacity for non-indigent defendants. United States v. Bertoli, 994 F.2d 1002, 1017–18 (3d Cir. 1993) (enumerating factors to take into consideration when entering such an order).

19 Faretta, 422 U.S. at 834 n.46 (1975).


21 Id. at 170–71.

22 Id. at 172.

23 Id. at 174–75.
witnesses, selected witnesses for the defense, and engaged in a variety of actions in his own defense. Following his conviction, he moved for a new trial, denouncing the services his standby counsel provided, and arguing that counsel had excessively interfered with the presentation of his defense. He claimed his defense was impaired by the “distracting, intrusive, and unsolicited participation of counsel throughout his trial.”

The Supreme Court of the United States, in a 6-3 decision, held that Wiggins’ Sixth Amendment rights were not violated by standby counsel’s participation. The Court first noted that Faretta indicated that “no absolute bar on standby counsel’s unsolicited participation is appropriate or was intended” and that “the primary focus must be on whether the defendant had a fair chance to present his case in his own way.” That right, the Court found, could be undermined by “unsolicited and excessively intrusive participation” by standby counsel; the pro se defendant “is entitled to preserve actual control over the case he chooses to present to the jury.” Standby counsel’s participation may not, without the defendant’s consent, “destroy the jury’s perception that the defendant is representing himself.” The Court noted “the appearance of a pro se defendant’s self-representation will not be unacceptably undermined by counsel’s participation outside the presence of the jury.”

In reviewing standby counsel’s participation, the Court found that it occurred outside the presence of the jury, and consisted of counsel’s suggesting motions, proposing strategies, objecting to prosecution testimony, urging additional witnesses be summoned, and suggesting questions that Wiggins should ask of witnesses. Wiggins variously agreed with, objected to, or had no reaction to counsel’s participation on

24 Id. at 175 n.5.
25 Id. at 173.
26 Id. at 176.
27 Id. at 188.
28 Id. at 176.
29 Id. at 177.
30 Id. at 177–78 (“If standby counsel’s participation over the defendant’s objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded.”).
31 Id. (“The defendant’s appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused’s individual’s dignity and autonomy.”).
32 Id. at 179.
33 Id. at 180–81.
different matters.\textsuperscript{34} One "acrimonious exchange" occurred when Graham was questioning a witness and Wiggins attempted to take over the questioning; counsel "used profanity" and told him to sit down.\textsuperscript{35}

The majority concluded that Wiggins was given "ample opportunity to present his own position to the court on every matter discussed," and that "all conflicts between Wiggins and counsel were resolved in Wiggins' favor."\textsuperscript{36} When Wiggins expressly approved of counsel's participation, such participation obliterated any claim that it denied him control over his case and diminished any claim that counsel unreasonably interfered with his right to self-representation.\textsuperscript{37} The Court also noted that:

\textit{Faretta} does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.\textsuperscript{38}

The Court noted that \textit{Faretta} rights are not violated when standby counsel "assists a 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,"\textsuperscript{39} nor when counsel "merely helps to ensure the defendant's compliance with the basic rules of courtroom protocol and procedure."\textsuperscript{40} The defendant, the Court held, in words cited by many later federal and state decisions, "does not have a constitutional right to receive personal instruction from the trial judge on courtroom

\textsuperscript{34} Id.
\textsuperscript{35} Id. This was a reference to the point during the prosecution's questioning at which Graham objected to the prosecutor testifying, and asked for a mistrial. Wiggins objected to the motion for mistrial, at which point Graham said "Jesus Christ." \textit{Id.} at 186 n.15.
\textsuperscript{36} Id. at 181 ("[I]n no instance was counsel's position adopted over Wiggins' on a matter that would normally be left to the defense's discretion.").
\textsuperscript{37} Id. at 182.
\textsuperscript{38} Id. at 183; \textit{see infra} notes 298--99 and accompanying text (questioning the Court's dismissal of any right to "choreograph special appearances by counsel").
\textsuperscript{39} Id.
\textsuperscript{40} Id. Such participation "is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense." \textit{Id.} at 184.
procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.”

The Court added that standby counsel’s participation at Wiggins’ trial “should not serve as a model for future trials,” without specifying whether it made that recommendation based on counsel’s extensive participation, or because of counsel’s use of profanity, or both. Standby counsel, the Court added, “[N]eed not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant’s express or tacit consent.”

In dissent, Justice White, joined by Justices Brennan and Marshall, argued that standby counsel’s participation went well beyond the trial court’s order that they serve “in a purely advisory capacity.” He cited the trial court’s statement to Wiggins that “I am not going to order him [standby counsel] to do or not to do anything,” and then its statement to counsel that “unless he consults with you, you do your own thing anyway, but don’t object or don’t ask questions unless and until the Court requests that you consult with him because he doesn’t know the proper way to do something.” The dissent argued that the conflicts that arose between the defendant and standby counsel “disrupted the proceedings and turned the trial into an ordeal through which the jury was required to suffer.”

The dissent further argued that the majority’s test for determining whether standby counsel engaged in excessive participation (that is whether the pro se defendant retained actual control over his defense, and whether counsel’s role destroyed the jury’s perception that the defendant was representing himself) provided, “little or no guidance for counsel and trial judges, [imposed] difficult, if not impossible burdens on appellate

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41 Id. at 184. The Court enumerated standby counsel’s involvement, which it characterized as “basic mechanics of the type we have described,” such as informing the court of the whereabouts of witnesses, supplying the defendant with a form needed to elect the jury during the sentencing phase, explaining to defendant that he should not argue his case while questioning a witness, pointing out to defendant that he needed to mark an exhibit for identification and lay a foundation for its introduction, and consulting with counsel regarding the proper procedure for summoning witnesses. Id. Such participation was found to be “irreproachable,” did not interfere with the defendant’s control over his defense, and could not be reasonably thought to have undermined defendant’s pro se appearance. Id. at 185.

42 Id. at 186.
43 Id. at 188.
44 Id. at 189.
45 Id.
46 Id. at 191.
courts, and undoubtedly [would] lead to the swift erosion of defendants’ constitutional rights to proceed pro se.’’ As to the “control” prong of the two-part excessive-participation test, the dissent suggested that “courts will be almost wholly incapable of assessing the subtle and not-so-subtle effects of counsel’s participation on the defense.” On the second question of the jury’s perception, the dissent argued that “the majority opinion ignores Faretta’s emphasis on the defendant’s own perception of the criminal justice system . . . and implies that the Court actually adheres to the result-oriented harmless error standard it purports to reject.” The two-part test is deficient, the dissenters argued, because:

[i]nstead of encouraging counsel to accept a limited role, the Court plainly invites them to participate despite their clients’ contrary instructions until the clients renew their objections and trial courts draw the line . . . [T]he trial court clearly denied Wiggins’ right of self-representation. The right to present and control one’s own defense means little if one’s “standby” attorneys remain free to take any action they choose, whether consistent with the desired defense or inimical to it, at any point during the trial.

The ruling in McKaskle involved alleged excessive interference with a pro se defense, rather than counsel’s neglect or failure to act in the defendant’s best interest. The latter is, as the review of the post-McKaskle case law described below indicates, a much more prevalent basis for ineffectiveness claims than excessive participation.

3. Earlier Supreme Court References to Standby Counsel

While the Supreme Court’s most extensive discussions of appointment of standby counsel appear in the Faretta and McKaskle decisions, the Court took note of the practice in several earlier cases. For example, in Grandison v. Maryland, Justice Marshall’s dissent to the Court’s denial of a petition for certiorari refers to the trial judge’s denial of a pro se defendant’s request for counsel at his sentencing hearing. The trial judge ordered the previously appointed standby counsel to represent the defendant, but advised counsel that the defendant “will still be the

47 Id. at 193.
48 Id. at 194.
49 Id.
50 Id. at 195–96.
51 See infra notes 196–209 and accompanying text.
attorney.”

The trial judge added, “Keep in mind, Mr. Crawford, you are not the attorney in this. Mr. Grandison is his own attorney. You are just kind of a law clerk.” In another case, the Court referred to a convicted, indigent attorney, for whom the trial court appointed “advisory counsel.”

The most interesting pre-*Faretta* Supreme Court statement regarding standby counsel appears in Justice Burger’s concurrence in *Mayberry v. Pennsylvania*, in which he stated:

Here the accused was acting as his own counsel but had a court-appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised—as so many do—to have such “standby counsel” to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such “standby counsel” to protect the rights of accused persons “foolishly trying to defend themselves,” as Mr. Justice Douglas so aptly described it.

This view of the role of standby counsel, reflected in the italicized language in *Mayberry*, is much broader than that contemplated in the *Faretta* and *McKaskle* decisions. Noteworthy also in the above quotation is the seeming contradiction between the notion of standby counsel as a mere “consultant,” and the very broad role that standby counsel is expected to play contained in the quoted passage, that is, performing “all the services a trained advocate would perform.” Not surprisingly, this conflicting view of standby counsel’s role mirrors the *Faretta* Court’s conception of standby counsel’s role, which is “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.”

Going further, the Court in *Mayberry* described an additional role played by standby counsel, one which serves the court rather than the defendant, and which was not mentioned later in *Faretta* or *McKaskle*:

In every trial there is more at stake than just the interests of the accused;

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53 *Id.* at 875.
54 *Id.*
the integrity of the process warrants a trial judge’s exercising his discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself. The value of the precaution of having independent counsel, even if unwanted, is underscored by situations where the accused is removed from the courtroom under Illinois v. Allen. The presence of counsel familiar with the case would at the very least blunt Sixth Amendment claims, assuming they would have merit, when the accused has refused legal assistance and then brought about his own removal from the proceedings.58

This language from Mayberry v. Pennsylvania concerned the integrity of the trial process by discussing the importance of a trial’s fairness in appearance and in fact. This is the same concern expressed by Justice Burger and the other dissenters in Faretta who argued that there is no constitutional right to self-representation, because it would result in many unfair trials.59 The Mayberry Court’s point, that “the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself,” is relevant to the question of the role of standby counsel. Unquestionably, active participation by standby counsel in the interests of the defendant will be seen by jurors as leveling the playing field, and thus adding to the appearance of trial fairness.60

B. CASES IN WHICH STANDBY COUNSEL IS APPOINTED

Standby counsel is generally appointed to a pro se defendant in capital cases, and failure to appoint such counsel has been held to be

58 Id. (emphasis added).
59 Id. (citations omitted). According to Justice Burger, joined by Blackmun, J., and Rehnquist, J.:
Although we have adopted an adversary system of criminal justice, . . . . the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. . . . That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant’s ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the “freedom . . . to go to jail under his own banner . . . .” The system of criminal justice should not be available as an instrument of self-destruction.

Id.

60 See infra note 382 and accompanying text (discussing the international law principle that justice must not only be done, it must be seen to be done).
The defendant has no right to a standby counsel of his or her own choosing, and a court may not appoint an unwanted standby counsel where defendants have private attorneys they wish to act in that capacity, because to do so is a Sixth Amendment violation of the defendants' right to counsel. Nor do pro se defendants have any right to bar standby counsel's unsolicited participation in their case. Most cases hold that appointment of standby counsel is a matter for the sound discretion of the trial judge. The decision, some courts hold, is not subject to appellate review. But there is no duty to advise a pro se defendant of the availability of standby counsel.

One court held that the decision regarding the extent of services to be performed by standby counsel should balance the following factors: (1) the stage of the proceeding in which the accused makes the decision to represent himself, (2) "the complexity of the case," (3) the disruptive effect a pro se defendant may have on the right of codefendants to a fair and speedy trial, and (4) the extent to which the attorney or his or her firm will be affected adversely by the extent of services ordered. Another court cited similar factors: (1) the nature and gravity of the charge, (2) the expected factual and legal complexity of the proceedings, and (3) the abilities and experience of the pro se defendant.

In addition to case law, a handful of jurisdictions have rules specifying when standby counsel should be appointed. For example,

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61 People v. Bigelow, 691 P.2d 994, 1002 (Cal. 1984) (finding a trial court erred in not appointing standby counsel to a pro se defendant in a complex capital case from Canada with a ninth grade education and who was unfamiliar with California law).
62 United States v. Webster, 84 F.3d 1056, 1063 (8th Cir. 1996).
63 United States v. Romano, 849 F.2d 812, 820 (3d Cir. 1988).
68 United States v. Bertoli, 994 F.2d 1002, 1006 (3d Cir. 1993); see also People v. Bigelow, 691 P.2d 994, 1001 (Cal. 1984) (holding that the trial court’s failure to exercise its discretion to appoint advisory counsel required reversal of a conviction given the complexity of the legal and factual issues in the case, and the defendant’s limited education and foreign citizenship).
70 But cf. WYO. STAT. ANN. § 7-6-107 (2015) ("A person who knowingly and voluntarily waives
standby counsel is appointed pursuant to court rule in the following kinds of cases: capital cases; other criminal cases; long or complicated cases, or cases with multiple defendants; where necessary; in the interest of justice; criminal contempt cases; collateral review petitions; juvenile cases; where the defendant is not competent to waive counsel, or is

his right to counsel and who elects to represent himself shall not be entitled to standby counsel under this act.

71 N.C. GEN. STAT. § 2A-3(b) (2015) (“If a capital defendant has elected to proceed without the assistance of counsel, the trial judge shall immediately notify the IDS Director, who may appoint, in his or her discretion, standby counsel to assist the defendant when called upon, and to bring to the judge’s attention matters favorable to the defendant upon which the judge should rule on his or her own motion.”). Cf. People v. Williams, 661 N.E.2d 1186, 1190 (Ill. App. Ct. 1996) (finding no abuse of discretion in trial judge’s denial of request for standby counsel where case was not complex, no scientific or expert testimony was involved, defendant had prior experience in legal proceedings, was articulate, and familiar with his case—having filed several motions and engaged in discovery). The court in Williams took the position that “the trial court’s prudent course in most cases is not to appoint standby counsel, even if the pro se defendant specifically requests that appointment.” Id. at 1192.

72 N.C. GEN. STAT. § 1.6(b) (2015) (“In a criminal case, if the defendant has elected to proceed without the assistance of counsel, the trial judge in his or her discretion may determine that standby counsel should be appointed to assist the defendant when called upon, and to bring to the judge’s attention matters favorable to the defendant upon which the judge should rule on his or her own motion.”).

73 CONN. GEN. STAT. § 44-4 (2015) (“When a defendant has been permitted to proceed without the assistance of counsel, the judicial authority may appoint standby counsel, especially in cases expected to be long or complicated or in which there are multiple defendants. A public defender or special public defender may be appointed as standby counsel only if the defendant is indigent and qualifies for appointment of counsel under General Statutes § 51-296, except that in extraordinary circumstances the judicial authority, in its discretion, may appoint a special public defender for a defendant who is not indigent.”).

74 U.S. DIST. CT. R. D.N.J., APP. IV(B)(2) (“In the event a person waives representation by counsel and a Magistrate Judge or District Judge deems representation necessary, and the person qualifies for appointed counsel and agrees to be represented at least in part, ‘standby’ counsel shall be appointed to assist the person in his or her defense.”).

75 U.S. DIST. CT. R. D.N.M. 2(b)(4) (“When a judge determines that the interests of justice require, representation may be provided to a financially eligible person who . . . needs standby counsel pursuant to § 2.17 of the CJA Guidelines.”).

76 ALA. R. CIV. P 70A(c)(3) (“In actions involving criminal contempt, . . . the court may, in its discretion, appoint advisory counsel to advise the alleged contemnor.”).

77 ARIZ. R. CRIM. P. 32.4(c)(2) (“In a Rule 32 of-right proceeding, counsel shall investigate the defendant’s case for any and all colorable claims. If counsel determines there are no colorable claims which can be raised on the defendant’s behalf, counsel shall file a notice advising the court of this determination. Counsel’s role is then limited to acting as advisory counsel until the trial court’s final determination. Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant in propria persona. The extension shall be [forty-five] days from the date the notice is filed. Any extensions beyond the [forty-five] days shall be granted only upon a showing of extraordinary circumstances.”) (emphasis added).

78 CONN. GEN. STAT. § 33a-6(f) (2015) (“Upon application for state paid representation, the
otherwise unable to effectively exercise his rights;\(^7^9\) or collaborative law (domestic relations) cases.\(^8^0\)

This Article now turns to an examination of case law and additional court rules that describe standby counsels’ role and obligations.

III. ROLE OF STANDBY COUNSEL

A. DESIGNATION AFFECTING ROLE OF STANDBY COUNSEL

Courts differ on the designation of a lawyer appointed to—as the Supreme Court in\(^7^9\) Faretta specified—assist a pro se defendant when requested to do so, and “to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.”\(^8^1\) Most courts refer to such appointed counsel as “standby counsel,” but some use the term “advisory counsel.”\(^8^2\) No doubt many state and federal trial judges use the terms interchangeably because there is no uniformity in these designations.\(^8^3\) The standby counsel designation

judicial authority shall promptly determine eligibility and, if the respondent is eligible, promptly notify the chief public defender, who shall assign an attorney to provide representation. In the absence of such a request prior to the preliminary hearing, the chief public defender shall ensure that standby counsel is available at such hearing to assist and/or represent the respondents.”\(^7^9\) (emphasis added); MIC.

**MASS. GEN. LAWS R. 3:10 § 3 (2015)** ("[I]f the judge determines that the party is not competent to waive counsel or is otherwise unable effectively to exercise the party’s rights at a hearing, the judge shall appoint standby counsel pursuant to Section 6.").

**CONTRA COSTA CNTY. SUPER. CT. R. 12.5(c)** ("The term ‘Collaborative Law Case’ is to be included in the caption of any document filed with the Court from and after the filing of the collaborative law stipulation and order; (d) As to any case designated as a collaborative law case: (1) The Court will consider collaborative law counsel to be advisory and not attorneys of record.").

\(^7^9\) Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

\(^8^0\) See, e.g., ARIZ. R. CRIM. P 6.1(c) (stating that advisory counsel may be appointed to assist self-represented defendants); ALA. R. CRIM. P. 6.1 (noting that a Notice of Appearance form has a box to check for “advisory counsel”).

\(^8^1\) State v. Reynolds, Nos. 01C01-9809-CC-00365, M1998-00059-CCA-R3-CD, 2000 WL
implies a much broader role (as in the theatrical understudy analogy) than the advisory counsel designation.\textsuperscript{84} It is possible that jurisdictions using the term "advisory counsel" will tend to limit standby counsel to a narrow role, and vice versa.\textsuperscript{85}

Many courts assume standby counsel has a mere advisory role, but the courts differ in their expectations regarding when such advice is to be given.\textsuperscript{86} Some courts have held that counsel’s role is only to respond to specific requests made by the pro se defendant, whether it be providing impromptu advice, or appearing before the court.\textsuperscript{87} But once defendants permit substantial representation from standby counsel, they are presumed to have acquiesced to it until they expressly and unambiguously renew their request to silence counsel.\textsuperscript{88}

The California Appellate Court discussed the terms as follows:

As the term “standby” counsel generally relates to an attorney’s being present to step in and represent an individual no longer able to represent himself, and, as appellant handled the entire trial, we are not presented with the issue in this appeal. “Advisory” counsel, however, generally refers to an attorney who assists a litigant representing himself in a variety of ways, and \textit{Faretta} doesn’t address the issue at all, commenting only on ‘standby’ counsel . . . to assist the court in case it needs to revoke the defendant’s pro per [pro se] privileges.\textsuperscript{89}

Here is another court’s understanding of the distinction between advisory and standby counsel:

“Advisory counsel” . . . mean[s] an attorney who is present in the courtroom at the defendant’s side, does not speak for him, and does not participate in the conduct of the trial but only gives him legal advice and . . . “standby counsel” . . . mean[s] an attorney who is present in the courtroom and follows the evidence and proceedings but does not give
legal advice to the defendant. He "stands by" in the event it is necessary for the trial court to revoke defendant's in propria persona status or even remove the defendant from the courtroom because of disruptive tactics so the case may proceed in an orderly manner to verdict.\textsuperscript{90}

Also affecting the expectations regarding standby counsel's role are state constitutional provisions guaranteeing the right to counsel as well as self-representation. In some states, such as Kentucky, the state constitutions permit defendants to appear "by [themselves] and counsel."\textsuperscript{91} Thus, case law in those states permits what has been called "hybrid" representation, meaning the accused and his attorney act like co-counsel.\textsuperscript{92} In other jurisdictions, defendants "share[] the duties of conducting their defense with a lawyer," also resulting in the court's characterization of the representation as hybrid.\textsuperscript{93}

The Supreme Court of the United States in \textit{McKaskle} noted that "\textit{Faretta} does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed."\textsuperscript{94} In \textit{Faretta}, the trial court had

\textsuperscript{90} Chaleff v. Super. Ct., 138 Cal. Rptr. 735, 742 nn.6 & 7 (Cal. Ct. App. 1977) (Hanson, J. concurring).
\textsuperscript{91} KY. CONST. § 11; cf. 28 U.S.C. § 1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . .") (emphasis added).
\textsuperscript{92} Wake v. Barker, 514 S.W.2d 692, 695 (Ky. Ct. App. 1974) ("Section 11 of the Kentucky Constitution guarantees to a defendant the right to be heard 'by himself and counsel,' but in view of the historical background of the constitutional guarantees of the right to counsel we think there is no valid basis for interpreting those words as meaning that the only right guaranteed is to appear with counsel."); see also CONST. STATE OF MISS., art. 3, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . . ."); cf. State v. Hirano, 802 P.2d 482, 484 (Haw. Ct. App. 1990) ("Both federal and state courts have uniformly held that there is no sixth amendment right to hybrid representation, but the matter is within the discretion of the court.").
\textsuperscript{93} United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998). The \textit{Morrison} court relied upon United States v. Schmitt, 105 F.3d 82, 90 (2d Cir. 1997), in which the court stated:

The trial court, acting over Schmidt's objection but within its discretion, properly appointed attorney Ricco as standby counsel. . . . Standby counsel examined and cross-examined some witnesses, and gave the defense summation. However, Schmidt frequently reaffirmed that she was her own counsel. Having chosen to represent herself, she may not now be heard to complain that her own shortcomings spell out some sort of constitutional deprivation. . . . Second, there is no constitutional right to hybrid representation of the kind defendant received here where she shared the duties of conducting her defense with a lawyer.

\textit{Id.}
\textsuperscript{94} McKaskle v. Wiggins, 465 U.S. 168, 183 (1984); see also Murray v. Schiro, 746 F.3d 418, 427 (9th Cir. 2014) (defining hybrid representation as "some combination of self-representation and counsel"). See also Parren v. State, 523 A.2d 597, 598–99 (Md. 1987), which describes hybrid representation as:

The term "hybrid representation" and the designation of a defendant as "co-counsel" are misleading. There is no right vested in a defendant who has effectively waived the
unconstitutionally forced unwanted counsel on the pro se defendant. Footnote 46 of the *Faretta* opinion referred only to the state’s authority to appoint “standby counsel” 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 accused’s self-representation is necessary.” So, there was no need to refer in that footnote or elsewhere to the trial judge’s not being “required” to permit hybrid representation. Also, Wiggins’ claim was excessive interference by counsel with his defense, so his was a claim of a Sixth Amendment violation of his right to self-representation, not a violation of his right to effective “Assistance of Counsel.” Thus, many courts’ reliance on *McKaskle*’s language that *Faretta* did not require hybrid representation is misplaced; the decision does not support the position that there is no constitutional right to effective standby counsel on request. In essence, *Faretta* and *McKaskle* involved claims of too much participation (by an appointed public defender, and an appointed standby counsel, respectively), rather than too little or neglectful assistance.

Use of the term “hybrid” representation, therefore, adds further confusion to any discussion of standby counsel. For those jurisdictions
without a state constitutional right of both self-representation and representation by counsel which use the term "hybrid" to represent a broad role played by standby counsel, use of the term begs the question of how much active participation by counsel gives rise to that designation. Put differently, at what point does a broadly defined standby counsel role equate to acting as co-counsel?

Moreover, does that hybrid or co-counsel designation mean an ineffectiveness claim may or may not be raised? It may be a moot point in the case of courts which do not rely upon a state constitutional right to hybrid representation, and instead take the view that there is no constitutional right to standby counsel. For them, ineffectiveness claims are barred regardless of counsel's designation, because there is no constitutional right to standby counsel in any form. In other words, the defendant's choice is to be either fully represented, or represent himself or herself—with standby counsel appointment being purely discretionary.99

B. DUTIES AND LIMITATIONS

1. Establishing Scope of Assistance

The Supreme Court of the United States held in Faretta that trial courts may appoint standby counsel for an accused—even over his or her objection—in order 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."100 The former function would be expected to be narrower than the latter. Likewise, trial courts using standby assistance describe the role of standby counsel in terms that vary from the narrowest to the broadest.101 Most cases refer to counsel's advisory role mentioned by the Court. Rarely have courts instructed standby counsel to be ready to step in and take over the
defense if necessary.102

The exact scope of standby counsel’s role is usually placed on the record at the time of appointment to advise the defendant and counsel as to the counsel’s specific duties.103 But, an appointment order is usually very short, lacking in specificity, and cannot contemplate all the possible ways in which standby counsel can and should participate.104 Trial judges usually limit the scope of standby counsel’s role to one of assistance only at the pro se defendant’s request, and may instruct counsel to not give unsolicited advice during the trial.105 At one extreme, a trial judge advised the lawyer appointed to be standby counsel that “[y]ou can sit there and back him up, and [defendant] Mr. Fischer, good luck to you.”106

Often, trial judges themselves don’t seem to be sure about what standby counsel’s functions are.107 One trial judge told a pro se defendant that:

you are on your own, other than maybe asking Mr. Capone [standby counsel] for some advice . . . He can tell you to object if he thinks it’s appropriate, but you will represent yourself. He is going to be simply what you say you want him to be. If you want to represent yourself, you’re going to be on your own. I’m not going to have him leave, I’m going to have him stay there, and I’m going to have him there to advise you, but he isn’t going to be doing some of the questioning and you doing some of it, that isn’t how it’s going to work. . . . Of course, he would not question you if he is not representing you if you took the stand, and he would not enter objections if he is not representing you, but he would be there to advise you. So, I can clarify or explain anything.

102 State v. Richards, 552 N.W.2d 197, 206 (Minn. 1996) (“There is . . . little case law directly discussing the issue here, namely, whether or not standby counsel should also fill the role of ‘second chair’ counsel and be ready to step in the continue the trial should the defendant be unable or unwilling to continue his or her own defense.”). This remains the case, although lack of preparedness is a common complaint. See infra notes 172–74 and accompanying text.


104 Kennedy Cabell, Student Article, Calculating an Alternative Route: The Difference between a Blindfolded Ride and a Road Map in Criminal Pro Se Defense, 36 LAW & PSYCHOL. REV. 259, 272 (2012) (arguing for “alternative routes to justice” for pro se defendants, and suggesting “it is the profession’s ethical duty to continue seeking improvement” to the justice system and noting that “[s]tandby counsel’s ability to participate in a defendant’s case without the defendant’s approval interferes with the defendant’s control over his own defense; this problem is exacerbated by the fact that standby counsel’s role in a trial is not definitively explained”).


106 State v. Fischer, 744 N.W.2d 760, 768 (N.D. 2008).

It is doubtful in this case that either the defendant or standby counsel really understood the court’s delineation of counsel’s duties. Will counsel be “what you [the defendant] say you want him to be?” That sounds good, but how does the pro se defendant determine what he wants standby counsel to be? The court gave this defendant the impression that standby counsel could do a lot for him, if he wanted. But, at the same time, the court prohibited hybrid representation, refused to allow standby counsel to conduct the defendant’s examination if he testified, and prohibited him from raising objections on behalf of the defendant. Consequently, “asking [standby counsel] for some advice” is really all that this court permitted.

A broad scope of standby counsel participation is illustrated by a case in which the defendant spoke Spanish but not English. The court defined standby counsel’s role as follows:

The court shall appoint new counsel to be involved in this case as standby counsel to give advice to defendant in the courtroom if defendant seeks such advice and to be prepared to represent defendant should defendant take actions which waive or forfeit his right to self-representation. In addition, standby counsel may be requested to facilitate the sharing of discovery with defendant. Standby counsel should contact the court when defendant seeks to review discovery and the court will attempt to work out a process for this to happen. Standby counsel should also be prepared to arrange for interpreters to interpret or translate documents when necessary for defendant. Counsel should seek permission first from the court before doing so. Standby counsel should review this order with defendant and, if necessary, help explain the order to defendant. Finally, standby counsel should meet with defendant (with the aid of an interpreter) and inform defendant that if he has any questions or concerns regarding the decision to represent himself or the cautionary advice the court gave defendant during the hearing upon that decision, then he should raise those questions with the court either through a letter or a motion. If defendant reconsidered his decision to represent himself, he may file a motion asking the court to appoint him

108 Id.
109 Id.
110 Id.
111 Id. (noting that the judge told the defense counsel that “he isn’t going to be doing some of the questioning, and you doing some of it”).
new counsel.\textsuperscript{113}

The italicized language in this order is couched in \textit{Faretta} terms in the sense that the duties of standby counsel involve giving pro se defendants advice when they request it, and being ready to step in and take over the defense if necessary. Such an admonition, however, is contradictory: counsel is being asked to, on the one hand, play a limited role by giving advice only when requested to do so, yet they play a much broader role of preparing for the possibility of taking over the defense mid-trial if ordered to do so.

Many questions arise from this dichotomous view of the role(s) of standby counsel. How does an attorney “speak only when spoken to” but also concurrently understand and prepare to competently present the defense selected by the client if ordered to do so by the court? And, what if the pro se-selected defense is frivolous? Must standby counsel prepare a more appropriate defense while in standby status, pending a possible order terminating the defendant’s right to self-representation? And what happens if the defendant fails to raise an issue before standby counsel takes over the defense? These are all currently open questions.

Court rules in nine states currently refer to the court’s discretionary authority to appoint standby counsel and a few other states refer to this authority elsewhere.\textsuperscript{114} In Georgia, the relevant court rule in one county tracks the ABA distinction between “active” standby counsel and counsel who provides “assistance upon request.”\textsuperscript{115} Connecticut,\textsuperscript{116} Missouri,\textsuperscript{117} and

\textsuperscript{113} \textit{Id.} at *3 (emphasis added).

\textsuperscript{114} These states are Arizona, California, Connecticut, Georgia, Kentucky, Massachusetts, Michigan, Missouri, and Minnesota. Two states refer to standby or advisory counsel in published court forms (Alabama and Washington), and Wyoming mentions it in the context of a rule prohibiting standby counsel’s appointment. \textit{See supra} note 70.

\textsuperscript{115} 2012 GA. CT. ORDER 0204 (2011).

A. Defense counsel whose duty is to actively assist a pro se defendant should permit the defendant 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 defendant only when the defendant requests assistance may bring to the attention of the defendant matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the defendant or insofar as directed to do so by the court.

\textit{Id.}

\textsuperscript{116} CONN. R. SUPER. CT. C.R., § 44-5 (“If requested to do so by the defendant, the standby counsel shall advise the defendant as to legal and procedural matters. If there is no objection by the defendant, such counsel may also call the judicial authority’s attention to matters favorable to the defendant. Such counsel shall not interfere with the defendant’s presentation of the case and may give advice only upon request.”).

\textsuperscript{117} MO. R. 2D CIR. 67.3(b) (“When the defendant has been permitted to proceed without counsel,
North Carolina\textsuperscript{118} court rules refer only to the assistance-upon-request-role of standby counsel. Connecticut has the only court rule that provides that, if standby counsel is required to take over the defense, that counsel shall be given "a reasonable time before proceeding" with the trial.\textsuperscript{119}

2. Conflicting Roles as Assistant to Court or to Defendant

Case law provides little guidance regarding the proper role of standby counsel. Courts have different conceptions of the recipient of counsel's assistance, which necessarily affects—and add confusion to—our understanding of their fundamental role. Below are examples of some courts' views of standby counsel's role:

(1) To ensure the fairness of the criminal justice process, to promote judicial efficiency, and to preserve the appearance of judicial impartiality.\textsuperscript{120}

(2) To function "primarily for the benefit of the circuit court." \textsuperscript{121}

(3) To act at the trial court's request and for its benefit.\textsuperscript{122}

(4) To promote the orderly, prompt, and just disposition of the cause.\textsuperscript{123}

(5) To serve the interests of the trial court, rather than the defendant's interests.\textsuperscript{124}

\textsuperscript{118} N.C. GEN. STAT. § 15A-1243 (2015) ("When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion.") (emphasis added).

\textsuperscript{119} CONN. R. SUPER. CT. C.R., § 44-6§ ("Upon direction of the judicial authority in situations involving a disruptive defendant or one who has been removed under Section 42-46, standby counsel shall enter the case and represent the defendant notwithstanding a previous waiver under Section 44-3. If standby counsel is ordered to represent the defendant, counsel shall be granted reasonable time before proceeding with the trial."). No reference is made to the other—more probable—possibility, that is, that pro se defendants voluntarily relinquish their pro se status when the going gets tough in preparing the defense.

\textsuperscript{120} State v. Jones, 755 N.W.2d 341, 351 (Minn. Ct. App. 2008).

\textsuperscript{121} State v. Campbell, 718 N.W.2d 649, 664 (Wis. 2006).


\textsuperscript{123} People v. Sullivan, 59 Cal. Rptr. 3d 876, 902 (Cal. Ct. App. 2007).

\textsuperscript{124} State v. Lehman, 403 N.W.2d 438, 444 (Wis. 1987); see also United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) ("There is a distinction in function between an amicus appointed to assist defendant and one appointed to assist the court. The latter may call witnesses
Despite the professed limited scope of standby counsel’s role, and the fact that some courts view the role as one primarily benefitting the court, other courts define counsel’s expected role broadly as an aid to the pro se defendant. They see the following as standby counsel’s role:

1. To protect the defendant’s rights once he [or she] elects self-representation;\textsuperscript{125}

2. To give meaningful technical assistance to the defendant, and to make a record for an appeal;\textsuperscript{126}

3. To help the defendant—without the defendant’s or the court’s request—comply with the basic rules of courtroom protocol and procedure;\textsuperscript{127}

4. To help with pretrial discovery, including witnesses;\textsuperscript{128}

5. To preserve the defendant’s rights once he or she elects to proceed pro se;\textsuperscript{129}

6. To be available to represent the defendant if his [or her] right to self-representation is terminated;\textsuperscript{130}

7. To advise defendants “in every way [counsel] knows how concerning [the defendant’s] claims, the pertinent legal principles and the pertinent procedure” in the case;\textsuperscript{131}

8. To ensure a fair trial when the trial court determines that the defendant, because of mental or physical problems, is incapable of representing himself [or herself], or is simply unable to handle the task he [or she] has undertaken;\textsuperscript{132}

9. To advise or assist defendants in the presentation of their defense, and the preservation of a record;\textsuperscript{133}

10. To lessen the barriers resulting from incarceration, and to provide defendant an opportunity to improve the quality of his self-

\textsuperscript{126} United States v. Coupez, 603 F.2d 1347, 1351 (9th Cir. 1979).
\textsuperscript{127} State v. Hart, 569 N.W.2d 451, 455 (N.D. 1997).
\textsuperscript{128} Pote v. State, 695 P.2d 617, 624 (Wyo. 1985).
\textsuperscript{131} Commonwealth v. Fletcher, 896 A.2d 508, 513, 522 (Pa. 2006).
\textsuperscript{133} State v. Burgin, 539 S.W.2d 652, 654 (Mo. Ct. App. 1976).
representation;\textsuperscript{134}

(11) To provide secretarial assistance and access to legal materials;\textsuperscript{135}

(12) To provide legal advice;\textsuperscript{136}

(13) To provide legal consultation and to conduct cross-examination;\textsuperscript{137}

(14) To provide defendant with legal advice and access to legal materials;\textsuperscript{138}

(15) To assist defendant in obtaining legal materials and in contacting witnesses;\textsuperscript{139}

(16) To provide the functional equivalent of a law library in the form of standby counsel;\textsuperscript{140}

(17) To act as research assistant and "backup" counsel.\textsuperscript{141}

Some courts recognize the need for standby counsel to act in a dual role, that is, "to assist the defendant as well as ensure an orderly courtroom and prompt disposition of the case";\textsuperscript{142} to act as a "safety net" to ensure that the pro se receives a fair trial, and to allow the trial to proceed without the undue delays likely to arise when defendants represent themselves;\textsuperscript{143} or, to relieve the judge of the need to explain and enforce rules of courtroom protocol, and assist pro se defendants in overcoming routine obstacles that stand in the way of the achievement of their goals.\textsuperscript{144}

A number of courts have placed limitations on standby counsel's role by either upholding their failure to act, which was the subject of an ineffectiveness claim, or by affirmatively imposing restrictions upon their role at trial. The prevailing view is that the duties of the standby counsel

\textsuperscript{134} Reed v. State, 491 N.E.2d 182, 188 (Ind. 1986).


\textsuperscript{137} Houston v. State, 246 N.W.2d 908, 909 (Iowa 1976).

\textsuperscript{138} Engle v. State, 467 N.E.2d 712, 715 (Ind. 1984).

\textsuperscript{139} State v. Carpenter, 390 So. 2d 1296, 1298 (La. 1980).


\textsuperscript{141} State v. Hahn, 726 P.2d 25, 27 (Wash. 1986).

\textsuperscript{142} People v. Doane, 246 Cal. Rptr. 366, 375 (Cal. Ct. App. 1988).


\textsuperscript{144} Clark v. Perez, 510 F.3d 382, 395 (2d Cir. 2008); see also N.Y. FED. CT. R. 83.3(f) ("In the Court's discretion, the Court may appoint stand-by counsel to act in an advisory capacity. 'Standby counsel' is not the party's representative; rather, the role of stand-by counsel is to provide assistance to the litigant and the Court where appropriate. The Court may in its discretion appoint counsel for other purposes.").
are expressly limited to the extent of the representation specified by the defendant, and ordered by the trial court. A typical limitation order would be one in which a court states that standby counsel may not substantially interfere with significant tactical decisions, control the examination of witnesses, speak on matters of legal importance to the defendant, or bear responsibility for the defendant’s defense. The Third Circuit in U.S. v. Tilley held that “even if standby counsel were capable of rendering ‘ineffective assistance’ for Sixth Amendment purposes, standby counsel would be under no obligation to object to testimony solicited by a pro se defendant. In fact, such an objection would likely constitute a violation of the defendant’s Sixth Amendment rights.” If standby counsel, however, was effective in preparing the pro se defendant for direct or cross-examination, or the witnesses’ examination, it is likely that prejudicial testimony would not be elicited. But, in Tilley, standby counsel took the back seat, so to speak, and waited on the defendant’s request for assistance, resulting in the adverse testimony. Moreover, the court made the assumption that standby counsel’s objection to the testimony would have been objected to by the defendant, which may not in fact have been the case; on the contrary, the defendant would have been pleased if the objection had been sustained, and the prejudicial testimony stricken. If those were the facts, the defendant would not have even claimed ineffectiveness of standby counsel.

Trial judges must balance defendants’ right to control their defense, and the need for conducting an orderly and fair trial. This can be hindered by the defendant’s own restrictions imposed on standby counsel. In one case, it was held that the trial judge should not meet separately with the prosecutor at sidebar after the pro se defendant declined to have standby counsel participate on his behalf.

145 Wake v. Barker, 514 S.W.2d 692, 697 (Ky. 1974) (“We conclude that the respondent trial judge erred in ordering the petitioner public defender to render services in Hendron’s defense of a character that Hendron clearly did not want.”).
146 In re N.A., 309 P.3d 27, 31 (Mont. 2013).
150 ‘This is not to say that standby counsel in such a case is unwanted; counsel and the pro se defendant may have a good attorney-client relationship, but the defendant may decide for his own reasons on a strategy or defense that differs from that recommended by counsel.
sidebar case, a trial judge barred standby counsel’s participation in bench conferences without the defendant, and over the defendant’s objection, on grounds that to do otherwise would risk a Sixth Amendment Faretta claim.\footnote{Allen v. Commonwealth, 410 S.W.3d 125, 146 (Ky. 2013).}

In one case, the trial court placed severe limitations on standby counsel’s role:

Prior to Appellant’s final decision to proceed pro se, the trial court clearly delineated standby counsel’s role, specifically informing Appellant that standby counsel is not the same as counsel; that if Appellant chose to represent himself, he, not his counsel, would be trying the case; that any mistakes he made during his self-representation could not be raised subsequently, as ineffectiveness of counsel was not a legal option on appeal in such circumstances; and that standby counsel cannot “sit there and go over the stuff with you as if they are really counsel but you are asking the questions”:

Court: [Standby counsel] will advise you [Appellant] as to any legal matters that come up. That’s it. They are not trying the case, you [Appellant] are....

Court: Just so that we understand and you understand, I’ve given some thought with regard to assistance by [standby] counsel. They can only advise you as to legal matters. Since they are familiar with the exhibits and so forth, they may help you. 

If you ask for an exhibit, they will give you the exhibit, but that’s it, they won’t discuss it with you. They won’t read through it or tell you to look on [sic] the exhibit. They won’t be able to sit and take notes. You’ll have to do that on your own....

This matter of the trial court’s limitations on the role of standby counsel was addressed at the PCRA [Post-Conviction Relief Act] hearing. Mr. Blocher and Ms. Smith both testified that, as standby counsel, their role was limited to answering Appellant’s legal questions, and they were not permitted to take notes concerning the trial testimony. 

They were also not permitted to volunteer instructions to Appellant as to what to do next or to volunteer a suggestion that an objection might be warranted. 

Ms. Smith further testified that the court’s restriction on note-taking limited her ability to recall guilt-phase testimony and its potential relevance to evidence of mitigation during the penalty phase; however, she did not specify any particular instance in which her inability to recall the testimony affected her performance during the penalty phase or at...
Despite these restrictions on standby counsel’s role, the Pennsylvania Supreme Court affirmed the trial court’s imposition of the aforementioned restrictions. Its reasons were that (1) the trial court properly relied upon a court rule defining the role of standby counsel, which states, in relevant part, that “standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice”; (2) the issue of limitations on counsel’s role was waived because neither the defendant nor standby counsel objected to them and “because the trial court acted within its discretion in restricting standby counsel’s role, and counsel is not ineffective for failing to raise a meritless objection”; and (3) because the defendant was not entitled to hybrid representation. This holding would seem to permit many additional restrictions to hinder standby counsel and impose barriers on their efforts to affirmatively assist a pro se defendant.
In one case it was an appointed standby counsel (a public defender) himself who placed limits on his own assistance. In *State v. Richards*, standby counsel "informed Richards and the trial court that it [the public defender’s office] would provide no services or assistance beyond the presence of these attorneys in the courtroom as advisors." The court was concerned about standby counsel’s self-imposed restriction, because "circumstances might eventually dictate that they take over the case . . . [in which case] a significant delay might result as the standby counsel had no access to the over 20,000 pages of documentation relating to the defense." Sure enough, the defendant claimed his high blood sugar level required that he relinquish his right to self-representation, and he moved for a change of appointment of standby counsel to defense counsel. Standby counsel opposed this motion, citing a lack of familiarity with the evidence, and because they thought the request was made "only in pursuit of a mistrial." The court thereupon denied the defendant’s motion, and he was forced to proceed pro se. Interestingly, rules in two courts specifically prohibit appointment of the public defender as standby counsel, without indicating any alternative source for such counsel.

On appeal, the Minnesota Supreme Court first noted that its procedural rule requires that standby counsel be appointed in every felony case with a pro se defendant. The court then reviewed *Faretta’s* language to the effect that a pro se defendant may not disrupt, obstruct, or otherwise impede the proceedings, as well as the authorities that have held that a pro se defendant must not allow self-representation to delay a

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*Id.* at 51 (citations omitted).

159 State v. Richards, 552 N.W.2d 197, 202 (Minn. 1996).

160 *Id.*. Standby counsel also erroneously argued “that Richards’ decision to represent himself was irrevocable.” *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 COLO. REV. STAT. § 21-1-103(b) (2015) ("[T]he state public defender shall be limited to defending the indigent person and shall not be appointed to act as advisory counsel."); MINN. STAT. § 611.17(b)(4) (2015) ("The court must not appoint the district public defender as advisory counsel or standby counsel.").

166 MINN. R. CRIM. P. 5.02.

167 State v. Richards, 552 N.W.2d 197, 205 (Minn. 1996).
trial, or to seek a mistrial. Illustratively, when a trial judge instructs pro se defendants that their standby counsel is only permitted to ask counsel occasional questions, but a defendant engages in extensive interactions with counsel, an order moving counsel away from the defendant to avoid such interactions does not violate the defendant’s right to self-representation. But pro se defendants may not “orchestrate appearances by standby counsel or alternate position on whether or not wishes [sic] to self-represent for purposes of delay.”

Perhaps the best statement reflecting the confusion regarding standby counsel’s role is that found in Brookner v. Superior Court:

Let us consider a typical case. A criminal defense attorney has been representing a headstrong, difficult client to the best of his ability. That client files a Faretta motion which is granted. 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?

It is all too easy for a court to say that an advisory or standby counsel may be found ineffective for his role in a case, when the courts have not adequately defined what that role is. It would be simpler and far more sensible if courts adopted the approach that a defendant may have an attorney, or have the right to represent himself—but may not have both.

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168 Id. (citing United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989)).
170 State v. Richards, 552 N.W.2d 197, 206 (Minn. 1996) (citing United States v. Taylor, 933 F.2d 307, 311 (5th Cir. 1991)).
IV. CLAIMS OF INEFFECTIVENESS OF STANDBY COUNSEL

As noted in *Corpus Juris Secundum*, "[w]hether standby counsel and lawyers acting as counsel for defendants should be held to the standards for the effective assistance of counsel remains an open question." A few courts categorically refuse to consider any claims of ineffectiveness arising from self-representation. Most courts refuse to consider standby counsel ineffectiveness claims based on the prevailing view that, because there is no constitutional right to standby counsel, then no complaint can be made about their effectiveness, or because *Faretta* precludes ineffectiveness claims by pro se defendants, or both.

A. NO INEFFECTIVENESS CLAIM WHERE NO CONSTITUTIONAL RIGHT TO STANDBY COUNSEL

The prevailing view in the jurisprudence is that since there is no constitutional right to standby counsel, there is no right to bring an ineffectiveness claim. Many of the courts taking this position rely upon *Coleman v. Thompson*. *Coleman* was a case interpreting federal habeas corpus law in which the defendant claimed ineffective assistance on the part of the attorney representing him in a state habeas corpus petition, a

172 22 C.J.S. CRIM. LAW § 397 (2015) (citing State v. Richards, 552 N.W.2d 197 (Minn. 1996)). The C.J.S. statement erroneously includes "lawyers acting as counsel for defendants," who are obviously held to standards of effectiveness. Id.

173 See, e.g., Commonwealth v. Fletcher, 896 A.2d 508, 522 n.13 (Pa. 2006) ("This author has taken the position applied by a number of other courts that a post-conviction petitioner should be permitted to challenge standby counsel's stewardship relative to the limited duties that were assigned to him. . . . The majority, however, implemented a categorical approach in refusing to consider any claims of ineffectiveness arising from a period of self-representation."). Below, this Article criticizes the extension by courts of the *Faretta* language regarding a pro se defendant's inability to later claim his own ineffectiveness, to cases involving claims of standby counsel's alleged ineffectiveness. See infra Part IV.C.

174 See, e.g., United States v. Oliver, 630 F.3d 397, 414 (5th Cir. 2011); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992); infra Part IV.C (criticizing this approach); cf. United States v. Prater, 462 F. App'x 859, 862 (11th Cir. 2011) (declining "to review his argument about ineffective assistance of counsel"); United States v. Wilson, No. 93-7402, 1994 U.S. App. LEXIS 4376, at *3 (10th Cir. Mar. 11, 1994) (rejecting ineffectiveness claim without any analysis or reason); People v. Myles, 427 N.E.2d 59, 63–64 (III. 1981) (finding collateral estoppel in the form of the pro se defendant's refusal to cooperate with standby counsel to be a bar to an ineffectiveness claim); State v. Brown, No. 02-0500881, 2011 WL 2622680, at *7 (N.J. Super. Ct. App. Div. Jul. 6, 2011) (rejecting ineffectiveness claim because the defendant "considered himself a 'top pro se attorney' [in New Jersey,] and should be bound by the choices he made in that capacity").

175 Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("Where there is no constitutional right to counsel there can be no deprivation of effective assistance.").
collateral review proceeding for which there was (and still is) no constitutional right to counsel.\footnote{Id.} Standby counsel had missed the thirty day deadline for filing an appeal, so the defendant was unable to raise his federal claims in the state court. The Supreme Court of the United States addressed the issue of whether this default by counsel was a sufficient cause to excuse dismissal of the federal habeas on grounds that the procedural default was an independent and adequate state ground.\footnote{Id. at 729–36.} At the end of its lengthy analysis, the Court stated, "We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not."\footnote{Id. at 755.}

Reliance upon Coleman is therefore misplaced because that case dealt with whether there is a right to effective counsel in a state collateral review proceeding; it did not deal with the right to have the "Assistance of Counsel" (or standby counsel) at trial. Nevertheless, the prevailing view is that there is no constitutional right to standby counsel, and, therefore, there is no right to claim standby counsel was ineffective.\footnote{United States v. Mendez-Sanchez, 563 F.3d 935, 947 (9th Cir. 2009) ("Under our established precedent there is no right to the assistance of standby counsel."); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) ("This court knows of no constitutional right to effective assistance of standby counsel."); McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985) (holding that appointing standby counsel "is the preferred practice[,] it is not mandatory").}

**B. THE STRICKLAND TEST FOR DEFENSE COUNSEL**

In Strickland v. Washington,\footnote{Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).} the Supreme Court of the United States established a two-pronged test for judging the effectiveness of defense counsel. The first prong is whether counsel's performance was objectively reasonable:

> [T]he proper standard for attorney performance is that of reasonably effective assistance.... When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment...
refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.181

The Court went on to describe some examples of the "basic duties" of defense counsel:

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.182

Interestingly, the Court stated that, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."183

The Court then described the second part of its effectiveness test for

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181 Id.
182 Id. at 688 (citations omitted).

Prevailing norms of practice as reflected in American Bar Association standards, and the like, for example, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980). "The Defense Function" are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

Id. at 688–89 (citation omitted).

183 Id. at 689.
defense counsel as follows:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.184

[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.185

The primary argument against applying the Strickland test to claims of ineffectiveness of standby counsel is that there is no constitutional right to such assistance, and, therefore, there is no right to claim that standby counsel be effective.186 Nevertheless, a few courts have applied Strickland to claims of ineffective standby counsel.

184 See infra note 196 and accompanying text.
C. DECISIONS APPLYING STRICKLAND TEST TO STANDBY COUNSEL

Most courts have found no constitutional right to standby counsel, much less effective assistance of standby counsel, but some of these courts go on to consider the claim and apply the Strickland effectiveness test anyway.

One example is U.S. v. Rosario, a case in which the defendant had been appointed a series of six attorneys, the fifth of whom was appointed standby counsel during the trial. The court, for unspecified reasons, rejected the claim that counsel was ineffective, stating: "we find that appellant did not demonstrate that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and did not affirmatively prove prejudice from the alleged derelictions in counsel’s performance, as required under Strickland v. Washington."

Some courts make no reference to the Strickland effectiveness-of-counsel test, and instead utilize the McKaskle control-jury perception test. The control-jury perception test establishes two requirements for a finding of ineffectiveness of standby counsel: (1) whether counsel’s participation adversely affects the defendant’s “actual control over the case and the defense [the defendant] chooses to present to the jury,” and (2) whether counsel’s participation “destroy[s] the jury’s perception that the defendant is [self-represented].” This test can of course only be applied if the defendant’s claim involves an allegation of counsel’s excessive participation, rather than one involving negligence or failure to act to protect the defendant’s rights.

In most of these cases the courts conclude that standby counsel did not interfere with the defendant’s control over his defense. In one case

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187 See supra notes 172–77 and accompanying text.
188 United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (“But, even if Windsor was entitled to effective assistance throughout the course of these proceedings, the assistance he received was not constitutionally deficient.”); Marcusse v. United States, No. 1:09-CV-913, 2012 U.S. Dist. LEXIS 153963, at *60–62 (W. D. Mich. Oct. 26, 2012) (pro se defendant cannot challenge effectiveness of standby counsel, but even if defendant “did not give up her right to challenge counsel’s effectiveness when she elected to proceed pro se, standby trial counsel was not ineffective,” applying Strickland test).
190 Id.
191 McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). The Court’s concern was to protect the dignity and autonomy of the defendant, which was the justification for the Court’s recognition of a Sixth Amendment right to self-representation. Id. at 176–77.
the court noted that standby counsel "performed relatively few tasks," such as assisting "in the presentation of some exhibits," informing the court that the defendant declined to testify, and "making challenges to certain proposed instructions." Based on this, the court concluded that, "[the pro se defendant] herself maintained control of the defense throughout the trial. As such, [the defendant] cannot now claim ineffectual assistance of counsel, because she would essentially be alleging herself ineffective."

There are also courts which have rejected ineffectiveness claims on multiple grounds. For example, in one case the court rejected the ineffectiveness claim based on application of Strickland, based on application of the admonition in Faretta that one who waives counsel cannot complain of their own ineffectiveness, and because any failure to act by standby counsel was incidental to the defendant's waiver of counsel.

D. DECISIONS CONDUCTING LIMITED EFFECTIVENESS REVIEW

A minority of courts permit limited review of claims of ineffectiveness of standby counsel. These courts are willing to judge the performance of standby counsel, but focus their review on the limited duties to which counsel was assigned. In one case, the California Court of Appeals stated that it would review such a claim, but noted that:

[the standard for advisory counsel's effectiveness must reflect the

194 Id.; cf. infra notes 209–11 and accompanying text (discussing the "in-name-only" exception to the general rule barring ineffectiveness claims, recognized in cases in which counsel did very little to assist the defendant). Warr seems to recognize an exception to that exception, that is, where the pro se maintained control over their defense.
195 Fletcher v. United States, No. 3:12-cv-00830, 2013 U.S. Dist. LEXIS 71684, at *20–21, 23, 24 (M.D. Tenn. May 21, 2013); see also Holmes v. United States, 281 F. App’x 475, 480–81 (6th Cir. Jun. 18, 2008) (“Even if standby counsel failed to act in some manner, such failure is an incidental effect of [defendant’s decision to proceed pro se], and not the basis of an ineffective assistance of counsel claim.”); Brooks v. United States, No. 1:08-CR-141, 2012 U.S. Dist. LEXIS 104808, at *5 (N.D. Ohio Jul. 28, 2012) (“As to the counsel’s conduct before Brooks proceeded pro se, Brook’s decision to represent himself also makes it virtually impossible to apply the Strickland test: the outcome of the case depended on both counsel and Brook’s conduct.”) (citing Wilson v. Parker, 515 F.3d 682, 699 (6th Cir. 2008)); Long v. United States, Nos. 3:03-cr-45, 3:08-cv-32, 2011 U.S. Dist. LEXIS 98348, at *15–16 (E.D. Tenn. Aug. 31, 2011) (rejecting petitioner’s claim that standby counsel was ineffective by failing to investigate the case and never discussing defense strategy with him because, by choosing to represent himself, he could not claim ineffective assistance of counsel).
narrow role played by advisory counsel—that of giving legal advice and assistance to a defendant who has the control and responsibility for his own defense. To effectively fulfill this role, it seems to us, advisory counsel must be reasonably available to the defendant and should provide the advice and assistance to be expected of a reasonably competent attorney acting as a diligent, conscientious advisor and assistant.196

After this comment, the court noted, “The question remains as to when does an ineffective advisory counsel deny a defendant a fair trial and require reversal on appeal. We conclude the answer is: almost never.”197 The court explained that advisory counsel “is essentially a resource” for the defendant, and “[i]f the defendant chooses not to use this resource... the defendant has only himself to blame.”198 The court went on to note:

To succeed on a claim of ineffective advisory counsel, a defendant’s claim must go to the narrow role of advisory counsel, not to the adequacy of the defendant’s own representation or to trial strategy matters within his control. Matters which can be explained as a choice of trial tactics (no matter how poor a choice of tactics) will not support an appellate claim of ineffective advisory counsel; advisory counsel’s ineffectiveness must affirmatively appear on the record. Additionally to succeed on such a claim, the defendant must show advisory counsel’s ineffectiveness resulted in the withdrawal of a potentially meritorious defense.199

197 Id. No reference was made to the statement in Faretta barring pro se defendant ineffectiveness claims.
198 Id.
199 Id. at 372-73.

Id. at 373 (footnote omitted) (citations omitted). In a footnote, the court noted that “[i]neffectiveness of advisory counsel which does not appear in the record on appeal ([for example], advisory counsel gave grossly negligent legal advice on which the defendant relied to his prejudice) could be raised in habeas corpus proceedings at which evidence outside the record
As to defendant's claim, the court found that it had no merit for several reasons: (1) "There is no requirement advisory counsel be present during the trial," and counsel testified at the motion for a new trial that he was not asked to attend the trial;\(^\text{200}\) (2) the record contradicted his claim that advisory counsel failed to instruct him on impeachment of a witness with prior inconsistent statements; (3) the defendant failed to complain about the inadequacy of advisory counsel; and, (4) defendant failed to establish any prejudice.\(^\text{201}\)

A number of state supreme courts have been willing to review claims of ineffectiveness of standby counsel. For example, in *State v. Fischer*, the North Dakota Supreme Court first noted that courts are split regarding whether ineffectiveness claims can be entertained against standby counsel,\(^\text{202}\) and then went on to apply its own test (similar to the *Strickland* test) for effectiveness of counsel, and denied the claim.\(^\text{203}\)

The Washington Supreme Court held that:

> [G]enerally, defendants who are afforded the right to self-representation cannot claim ineffective assistance of counsel for the obvious reason they become their own counsel and assume complete responsibility for their own representation. However, this does not mean standby counsel has no obligations or duties to the defendant when standby counsel has been appointed by the court. A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.\(^\text{204}\)

The Nebraska Supreme Court acknowledged that standby counsels' effectiveness could be judged based on their limited duties.\(^\text{205}\) But in the

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\(^{200}\) *Id.* at 373 n.9 (citations omitted).

\(^{201}\) *Id.* But see United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (holding that ineffectiveness presumed where counsel is "either totally absent" or "prevented from assisting the [defendant] during a critical stage of the proceedings," and that such failure deprived defendant of any meaningful opportunity to subject the state's evidence to adversarial testing).

\(^{202}\) *Doane*, 246 Cal. Rptr. at 373.

\(^{203}\) *State v. Fischer*, 744 N.W.2d 760, 766 (N.D. 2008).

\(^{204}\) The North Dakota test also has two parts: whether counsel performed reasonably under prevailing professional norms or was "plainly defective," and whether the defendant was prejudiced by that performance. *Id.* at 766–67.

same case it found that the defendant's claims that standby counsel failed
to investigate a previous defense lawyer's effectiveness, and failed to file a
motion to discharge him, were without merit because they were "beyond
the scope of duties" assigned to counsel.\textsuperscript{206}

The California Supreme Court is also willing to consider claims of
ineffectiveness of standby counsel, but the defendant "may only raise
those narrow claims of 'ineffectiveness assistance' which arise directly
from assisting counsel's breach of the limited authority and
responsibilities counsel has assumed."\textsuperscript{207} Some federal courts have also
been willing to consider ineffectiveness claims arising from standby
counsel's limited role and duties.\textsuperscript{208}

The Second Circuit in \textit{U.S. v. Morrison} followed the majority of
courts in holding that no claim of ineffectiveness of standby counsel lies
where there is no constitutional right to such counsel's appointment.\textsuperscript{209}
But, where the title of standby counsel was held "in name only and, in
fact, [counsel] acted as the defendant's lawyer throughout the
proceedings," an ineffectiveness claim could be considered.\textsuperscript{210} Applying
\textit{Morrison}, one district court found that the defendant's ineffectiveness
claim should not be considered because "it cannot be said that his [standby
counsel] held such title 'in name only.' Indeed, [he] conducted voir dire,
engaged in direct and cross examination, made objections, and read the
opening and closing statements. Under these circumstances, [the
defendant] has no grounds to challenge the effectiveness of his standby
counsel."\textsuperscript{211}

The foregoing illustrates the problematic and illogical nature of the
prevailing view whereby courts refuse to review ineffectiveness claims
against standby counsel. Ironically, where standby counsel does nothing or
almost nothing, that conduct may be reviewed. But, if standby counsel
provides much greater assistance, approaching co-counsel status, that
counsel's ineffectiveness cannot be challenged. If courts view standby

\begin{footnotesize}
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\item \textsuperscript{206} Dunster, 769 N.W.2d at 411.
\item \textsuperscript{207} People v. Hamilton, 774 P.2d 730, 742 n.14 (Cal. 1989); see also People v. Lawley, 38 P.3d
461, 491 (Cal. 2002) ("[D]efendant is entitled to expect professionally competent assistance
within the narrow scope of advisory counsel's proper role.").
\item \textsuperscript{208} See, e.g., Jelinek v. Costello, 247 F. Supp. 2d 212, 265 (E.D.N.Y. 2003) ("[W]here standby or
advisory counsel assumes an advisory role or exercises a degree of control over a defendant's
case, 'his or her potential for ineffectiveness, though diminished by the defendant's primary role,
is not completely eliminated.'") (citation omitted).
\item \textsuperscript{209} United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998).
\item \textsuperscript{210} Id. (quoting United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997)).
\item \textsuperscript{211} United States v. VanHoesen, 636 F. Supp. 2d 155, 158–59 (N.D.N.Y. 2009).
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\end{footnotesize}
counsel's role as one of assistance, why should ineffectiveness claims be limited to the "in name only" case in which standby counsel, say, falls asleep during the trial, or does little or nothing to assist? And how minimal must assistance be from standby counsel for a defendant to have a viable ineffectiveness claim? Should not the claim logically also be permitted when greater assistance is provided, and there is a greater likelihood of neglect or omission on the part of standby counsel? Case law provides no guidance to these questions.

A final example of a court that found standby counsel ineffective and reversed a conviction is Howard v. State, in which two standby counselors were appointed to assist the defendant, whom the state supreme court held should have been the subject of a competency hearing. The reversal, however, was based upon the court's denial of the defendant's request near the end of his trial that counsel take "an active role" in his defense, and that counsel present his closing argument to the jury. One of the standby counsel thereupon advised the court:

I [don't] want to be put in that position because number one, it had just been sprung on us. Uh, we had been sitting on the rail not actively taking any participation in the trial. As a matter of fact, I don't recall that he ... had asked you to do anything during the trial at all, and I didn't think that it was fair for us to be thrust into that with no time to prepare any closing arguments . . .

Commenting on standby counsel's role, the court stated:

The role of counsel appointed to assist Howard in carrying out his own defense includes, among other things, the necessity of preparing as adequately as possible to assume a more active role in the trial, should the need arise. It is apparent that, for whatever reason, Howard utilized counsel very little before attempting to have them present the final argument on his behalf. Howard did, however, apparently understand that they were present to act as his counsel and as his advocates at all times, and that the trial court had encouraged him to trust them and to rely upon them. In an ironic twist, when Howard finally attempted to rely upon court-appointed counsel to convey his wishes to the trial judge, Kesler went into the judge's chambers and successfully argued that Howard's request to have standby counsel present the final arguments should not be granted. From the foregoing, it is apparent that the trial judge understood that Howard wished for counsel to make the closing

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212 Howard v. State, 697 So. 2d 415, 424 (Miss. 1997).
213 Id. at 426.
214 Id. at 425.
argument, but that both Howard's appointed attorneys and the trial judge were more concerned with the prospect of the presentation of a somewhat impromptu closing argument than with guarding the defendant's right to counsel.\textsuperscript{215}

The court concluded that the right to counsel was so fundamental that courts should "indulge every reasonable presumption against waiver,"\textsuperscript{216} and, here, "it would have required little effort for someone already ordered to serve as standby counsel to make some sort of argument, while granting the request would have done a great deal to protect the [sic] Howard's right to counsel."\textsuperscript{217} The court reversed the defendant's conviction without using the words "ineffective assistance of counsel," and without reference to Strickland v. Washington.

The question of the appropriate standard, if any, for effectiveness of standby counsel is not merely an academic question. We now turn to concrete examples of alleged neglect and failure to act which pro se defendants have claimed prejudiced them at trial.

E. ILLUSTRATIVE ALLEGATIONS OF NEGLECT AND FAILURE TO ACT

Standby counsel are accused of many defaults and inadequacies by pro se defendants. The following cited examples from allegations in case law reflect the ambiguity in standby counsel's role as it is currently (mis)understood by lawyers, pro se defendants, and the court. They also reflect the growing number of claims of neglect or failure to act, rather than excessive participation. These claims include instances in which counsel:

(1) failed to submit an instruction permitting the jury to find the defendant guilty of a lesser included offense;\textsuperscript{218}

\begin{flushright}
\textsuperscript{215} Id. at 426. The court cited and quoted from Dowell v. State, 557 N.E.2d 1063 (Ind. App. 1990), which set forth the following factors judges should consider in deciding whether to allow standby counsel to make a closing argument for a pro se defendant:

These factors include the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, the reasons set forth for the request, the length and stage of the trial proceedings, disruption or delay which reasonably might be expected to ensue if the motion is granted, and the likelihood of the defendant's effectiveness in defending against the charges if the motion is denied.

\textsuperscript{216} Howard, 697 So. 2d at 427 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

\textsuperscript{217} Id.

\textsuperscript{218} United States v. Windsor, 981 F.2d 943, 946 (7th Cir. 1992).
\end{flushright}
(2) failed to submit an “instruction on unreasonable self-defense”;\(^{219}\)

(3) failed to advise the defendant to move to suppress an incriminating statement the defendant made in his opening statement;\(^{220}\)

(4) failed to subpoena a witness;\(^{221}\)

(5) failed to protect the defendant’s speedy trial right by requesting a continuance to subpoena evidence and witnesses;\(^{222}\)

(6) “[failed] to file certain pretrial motions, [failed] to cross-examine or assist defendant in cross-examining witnesses . . . [failed] to prepare or assist [the defendant] in preparing jury instructions,” and “failed to consult and advocate for [the defendant];”\(^{223}\)

(7) “[f]ailed to move to suppress his statement to police;”\(^{224}\)

(8) failed to attend the trial, and to provide assistance “on impeaching a witness with prior inconsistent statements”;\(^{225}\)

(9) “[f]ailed to object to instances of alleged [prosecutorial] misconduct”;\(^{226}\)

(10) failed to “adequately consult with [the defendant],” to “provide him with timely copies of discovery,” and failing to prepare for trial;\(^{227}\) and

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\(^{219}\) People v. Michaels, 49 P.3d 1032, 1056 (Cal. 2002).


At the sentencing hearing before a three-judge panel, the State presented evidence of aggravating circumstances. [Defendant] Bishop introduced no evidence in mitigation. Standby counsel sought to present evidence of mitigating circumstances. Bishop, however, refused to agree to the admission of any such evidence. The court acceded to his wishes and did not allow standby counsel to proceed. Finding the existence of aggravating circumstances and noting that Bishop had offered no proof of mitigating circumstances, the court imposed the death penalty.


\(^{224}\) People v. Silagy, 507 N.E.2d 830, 835 (Ill. 1987).


\(^{226}\) People v. Michaels, 49 P.3d 1032, 1056 (Cal. 2002).

\(^{227}\) Wilkerson v. State, 686 S.E.2d 648, 654 (Ga. 2009). In this case, the trial court had erroneously informed that defendant that, if he waived counsel and was permitted to proceed pro se, he could not later request representation. Id. at 651. Although a Sixth Amendment violation, as occurred here, is a structural error, not subject to harmless error analysis, the majority held that the defendant had waived the issue because his attorney (who represented him just prior to the Faretta waiver hearing—after which he became standby counsel) had not objected to the judge’s admonition. Id. at 655. The dissenting justices wrote:
The last failure enumerated was found to be irreversible error. The only other case disclosed by research in which standby counsel was found to be ineffective is People v. Derra. In that case, the court appointed the public defender as standby counsel “to be present in an advisory capacity.” The court found that “the public defender here was virtually silent. In fact, the record reflects only one discussion with counsel which—according to the record—was somewhat less than four minutes.” While the court’s opinion revolved primarily around whether the trial court had given the defendant the proper waiver-of-counsel admonitions under a court rule, it held the “conclusion that counsel was in fact ineffective is compelled by [the] record. Counsel questioned no witnesses, made no statements of record during the trial, and—according to the defendant—consulted with [him] for a period of something less than four minutes. This can hardly be considered effective assistance of counsel.”

The recent Supreme Court of the United States decision in Porter v. McCollum illustrates what can happen when standby counsel is not ready to take over the defense. In this case, the defendant had appeared

The majority ... relies on the fact that standby counsel apparently compounded the trial court’s error by failing to correct the misinformation given Wilkerson when they discussed Wilkerson’s pro se performance at trial. ... [A] reasonable explanation for Wilkerson’s behavior at trial is that, having asked and been rebuffed on his request to obtain counsel’s partial assistance in his defense, the trial court’s misinformation led Wilkerson to conclude it would be utterly futile to ask for counsel to assume total control of his defense.

Id. at 656. Thus, we have here an example of how ineffectiveness on the part of an attorney acting as defense counsel (and then standby counsel) in not informing the defendant that the trial judge was wrong about his having no right to make a post-waiver request for counsel; this led to a structural Sixth Amendment right-to-counsel violation. But, ironically, defendant’s claim was waived due to the ineffectiveness of counsel in not objecting to that misinformation. And, to add insult to injury, the defendant was then barred from raising the ineffectiveness of standby counsel under Georgia law. Id. at 656 n.4 (citing Mullins v. Lavoie, 290 S.E.2d 472, 474 (Ga. 1982)).

229 Id.
231 Id. at 689.
232 Id. at 691.
233 Id. at 692. The case is also an example of the use of the term “advisory counsel,” suggesting a very limited role, but one where the court conversely expected much more participation in the defense than the term suggests. See supra Part I.A(3).
pro se with standby counsel assisting, until near the end of the prosecution's case in chief. Then, he pled guilty, and requested standby counsel to represent him during the sentencing phase of the case.

The defense put on only one witness, defendant Porter's ex-wife, and read an excerpt from a deposition. The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son. Although his lawyer told the jury that Porter "has other handicaps that weren't apparent during the trial" and Porter was not "mentally healthy," he did not put on any evidence related to Porter's mental health.

The Court concluded that counsel's performance was deficient and ineffective under the first part of the Strickland test:

Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment. . . . Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct some sort of mitigation investigation.

The Court applied the second part of the Strickland test of ineffectiveness of counsel and found that it, too, was satisfied:

We do not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish "a probability sufficient to undermine confidence in [that] outcome." This Porter has done.

In Porter the Court for the first time recognized an ineffectiveness claim against standby counsel based on neglect, rather than excessive participation. Interestingly, the Court did not—like most lower courts—rely upon the argument that there is no constitutional right to standby

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235 Id. at 32.
236 Id.
237 Id.
238 Id. at 40 (citations omitted).
239 Id. at 44 (citations omitted); see also Hinton v. Alabama, 134 S. Ct. 1081, 1089 (2014) (finding the Strickland ineffectiveness test met where defense counsel failed to make "even the cursory investigation of the state statute providing for defense funding for indigent defendants" that would have provided defense with sufficient experts fees, leading to hiring of unqualified defense expert whose testimony was prejudicial to the defendant). What if this lawyer had first been appointed as standby counsel, after which his or her pro se client terminated their self-representation? Would a finding of ineffectiveness have been made, where Faretta requires counsel to be ready to step into the case if necessary? It is just a matter of time before the Court takes up a case raising such an issue.
counsel, and therefore no ineffectiveness claim can lie, or the argument that waiver of the right to counsel precludes both self-ineffectiveness and standby counsel ineffectiveness claims.

V. LEGAL BASES FOR THE RIGHT TO APPOINTMENT OF STANDBY COUNSEL

A. WAIVER OF "COUNSEL" IS NOT A WAIVER OF "ASSISTANCE"

The Sixth Amendment states in relevant part that in all criminal prosecutions, "the accused shall . . . have the Assistance of Counsel for his defence." The importance of the role of counsel was described in Justice Sutherland's famous passage from *Powell v. Alabama*, which recognizes the right of counsel as an element of the Due Process Clause of the Fourteenth Amendment:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, [lay persons are] incapable, generally, of determining for [themselves] whether the indictment is good or bad. [They are] unfamiliar with the rules of evidence. Left without the aid of counsel [they] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. [They] lack both the skill and knowledge adequately to prepare [their] defense, even though [they] have a perfect one. [They] require the guiding hand of counsel at every step in the proceedings against [them]. Without it, though [they] be not guilty, [they] face the danger of conviction because [they] do not know how to establish [their] innocence. If that be true of [persons] of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

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240 The Sixth Amendment states in full:

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.

U.S. Const. amend. VI.

At the end of this eloquent passage describing the importance of counsel, Justice Powell makes it clear that he believed that due process was violated when counsel is denied, or is refused the right to appear for their clients. The Court has many times since elaborated upon the importance of having counsel, especially in criminal cases where the stakes are so high.

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Nothing has changed since the common law with respect to the increasing complexity of law, and the unequal resources available to the state and the individual defendant. Effective legal assistance is essential to a fair trial. The foregoing language describing the importance of having counsel for one’s defense is no less applicable to standby counsel’s assistance than that of defense counsel.

The Court in Faretta, in which it recognized the Sixth Amendment right to self-representation, formulated requirements for a knowing and intelligent waiver of the right to “Counsel” for the defendant electing to represent himself. In doing so, the Court, like all other courts, have interpreted the phrase “Assistance of Counsel” to have only one meaning, namely, full representation by defense counsel, and that this method is the

242 Id.
244 Earlier cases noted the importance of not lightly finding a waiver of the right to counsel because it is of such critical importance as to be an element of due process. See, e.g., Faretta v. California, 422 U.S. 806, 818 (1975); Von Moltke v. Gillies, 332 U.S. 708, 723 (1948); Glasser v. United States, 315 U.S. 60, 70 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
only manner in which a state can discharge its Sixth Amendment obligations. The Court also expanded the Sixth Amendment right to the "Assistance of Counsel" to include self-representation. This was the Court's conclusion after it conducted a comprehensive review of the history of criminal procedure at common law, as well as the Enlightenment values of dignity and autonomy.

Likewise, the Court should recognize a third leg to the stool constituting the Sixth Amendment assistance of counsel rights, namely, recognition of a right to standby counsel on request of a pro se defendant. As the Supreme Court did in Faretta, the best place to start the argument for recognition of this right is legal history.

B. COMMON LAW ROOTS OF THE SIXTH AMENDMENT RIGHT TO "ASSISTANCE OF COUNSEL"

Legal history shows that limited scope representation preceded full representation by attorneys in criminal courts, a history that cannot be ignored when considering whether to recognize a constitutional right to effective assistance of standby counsel. As legal historians report, up through the seventeenth century, defense counsel was not permitted in criminal cases:

The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment; since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help. This harsh rule was defended on the grounds that the evidence to convict the prisoner ought to be so clear that it could not be contradicted, and that the judges would take care of that and also ensure that the trial proceeded according to law. Another reason, if not expressly articulated, was the fear that trials would be lengthened if advocates took part. If counsel were allowed, it was pointed out with some alarm in 1602, every prisoner would want it.

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245 Faretta, 422 U.S. at 807.
246 Id. at 851.
247 Id. at 850–52.
248 J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 417 (2d ed.) (1979). ("Even as early as the thirteenth century we find a form of standby counsel. Then, serjeants-at-law were considered 'professional pleaders' who represented 'the great men of the realm' in civil cases. 'The universal litigant needed someone to say the right thing for him during the pleading even more than he needed an attorney to go through the procedural moves... The pleader stood beside the litigant prompting him, but not replacing him—the litigant had to take the pleader's..."
Defense attorneys were first permitted in cases of treason in 1696.\textsuperscript{249} It was not until the 1730s—and then routinely by the last half of the eighteenth century—that judges began to permit defense counsel to appear at their discretion in felony cases.\textsuperscript{250} Up to that time, the trial was seen as an opportunity for the defendant to orally respond to the charges brought and the evidence produced by the victim, a sort of “accused speaks” trial.\textsuperscript{251} The rationale for preserving the form of trial where all defendants appeared pro se, was that the defendants themselves would be a source of information and evidence for the court; it was feared that if defense counsel was allowed to participate it would interfere with this function.\textsuperscript{252}

The right to counsel for treason cases, and later for felonies, was premised on the view that the court needed to “even up” the legal battle between the prosecution and the defendant, and give the defendant the assistance of counsel to probe the prosecution’s trial evidence.\textsuperscript{253} Until this time, judges themselves assisted the defendant in ensuring a fair trial, acting in a sense as “counsel for the accused.”\textsuperscript{254} The newly permitted defense counsel, however, were only permitted for the limited purpose of examining and cross-examining the prosecution’s witnesses.\textsuperscript{255} Counsel could not comment on evidence or narrate the defendant’s version of the facts. In 1733, they were allowed to sit by the defendants and give them instruction on how to make their defense.\textsuperscript{256} Blackstone noted that by 1769 courts permitted defense counsel to stand by the defendants at the bar and to instruct them as to what questions to ask, or even to ask questions for them, regarding matters of fact.\textsuperscript{257} Defendants were informed that, despite having counsel, they still had to make their own defense.\textsuperscript{258} Nevertheless, increasingly broader permission was granted to counsel to, for example,
state the defendant's defense to the jury. Eventually, defense counsel overcame restrictions placed upon them. Coupled with the adoption by judges of a variety of rules of evidence, "[defense counsel would ultimately end the altercation trial [that is, the direct confrontation between victims and the accused], silence the accused, marginalize the judge, and break up the relationship between the judge and jury.]"

The recognition of the prosecutor's burden, combined with the use of defense counsel to test whether that burden had been met, materially reduced the amount of speaking that the accused had to do in order to defend effectively. As counsel assumed the work of cross-examining prosecution witnesses and examining defense witnesses, the accused was remitted to making a statement after the close of the prosecution case, hence after the strengths and weaknesses of the accusing evidence had been fully disclosed.

Gradually, lawyers' roles expanded beginning in the late eighteenth century so that they could call witnesses to contradict the prosecution's case, make tactical adjustments to silence the defendant, advise defendants to rest their case on evidence so far presented, and advise defendants to remain silent. Soon thereafter judges advised defendants to consult with their lawyers before making any statement during the prosecution case, or in defense; it became "common practice for defense counsel to ghostwrite the defendant's trial statement, further removing the defendant as an informational resource."

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259 Id. at 176.
260 Professor Langbein describes this sixteenth century trial as a "relatively spontaneous bicker between accusers and accused.... Such trials had a formless or wandering quality that resembled ordinary discourse, a conversation of sorts, lacking the crisp division into prosecution and defense case that we now expect." Id. at 259. This form of trial was no longer in practice by the second quarter of the eighteenth century, "during the early decades of lawyerization." Id.
261 Id. at 177.
262 Id. at 261. Beginning in the latter half of the eighteenth century, defendants with attorneys, when asked by the court to reply to the presentation of the prosecution's case, would say "I leave it to my counsel." Id. at 266. A search of the recently created web site containing transcripts of criminal trials at the Old Bailey, the Central Court in London, from 1674 to 1913, reveals 313 references to cases in which a defendant states "I leave it to my counsel." See THE PROCEEDINGS OF THE OLD BAILEY: LONDON'S CENTRAL CRIMINAL COURT, 1674 TO 1913, available at http://www.oldbaileyonline.org/index.jsp.
263 LANGBEIN, supra note 249, at 267.
264 Id. at 268–69. Langbein notes the broader implications of these developments. Not only was the accused's participation in the trial no longer necessary, the defendant no longer played the two roles of defending and informing. Defense counsel had "silenced the accused" and "transformed the very purpose of the criminal trial, recentering the trial on the prosecution rather than the defendant." Id. at 271.
In 1836, reform legislation in England established the right of defendants in felony cases to have legal counsel. Before its passage, the royal commission that was assigned to study the criminal law problems to be addressed in the legislation rejected the view that an innocent defendant could defend himself as well "as a skillful advocate":

[Persons] charged with a crime, though in full possession of all of [their] faculties, must often, from a sense of the disgrace and danger to which [they are] exposed, and from ignorance of the forms of law, conduct [their] defense to great disadvantage. It . . . frequently happens that an innocent person is surprised and confused by false evidence and rendered incapable of making an efficient defense by a forcible exposition of the improbabilities and discrepancies arising on a nice comparison of facts, which may be the only means of discovering the truth and rescuing an innocent [person]. To cope with a false charge so supported calls for the greatest exercise of the skill of the experienced advocate. It can seldom happen that an ordinary defendant can in such a situation possess the coolness and talent requisite for the task.

From this development the rule "became settled that the accused's decision to be heard by counsel precluded him from also making a statement in his own defense . . . 'The defense was entitled to address the jury only once, and so had to choose between a prisoner's statement and a speech from counsel.'"

Most of the defendants through the end of the eighteenth century were unable to afford counsel and were unrepresented. These defendants were "left to fall back upon the assistance of the court as counsel." Judges would cross-examine prosecution witnesses, comment on evidence to support the accused, or "subject the indictment to special scrutiny." However:

[In a system in which only the affluent had defense counsel, court as counsel appears to have degenerated into outright neglect. Withdrawal from the fray—the new model of judicial rectitude—presupposed the provision of counsel, yet the criminal justice system had not been

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265 *Id.* at 272.
266 *Id.* (citing Sergeant Hawkins' defense of the rule against felony defense counsel in the SECOND REPORT FROM HER MAJESTY'S COMMISSIONERS ON CRIMINAL LAW OF 1836).
267 *Id.* at 273 (quoting DAVID J.A. CAIRNS, ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800-1865 118 (1998) (citing English cases)).
268 LANGBEIN, supra note 249, at 314.
269 *Id.* at 315.
270 *Id.* at 316.
organized or funded to supply it.271

The history of criminal procedure in the colonies parallels English practice. As in England, anti-lawyer sentiment in the colonial era prompted a ban on lawyers in the courtroom.272 As Roscoe Pound put it, "Legislation hostile to the practice of law is continuous from substantially the middle of the seventeenth century to the middle of the eighteenth century."273 In some colonies, such as Connecticut and Virginia, the right to "advice of counsel" was recognized as early as 1796.274 The right to self-representation was guaranteed in many colonial charters and declarations of rights, and after the Declaration of Independence, the right—and other rights to make a defense—were adopted in the new state constitutions "in wholesale fashion."275 Some state constitutions, such as those of New Jersey and Georgia, guaranteed an accused the right to be heard pro se and by counsel.276 After the Revolution, "the public was very hostile to England,"277 but after this "period of distrust" of English law in

271 Id. at 318.
272 See WILLIAM SEAGLE, THE HISTORY OF LAW 148 (1946) ("In all centuries in which they have existed lawyers have been unpopular with the common people. Lawyers have not unjustly been regarded by them as their enemies, for in every society the lawyer has tended to be the servant of the dominant class, to help it do as it pleased.").
273 ROSCE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 136 (1953). The Supreme Court in Faretta explained:

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution." Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." In the heat of these sentiments the Constitution was forged.

Faretta v. California, 422 U.S. 806, 826–27 (1975) (footnotes omitted). Roscoe Pound describes four stages in the development of the bar in early America up to the Declaration of Independence: "(1) the attempt to get on without lawyers, (2) the stage of irresponsible filling out of writs by court officials and petitifoggers, (3) the era of admitted practitioners in permanent judicial organizations, and (4) the era of trained lawyers." POUND, supra note 273, at 135.

274 Faretta, 422 U.S. at 828 n.35 (citing H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURTS OF COLONIAL VIRGINIA 67, 89 (1965)).
275 Id. at 829. Where the new states guaranteed the right to counsel through legislation, "they also meticulously preserved the right of the accused to defend himself personally." Id. at 830.
276 Id. at 830 n.38; see supra note 91 (citing Kentucky as another state guaranteeing the right to representation pro se and by counsel.)
277 This was reflected in prohibitions in four states against citation of English decisions. POUND,
the years leading up to the Civil War, courts took the seventeenth century legal materials which "were made over into a common law for America, [and] which became controlling for every state but one . . . ." 278

This historical review indicates that pro se defendants at common law were first permitted what would now be called standby counsel to assist them in testing the prosecution's case against the defendant. 279 Counsel's role expanded gradually over time to include taking additional affirmative action to protect the defendants' rights. Curiously, despite contemporary appointments of standby counsel, in today's system it is only defense counsel who is charged with defending the defendant's rights and testing the prosecution's case, and only the latter's performance is judged for effectiveness.

C. NEW INTERPRETATION OF THE RIGHT TO "ASSISTANCE OF COUNSEL"

If I were to try to draft a dialogue between a hypothetical defendant who desires to represent himself, but also wants "the assistance of counsel" (that is, standby counsel) to illustrate the necessity for a new interpretation of the Sixth Amendment's "Assistance of Counsel" clause, it would not be as good as the real dialogue that took place several years ago in a Kentucky federal district courtroom. 280 The court in United States v. Williams was confronted with a defendant who objected to the Magistrate's prior ruling denying him leave to represent himself; he advised the Magistrate that "he wished to represent himself, but that he would not waive a claim to effective assistance of standby counsel." 281 The Magistrate insisted that his options were to either be represented, or to represent himself—that he had no constitutional right to standby counsel—and thus he could not later claim standby counsel was ineffective. 282

Unfazed, Williams responded, "Well, what I would like to do, Your Honor, is exercise my right to represent myself with Mr. Curtis appointed as standby counsel. And as standby counsel, I expect that Mr. Curtis will fulfill all his obligations, duties, and responsibilities to his client as

supra note 273, at 180–81.

278 Id. at 181, 185. The reference here is to Louisiana, a civil code jurisdiction.

279 Faretta, 422 U.S. at 832.


281 Id. at *1.

282 Id.
required by the *McKaskle* case.\textsuperscript{283}

He confirmed to the court that he would only represent himself with standby counsel.\textsuperscript{284} Before analyzing Williams’ claim, the court cogently restated it:

Williams’ argument rests on what he believes to be a significant distinction between the terms “representation” and “assistance.” He believes that “representation” entails examining witnesses, objecting to evidence, and making motions. However, he believes there is a separate aspect of the attorney-client relationship known as “assistance.” “Assistance,” in Williams’ mind, constitutes being on standby in case he is unable to proceed in his own defense. It also entails advising him on procedural rules and legal matters when necessary or requested. Williams believes that, in order to proceed pro se under *Faretta*, he must waive his right to “representation” but not his right to “assistance.” In other words, Williams maintains that he would like to proceed pro se but nevertheless be guaranteed the effective assistance of his standby counsel. Williams also believes there is a substantive distinction between the term “hybrid representation”—to which he agrees he is not entitled—and the “self-representation with the effective assistance of counsel” that he requests.\textsuperscript{285}

The district court denied the defendant’s objection to the Magistrate’s order denying him leave to proceed pro se on several grounds: (1) his Sixth Amendment waiver was not “unequivocal,”\textsuperscript{286} (2) his right to counsel and to self-representation are mutually exclusive, and (3) a defendant may not logically assert both rights.\textsuperscript{287} The court stated:

In the present case, Williams seeks to avoid this rule by distinguishing “representation” and “assistance.” He admits that he must waive his right to representation, but wants to maintain his right to assistance. The distinction Williams finds is not grounded in the law. The Sixth Amendment guarantees that “the accused shall enjoy the right... to have Assistance of Counsel for his defense.” *It does not provide for two*

\textsuperscript{283} *Id.* The court asked Williams if he understood that, if he waived counsel, “you would not have the same access to legal materials, research, and other resources of that variety, as your counsel would have if you were represented by counsel. Do you understand that?” To which the defendant responded, “No, sir. I disagree with that... Because counsel is required to provide effective assistance to the criminal defendant.” *Id.*

\textsuperscript{284} *Id.* at *2.

\textsuperscript{285} *Id.* The defendant’s position regarding hybrid representation reflects current law, which is criticized in Part II, *infra*, as adding confusion to courts’ understanding of the scope of standby counsel’s role.

\textsuperscript{286} *Id.*

\textsuperscript{287} *Id.* at *3.*
rights: one to representation of counsel and one to assistance of counsel. Therefore, when the Sixth Circuit explains that "when a defendant asserts his right to self-representation, he necessarily waives his right to counsel," . . . the "right to counsel" it discusses is the assistance of counsel. Neither the text of the Sixth Amendment nor any precedent the Court can find has distinguished between representation and assistance of counsel. Consequently, to assert his right to self-representation, Williams must waive his right entire right to counsel, including assistance of counsel.

Further, numerous courts have held that there is no constitutional right to standby counsel . . . This Court fully agrees. If Williams chooses to represent himself, there is no guarantee he will have standby counsel appointed. . . . Therefore, to the extent his waiver relies on such a guarantee, it is not knowingly and intelligently made.288

The court's reasoning is flawed for two reasons. It misinterpreted the Sixth Amendment phrase "Assistance of Counsel" as having only one meaning, namely, full representation, and it simply ignores the words "Assistance of' as if they were not there. Had the phrase been written as "to have Counsel for his defense," then the court would be correct in its interpretation. But it was not. One does not need to be a constitutional textualist to know that the words "Assistance of' must be given their ordinary meaning, and may not be ignored.289 Legal assistance takes many forms, and standby counsel is only one of them. The mere fact that states have uniformly interpreted their obligation under the Sixth Amendment as being satisfied by providing full attorney representation pursuant to Powell v. Alabama290 and Gideon v. Wainright291 does not ipso facto mean that a defendant does not have a right to some other form of "Assistance"

288 Id. at *4 (emphasis added) (citations omitted); see also, United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997). That court stated:

Singleton's final and boldest argument is that the trial court infringed an implied Sixth Amendment right by refusing to appoint him advisory counsel to assist him in self-representation. It would appear that he claims this right as an independent Sixth Amendment right. . . . But, if the right were a constitutional one, the defendant would have a right to make certain that any assistance of counsel that he received was effective—even if the assistance were merely advisory. To institute such a regime, however, would redefine the role of counsel and would put courts in a nearly impossible position for determining what constitutes effective advice. . . . The Constitution does not require such a manipulable and unwise arrangement.

Id. at 1100-02.

289 "It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1 U.S. (1 Cranch) 137, 174 (1803).


short of full representation. The Williams court—reflecting the prevailing view of courts nationwide—erroneously interpreted the Sixth Amendment as establishing an all-or-nothing option for the indigent defendant: either accept full representation, or no assistance at all, coupled with the obligation to comply with the same law, rules, and court protocols as is required of represented defendants. This reasoning forces defendants to choose between accepting full representation by unwanted counsel, or defending oneself with no knowledge of the law, rules of procedure or evidence, or court protocol. Fairness dictates that an indigent defendant dissatisfied with appointed counsel should not be forced into this Hobson’s choice.

Since the Court in Powell, Gideon, and their progeny were unaware of any other form of assistance of counsel other than full representation by a lawyer (and the common law history of the role of counsel), it is not surprising that this standard was set as the means by which the states satisfy their obligations under the Sixth Amendment. Now there is a variety of other forms of assistance for those defendants electing to invoke their constitutional right to self-representation. These include a variety of methods used in Canada, including recognition of a duty of reasonable judicial assistance, duty counsel (volunteer bar members available at all times in the courtroom to advise self-represented litigants), amicus curiae (to act as a liaison between court and the defendant), and a McKenzie Friend (a lay, legal, or financial assistant at the elbow of a self-represented party).

Some may object to the foregoing argument by pointing to the sentence in McKaskle which states that “[a] defendant does not have a constitutional right to choreograph special appearances by counsel.” There are several responses to this objection. Firstly, the statement was made in the context of a case in which the defendant Wiggins objected to excessive interference with his defense by standby counsel. The Court held that, “if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel’s subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel.” The comment regarding choreographing

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292 See supra note 18 and accompanying text (discussing other forms of amici).
295 Id. This is followed by the statement that “Once a pro se defendant invites or agrees to any
“special appearances” by standby counsel seems out of place in the paragraph in which it is found. Defendant Wiggins was complaining about unwanted interference with his defense, and was not choreographing anything. Thus, the comment not only makes no sense in the context in which it appears, it is also obiter dicta.

Secondly, the use of the term “special appearances” seems misplaced because it usually refers to instances in civil cases when a special appearance might be entered by counsel who, for example, was objecting to the jurisdiction of the court. It was used here probably as a reference to standby counsel individually taking action for the benefit of the defendant, presumably with the defendant’s consent or, at least, knowledge. Did the Court mean that standby counsellors could not, at certain junctures in the case, protect their client’s rights by filing a motion, making an objection, or conducting some of the witness examination, while the pro se defendant conducted the remainder of the defense? If that were the case, standby counsel could never be effective, and counsel would indeed be relegated to the status of a proverbial potted plant, limited to giving advice only when asked. Surely, that cannot be the only proper function of standby counsel, whose appointment is designed to protect the defendant’s rights.

Lastly, while Faretta does not in fact require hybrid representation, which is in fact what legal history tells us lawyers did at common law, many state courts permit that form of representation because their state constitution permits it, or because it is a discretionary matter for trial judges. Thus, merely because Faretta does not require hybrid representation does not mean that a pro se defendant cannot request some form of division of labor with respect to making his defense. Thus, the comment in McKaskle regarding the lack of a right to choreograph special substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant’s acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.” Id. However, it has long been held that “[t]he need to file a special appearance in order to object to jurisdiction or venue has vanished. A party can file a general appearance and object to personal jurisdiction or venue at any time before the answer is filed or in the answer.” Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972).

Or perhaps not, if counsel was responding to a potential miscarriage of justice. See supra note 249 and accompanying text. See supra note 276 and accompanying text. See, e.g., United States v. Nivica, 887 F.2d 1110, 1121 (5th Cir. 1989), cert. denied, 494 U.S. 1005; United States v. Lowdermilk, 425 F. App’x 500, 504 (6th Cir. 2011); Locks v. Sumner, 703 F.2d 403, 408 (9th Cir. 1983); Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976).
appearances by counsel cannot be used to justify an expanded role for standby counsel.

D. THE NO-CONSTITUTIONAL-RIGHT—NO-RIGHT-TO-COMPLAIN ARGUMENT

Noted above is many courts’ reliance on Coleman v. Thompson for the proposition that, where there is no constitutional right to standby counsel, there cannot be any claim of ineffectiveness. Coleman is distinguishable because it dealt with a claim of ineffectiveness by standby counsel in a collateral review proceeding, where there was no federal or state law right to appointment of counsel. It should be noted that the Sixth Amendment guarantees the defendants’ right to “the Assistance of Counsel for [their] defense.” So, this phrase, given its literal meaning, supports the recognition of a constitutional right to standby counsel as a form of “assistance” guaranteed to criminal defendants “for their defense” at a trial. The courts which rely upon Coleman, however, also cite the language in Faretta v. California in which the Court stated that a pro se defendant “cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’” Courts refusing to recognize a constitutional right to standby counsel, or effective standby counsel for that matter, have erroneously extended this bar against self-effectiveness claims to claims of standby counsel ineffectiveness.

The language in Faretta barring pro se defendants from later claiming their own ineffectiveness seems like a reasonable condition placed upon defendants who decide to forgo their right to state-paid legal representation. The issue here, of course, is standby counsel’s...

301 See supra note 175 and accompanying text.
303 U.S. CONST. amend. VI. (emphasis added).
304 See supra notes 175 and accompanying text.
305 Faretta v. California, 422 U.S. 806, 834–35 n.46 (1975).
306 Cf. R. v. Ryan, [2012] N.J. No. 55, 2012 NLCA 9. In Ryan, the Newfoundland and Labrador Court of Appeals held, for the first time in Canadian jurisprudence, that a pro se defendant’s judgment of conviction would be reversed because of the pro se defendant’s ineffectiveness. Id. There, the defendant represented himself in a 14-week murder trial resulting in a conviction for second degree murder. Id. at ¶ 2. He sought a new trial based, in part, upon his own ineffectiveness at trial. Id. at ¶ 3. The court cited the Canadian rule, which, like the rule established in Faretta, holds that a pro se defendant may not claim self-ineffectiveness upon being convicted. Id. at 5 (citing R. v. Harris, [2009] SKCA 96, at ¶ 27) (“An accused who decides to proceed absent the assistance of a lawyer cannot, after the fact, attack a conviction on the basis that he or she did not have representation as effective as what might have been
effectiveness, not the defendant’s. What is the reasoning that would lead courts to conclude that, because pro se defendants cannot later complain of self-ineffectiveness, they are also barred from making claims of

provided by counsel... In other words, individuals who decide to represent themselves cannot have their cake and eat it too”). In Ryan, the trial judge found that the defendant was incapable of conducting cross-examination. Id. at ¶ 60-65, had no understanding of consistent or inconsistent statements, Id. at ¶ 66, and understood neither the law concerning admissibility of his statements to the police, nor the issue of references to his prior criminal record. Id. at 69. The judge made the following comments on the issue of whether to declare a mistrial:

If I were to declare a mistrial at this stage because of my belief at least from what has transpired from the cross-examination of [a victim], that he does not have the capability of conducting an effective cross-examination of... this witness, which is crucial to his defence. I’m not certain how the matter will unfold, because he is not required by law to have counsel defend him at a trial. He has a right to [choose] to represent himself. There is no issue put before me as to fitness at this stage, so he has made that decision. Even if a mistrial were declared by me, he may not necessarily get counsel of his own choice, and therefore if the legal aid staff are offered to him again to defend him with respect to a criminal trial, he may well refuse them the second time around, so we’re back into the same situation again of him going through a second trial representing himself.

Id. at 75 (emphasis in original). This was one of several statements made by the trial judge casting doubt on the fairness of defendant’s trial. The Court of Appeals stated:

It is clear from these remarks that the trial judge was of the view that Mr. Ryan needed the services of counsel to enable him to be able to make full answer and defence and could not do without one if he were to receive a fair trial. Nevertheless, she concluded that she should not manage the trial in such a way that he could have legal counsel or stop the trial to enable counsel to be provided. The key considerations were twofold: (i) he chose to put himself in the situation he was in; and (ii) he would be in exactly the same situation in a second trial if a mistrial were to be ordered. Fault and futility were the watchwords. Faced with the choice of proceeding with a trial in circumstances where Mr. Ryan likely could not properly defend himself or stopping the trial in circumstances where Mr. Ryan had chosen not to be represented by counsel (was the author of his own misfortune, so to speak), she opted for the former.

Id. at 77. After reviewing Canadian law regarding the judicial duty to provide pro se defendants with reasonable assistance, and the options available to the trial judge, the Court of Appeals concluded:

In the circumstances, as the trial judge recognized and reiterated on a number of occasions throughout the trial, Mr. Ryan was not receiving a fair trial. I agree that Mr. Ryan’s inability to cross-examine such an important witness as [the victim] effectively, as found by the trial judge; his inability to appreciate and deal with the implications of the admission of some, but not all, of his police statements, which portrayed him as evasive and did not allow the jury to see his denials of culpability; and his difficulties in preparing for trial and cross-examining witnesses due to late disclosure of videotaped statements, rendered the trial unfair and also gave the appearance of unfairness. It did not “satisfy the public interest in getting at the truth while preserving basic procedural fairness” to him... There could not, in the circumstances, be any confidence that the resulting verdict was “a reliable determination of the accused’s guilt or innocence.”... The error of the trial judge in not providing an appropriate remedy, including, if nothing else was appropriate, a mistrial, resulted in Mr. Ryan not receiving a fair trial. Such an error which deprives him of his entitlement to a fair trial constitutes a miscarriage of justice.

Id. at 181 (citations omitted).
ineffectiveness regarding standby counsel’s performance? The Seventh Circuit in *United States v. Windsor* used this argument:

The court knows of no constitutional right to effective assistance of standby counsel. As the word “standby” implies, standby counsel is merely to be available in case the court determines that the defendant is no longer able to represent himself [or herself] or in case the defendant chooses to consult an attorney. A defendant who has elected to represent himself [or herself] 'cannot thereafter complain that the quality of his [or her] own defense amounted to a denial of effective assistance of counsel... But, even if Windsor was entitled to effective assistance throughout the course of these proceedings, the assistance [the defendant] received was not constitutionally deficient.307

The *Windsor* court mischaracterized the role of standby counsel as “merely” being “available” to take over the defense if necessary, rather than being “ready” to take over as *Faretta* requires.308 It then, through a leap in logic, extended the bar against pro se defendants’ self-effectiveness claims to claims of standby counsel ineffectiveness without any explanation.309

Another court used the following reasoning to justify its refusal to consider a standby counsel ineffectiveness claim:

From March 22 through March 25, defendant represented himself. During this time, Gorosh was his standby counsel in reality as well as in name. Because defendant chose to represent himself during this period, he may not now assign blame for his conviction to Gorosh. Further, Gorosh did nothing to interfere with defendant’s right to control the case or to alter the jury’s perception that defendant was representing himself. In short, during this period, Gorosh was not acting as counsel within the meaning of the Sixth Amendment or Const 1963, art 1, § 13 and, therefore, cannot be held to the standards of effective assistance required of trial counsel.310

The court here found standby counsel did not exceed his proper role, but went further and held that he “was not acting as counsel within the meaning of the Sixth Amendment” or the equivalent state constitutional provision.311 The court erroneously concluded that the defendant could not make an ineffectiveness claim (or, as the court put it, “assign blame”)

307 United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992).
308 Id. at 947.
309 Id.
311 Id. at 323.
against standby counsel “because the defendant chose to represent himself,” and that standby counsel is not really “counsel” within the meaning of the Sixth Amendment. Given the role standby counsel is expected to play in protecting the defendant’s rights, the latter conclusion ignores the realities of the legal and ethical forces that require standby counsel to be more than be the proverbial potted plant at trial.

Defendants’ election to self-represent should not estop them from complaining about the ineffectiveness of standby counsel. The logic of a contrary rule could be based on the Faretta language barring the pro se from complaining about the “quality of [their] defense,” a phrase courts interpret broadly to include the defendants’ standby counsel. But defendants do not control standby counsel; they are only able to make requests for assistance under the prevailing view of standby counsel’s role. It is more likely that the extension of the no-constitutional-right, ergo no claim of ineffectiveness rationale, is an unnecessary, punitive measure taken against pro se defendants. Is it a “reminder” (that ineffectiveness claims will be precluded) that is used as part of the Faretta waiver colloquy, which is intended to ensure a voluntary and intelligent waiver of counsel, or a means to prompt defendants to change their minds and accept unwanted counsel?

Research discloses no case in which a court questioned (or explained) the reasoning of decisions extending the prohibition against pro se self-effectiveness claims to standby counsel.

E. DUE PROCESS

For those readers who do not accept the argument that the Sixth Amendment right to the “Assistance of Counsel” guarantees not only full representation but also “assistance” of counsel, alternative support for a constitutional right to effective assistance of standby counsel can be found in the Due Process Clauses in the Fifth and Fourteenth Amendments.

Due process has its origins in the Magna Carta of 1215 A.D., which required that litigants be judged by the “law of the land” and that no one

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312 Id.

313 A similar “reminder” (or, more accurately, a stern warning) appears as a question in a court questionnaire for prospective pro se defendants used in Washington: “Do you realize that while the Court may provide you with an attorney as a legal advisor or standby counsel, you do not have an absolute right to receive this assistance and that you, and not standby counsel, must prepare for trial?” The question clearly misstates the holding in Faretta to the effect that standby counsel must assist when requested to do so, but must also be ready to step into the role of defense counsel should defendant’s pro se status be terminated. See supra note 2 and accompanying text.
be denied their "right or justice."314 The Due Process Clause has been applied innumerable times to the criminal justice process. Whether courts interpret due process independently to a particular set of facts, or determine whether the words encompass some other express right contained in other Amendments (and thereby should be incorporated into the Due Process Clause of the Fourteenth Amendment), the stated purpose is to ensure defendants receive a fair trial.315

Three lines of Supreme Court decisions are relevant to this discussion, namely, cases interpreting the Due Process Clause as requiring a fair trial, cases providing for the right to a meaningful hearing in a meaningful manner where deprivations of life, liberty, or property are at stake, and those which guarantee persons the right of access to courts.

1. Right to Fair Trial

Judges' obligation to ensure trial fairness is grounded in the Due Process Clause. The words "fair trial," however, do not appear in the Constitution or the Bill of Rights.316 Instead, due process has become a

314 See Magna Carta, NAT'L ARCHIVES AND RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/magna_carta/ (last visited January 19, 2015); see also Canadian Charter of Rights and Freedoms § 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.") (emphasis added).


While the text of the due process clause is extremely general, the fact that it appears twice makes clear that it states a central proposition. Historically, the clause reflects the Magna Carta of Great Britain, King John's thirteenth century promise to his noblemen that he would act only in accordance with law ("legality") and that all would receive the ordinary processes (procedures) of law. It also echoes that country's Seventeenth Century struggles for political and legal regularity, and the American colonies' strong insistence during the pre-Revolutionary period on observance of regular legal order. The requirement that government function in accordance with law is, in itself, ample basis for understanding the stress given these words. A commitment to legality is at the heart of all advanced legal systems, and the Due Process Clause often thought to embody that commitment.

The clause also promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is "due" would be unconstitutional.

316 Cf. Canadian Charter of Rights and Freedoms, § 11(d), Part I of the Constitution Act, 1982,
The leading case on the right to fair trial is *In re Murchison*, in which the Supreme Court of the United States found that a system in which a judge would sit as a “one-man grand jury,” find probable cause that a person was guilty of contempt, and then sit as the judge in the same case, denied the defendant due process of law. In the course of that opinion, the Court held that “[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”

That is exactly what occurs when pro se defendants try to make their defense to a criminal charge. If it is not plainly unfair to pit a law defendant against a seasoned prosecutor, what is? This is why appointment of effective standby counsel must be a constitutional right. As the Court previously held, the prosecutor has an overriding interest that “justice shall be done” and that innocence shall not suffer. This interest can be served by appointment of standby counsel in cases in which defendants invoke their right to self-representation.

Recently, in *Indiana v. Edwards*, the Supreme Court of the United States held that trial judges may appoint unwanted defense counsel over the objection of a mentally ill—but not incompetent—pro se defendant. Relevant to the discussion is the following excerpt from that opinion:

> [I]n our view, a right of self-representation at trial will not “affirm the dignity” of a defendant who lacks the mental capacity to conduct his [or her] defense without the assistance of counsel. . . . (“Dignity” and “autonomy” of individual underlie self-representation right). To the contrary, given that defendant’s uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the

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being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (guaranteeing the right of an accused “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”) (emphasis added).


318 *Id.* at 136; see also, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”) (quoting *In re Murchison*, 349 U.S. at 136).


Constitution's criminal law objectives, providing a fair trial. As Justice Brennan put it, "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes. . . . (Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer) . . . ([T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one").

This same reasoning can be applied to the ordinary pro se defendant who lacks any form of legal assistance. A fair trial cannot be had when the disparity in legal knowledge and skill, not to mention resources, between the pro se defendant and the law-trained prosecutor is so great. The same "spectacle" will result when the jury observes such a trial in which no legal assistance is provided to the defendant. One way to cure the unfairness and maintain the "integrity and efficiency of the trial" is appointment of effective standby counsel.

2. Right to Meaningful Hearing in a Meaningful Manner

The criminal trial is an opportunity for the accused to make their defense, and the Supreme Court of the United States has long held that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.

Due process requires that persons "in jeopardy of serious loss [be given] notice of the case against [them] and opportunity to meet it." It is necessary that the procedures be tailored, in the context of the decision to be made, to "the capacities and circumstances of those who are to be heard.

Furthermore:

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.

Pro se defendants are unable to secure their right to a meaningful

321 Id. at 176–77 (emphasis added) (footnotes omitted) (citations omitted).
hearing, that is, a fair trial, if it is not conducted in a meaningful manner. Given the complexity of conducting a criminal defense, to deny a defendant legal assistance in the form requested, whether it be defense counsel or standby counsel, is to deny the right to a meaningful hearing and due process. The right to a fair trial is not meaningful if the manner in which it is conducted includes a denial of—or restrictions upon—standby counsel. The reason is obvious: as argued above, the assistance given by standby counsel to a pro se defendant, regardless of its scope, is a form of "Assistance of Counsel" guaranteed by the Sixth Amendment.

3. Right of Access to Courts

The right of access to courts has been articulated primarily in cases involving prisoner civil litigants. In Smith v. Bounds, the Supreme Court of the United States addressed a prisoner's claim challenging the adequacy of a state prison law library for use in gaining access to court to file civil rights complaints and other original trial court proceedings, as distinguished from appeals. The Court held, are more compelling in the trial context than in the post-conviction context. Concluding its analysis, the Court stated: "We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

Later, in Lewis v. Carey, the Supreme Court of the United States found:

327 Id. at 827–28. The Court noted:
[W]e are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance... in our constitutional scheme" because they directly protect our most valued rights.... While applications for discretionary review need only apprise an appellate court of a case's possible relevance to the development of the law, the prisoner petitions here are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review.

Id. (emphasis added) (citations omitted). That italicized statement supports the conclusion that access to courts via legal research or "advice" has the greatest importance in guaranteeing a "meaningful initial presentation to a trial court," even more so than for post-conviction, discretionary review cases. Id.
328 Id. at 828 (emphasis added).
addressed another claim challenging the adequacy of a state’s prison law library on First, Sixth, and Fourteenth Amendment grounds.\textsuperscript{329} Reversing the Ninth Circuit, which had affirmed the district court’s broad, injunctive order regulating the prison’s library, the Court found the plaintiff class representatives had not met the injury-in-fact requirement for standing, so that the system-wide injunctive relief granted was held invalid.\textsuperscript{330} The Court went on to discuss the issue of the right of meaningful access to courts (as distinguished from the right to a meaningful hearing) in its various forms:

[Regarding the right] to a law library or to legal assistance. . . . Bounds established no such right, any more than Estelle established a right to a prison hospital. The right that Bounds acknowledged was the (already well-established) right of access to the courts. . . . In the cases to which Bounds traced its roots, we had protected that right by prohibiting state prison officials from actively interfering with inmates’ attempts to prepare legal documents, . . . or file them, . . . , and by requiring state courts to waive filing fees, . . . , or transcript fees, . . . , for indigent inmates. Bounds focused on the same entitlement of access to the courts. Although it affirmed a court order requiring North Carolina to make law library facilities available to inmates, it stressed that that was merely “one constitutionally acceptable method to assure meaningful access to the courts,” and that “our decision here. . . . does not foreclose alternative means to achieve that goal.” In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”\textsuperscript{331}

The italicized language in the foregoing passage from \textit{Lewis} indicates that, while there is no right to any particular means of access to courts, law libraries and legal assistance programs are considered measures to ensure prisoner litigants have a reasonable opportunity to present their legal claims. But, prisoners could state a claim for a violation of their right to meaningful access to the courts if they could:

demonstrate that the alleged shortcomings in the library or legal assistance program hindered [their] efforts to pursue a legal claim. [They] might show, for example, that [ ] complaint[s] [they] prepared [were] dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, [they] could not have known. Or that [they] had suffered arguably actionable

\textsuperscript{330} \textit{Id.} at 349.
\textsuperscript{331} \textit{Id.} at 350–51 (citations omitted) (emphasis added).
harm that [they] wished to bring before the courts, but was so stymied by inadequacies of the law library that [they were] unable even to file a complaint.\textsuperscript{332}

Recently, however, in \textit{Kane v. Garcia Espitia}, a state court defendant in a federal habeas corpus proceeding alleged that he had been denied access to the court by restrictions upon his use of the prison law library.\textsuperscript{333} The Supreme Court of the United States held:

A necessary condition for federal habeas relief here is that the state court’s decision be “contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Neither the opinion below, nor any of the appellate cases it relies on, identifies a source in our case law for the law library access right other than \textit{Faretta}.\textsuperscript{334}

The federal appellate courts have split on whether \textit{Faretta}, which establishes a Sixth Amendment right to self-representation, implies a right of the pro se defendant to have access to a law library.\textsuperscript{335} That question cannot be resolved here, however, as it is clear that in this case \textit{Faretta} does not, as § 2254(d)(1) requires, “clearly establis[h]” the law library access right. In fact, \textit{Faretta} says nothing about any specific legal aid that the State owes a pro se criminal defendant. The . . . court below therefore erred in holding, based on \textit{Faretta}, that a violation of a law library access right is a basis for federal habeas relief.\textsuperscript{336}

Inexplicably, the Court in \textit{Kane} referred to a “split” in the federal courts regarding a prisoner’s right to access to a law library (or some other form of reasonable assistance to ensure access to courts), without citing any examples, and it made no reference to the previous \textit{Bounds}, \textit{Smith}, or \textit{Lewis} decisions.\textsuperscript{337} But, even if under \textit{Lewis} the right of prisoners to bring an action regarding denial of access to a law library arises only where such access in fact denies access to the court, the same right to some reasonable form of assistance must apply to pro se defendants incarcerated before trial. They could and should be provided law library access at their jail to prepare for trial, or in the alternative, law students’ assistance. Their Sixth Amendment right to have the “Assistance of Counsel” for their defense should also include standby counsel at trial.

Pro se defendants, who in many cases are also incarcerated like the prisoner plaintiffs in \textit{Lewis}, are involved in original proceedings for which

\textsuperscript{332} \textit{Id.} at 351.


\textsuperscript{334} \textit{Id.} at 10.

\textsuperscript{335} \textit{Id.}
there are no previous transcripts or other legal documents available; they, too, are entitled to meaningful access to courts. Just like prisoner litigants, pro se defendants for whom standby counsel is appointed have a right to "a reasonably adequate opportunity" to present their defense, and may be able to demonstrate that they were convicted because of a "failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, [they] could not have known. Or that [they] . . . [were] so stymied by inadequacies of the law library that he was unable even to file a complaint."336

Standby counsel is certainly one form of the state's "legal assistance facilities" referred to in Lewis that, like prison law libraries or law student assistance programs, is intended as a means of ensuring the right to meaningful access to courts and a fair trial.337 Most importantly, courts should recognize that standby counsel, no less than a law library, could be found to be constitutionally "inadequate."338 Thus, whether standby counsel's alleged neglect or failures are characterized as "inadequacy" or "ineffectiveness," the same denial of meaningful access to courts, or—in the pro se defendant's case—a fair trial occurs.339

337 Standby counsel also fit the "adequate assistance from persons trained in the law" alternative to law libraries noted in Bounds v. Smith. The Court described this category as follows:

Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices.

Bounds v. Smith, 430 U.S. 817, 831 (1977). If prisoner civil rights litigants are constitutionally guaranteed some form of legal assistance through such a variety of programs or access to adequate law libraries, there is no reason why pro se defendants (incarcerated or not) should not be entitled to reasonable assistance in the form of standby counsel.

338 See, e.g., Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986) (holding that unreasonable restrictions on law library use denied prisoners meaningful access to the courts, and "[i]f the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance").

339 The Court in Lewis retrenched from its decision in Bounds by casting doubt on the latter opinion's reference to an affirmative obligation on states to provide reasonable access to courts. First, here is the language from Bounds:

Moreover, our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that in the case indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, . . . and in appeals as of right, . . . The inquiry
F. INTERNATIONAL HUMAN RIGHTS LAW

Several principles in international law associated with the concepts of justice, fairness, and self-representation provide additional support for recognition of a Sixth Amendment right to effective assistance of standby counsel. The unfairness at the outset of a criminal case involving a pro se defendant (who is not an attorney) is obvious: the defendant will have insufficient knowledge of the law, procedures, and protocols (not to mention lacking resources) compared to the prosecution. And, this is in the context of an adversarial justice system, which assumes the legal battle will take place between co-equal parties represented by counsel. The

is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. . . . It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner. . . . It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation. Bounds, 430 U.S. at 824–26. The Court later disavowed the foregoing language from Bounds as follows:

It must be acknowledged that several statements in Bounds went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present. . . . These statements appear to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court. . . . These elaborations upon the right of access to the courts have no antecedent in our pre-Bounds cases, and we now disclaim them. To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.

Lewis, 518 U.S. at 354 (citations omitted) (emphasis added). The meaning of this paragraph is unclear. The statement referred to in Bounds was part of the Court’s justification for ensuring law libraries or other forms of legal assistance are provided to prisoners because of their need to navigate our complex legal system when bringing original actions, such as civil rights cases. The Court was critical of that language because it “appear[s] to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court.” Of course, there is no established right to being an effective self-represented civil litigant, and no civil Gideon either. But there is a right to effective assistance of counsel in criminal cases, as well as the right of self-representation. Therefore, this limiting language in Lewis is inapplicable to the situation of the pro se defendant, who is entitled to “have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

In United States v. Cronic the Court made the following observation:

[T]he adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate” . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to
following principles are invoked to rectify this inherent inequality and unfairness.

1. Right to Fair Trial with Equality of Arms

The right to a fair trial is “by now a universally accepted principle of international law.” It “belongs to the category of customary norms of international law, and [a]rguably the principle is even endowed with the force of a peremptory norm (jus cogens); that is, it may not be derogated from by treaty . . . [which seems] nevertheless warranted by the insistence of all states on the importance of fair and expeditious trials.”

The fair trial right is enshrined in numerous international documents and charters. The United Nations Charter’s Preamble acknowledges and reaffirms the peoples’ “faith in fundamental human rights . . . .” Among those rights enumerated in the Universal Declaration of Human Rights (“UDHR”), adopted by the General assembly in 1948, is the right to “full equality to a fair and public hearing by an independent and impartial tribunal . . . .” UDHR Article 11 states that everyone is entitled to a “public trial at which [they have] had all the guarantees necessary for [their] defence.”

The International Covenant on Civil and Political Rights (“ICCPR”) further provides that “[i]n the determination of any criminal charge against
[them], or of [their] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14(3) states, in relevant part: “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.” Article 14(3) states, in relevant part: “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.”

The European Convention on Human Rights (“ECHR”) also contains, in Article 6, a reference to everyone’s right to a “fair and public hearing” in the determination of criminal charges, and the fair trial guarantee is also found in various international criminal court charters.

The phrases “full equality” or “equality of arms,” referenced in the provisions noted above, have come to be associated with the fair trial guarantee as a result of European Court of Human Rights case law:

It implies that the accused may not be put at a serious procedural disadvantage with respect to the prosecutor. . . . [E]quality of the parties is an essential ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties. Under this approach, it is indispensable for both parties to the proceedings to have the same rights; otherwise, there is no fair fight between the two “contestants,” and the spectators will not be convinced by the outcome.

Former Judge Cassese wrote that, in reference to the first type of equality of arms:

It acquires particular importance in cases concerning international crimes. Since these crimes are complex, may involve multiple defendants, the evidence may be scattered over many countries and the legal issues at stake may prove complicated, it is crucial for the defendant fully to exercise a host of fundamental rights and in particular to be assisted by competent counsel or even a robust team of such

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347 Id. at art. 14(3) (emphasis added).
349 See CASSESE, supra note 341, at 384 (citing the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Art. 21), the International Criminal Court for Rwanda (ICTR) (Art. 20), and the International Criminal Court (ICC) (Articles 64, 66, and 67)).
350 Id.
counsel. 351

As one commentator noted:

[F]airness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it. A trial is not fair if the procedural dice are loaded in favour of one side or the other, if (in the phrase used in the European cases), there is no equality of arms. 352

The equality of arms notion is therefore inherent in the modern, international conception of a fair trial. Its relevance to the context of pro se defendants in federal and state courts is obvious. Given defendants lack of legal knowledge or skills, some form of legal assistance is required. To deprive them of standby counsel is to deny them a fair trial. Discretionary appointment of standby counsel is simply inadequate. Even requiring standby counsel appointment for “complex” or “complicated” cases is insufficient because defendants will be left at the mercy of trial judges’ opinions as to whether their cases rise to that level. The right to effective standby counsel should be extended to all felony defendants, so as to level the playing field. Of course, appointment of standby counsel will not actually do that. Pro se defendants would still not be equal to the prosecution in terms of legal knowledge and skill. But, the imbalance would be slightly corrected, which enhances trial fairness in both fact and appearance.

2. Right to Self-Representation and Legal Assistance

The right to self-representation is also firmly established in human rights law. 353 It is embodied in all relevant international treaties. Under the UDHR, “[e]veryone has the right to recognition everywhere as a person

351 Id. at 385.

352 Tom Bingham, The Rule of Law 90 (2010); see also Geert-Jan Alexander Knoops, The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective, 28 Fordham Int’l L.J. 1566, 1567 (2005) (noting that “equality of arms” requires “that the defense in criminal cases is not unjustly put at a disadvantage compared to the position of the prosecution in terms of time and facilities to prepare its defense case, as well as having access to information material to the case.”) (footnote omitted); Jay Sterling Silver, Equality of Arms and the Adversarial Process: A New Constitutional Right, 1990 Wis. L. Rev. 1007, 1039 (calling for the recognition of a constitutional right to equality of arms, defined as “the procedural rights of each advocate to formulate and present her case”).

before the law."\textsuperscript{354} In addition, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of [their] rights and obligations and of any criminal charge against [them]."\textsuperscript{355} The Declaration then provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which [they have] had all the guarantees necessary for [their] defence."\textsuperscript{356} While the rights to self-representation and counsel are not expressly guaranteed in the UDHR, they are implied from these provisions.

The ICCPR, in contrast, states that persons criminally charged are entitled to certain "minimum guarantees," including the right "[t]o have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing,"\textsuperscript{357} Another such guarantee is the right:

[t]o be tried in [their] presence, and to defend [themselves] in person or through legal assistance of [their] own choosing; to be informed, if [they] does not have legal assistance, of this right; and to have legal assistance assigned to [them], in any case where the interests of justice so require, and without payment by [them] in any such case if [they] do not have sufficient means to pay for it.\textsuperscript{358}

The ECHR provides that every person also has the right "to defend

\textsuperscript{354} UDHR, supra note 344, at art. 6.
\textsuperscript{355} Id. at art. 10.
\textsuperscript{356} Id. at art. 11(1) (emphasis added).
\textsuperscript{357} ICCPR, supra note 346, at art. 14(3)(b).
\textsuperscript{358} Id. at art. 14(3)(d). Former ICTY Judge Wolfgang Schomburg argues that the "or" in the preceding provision should not be read in the disjunctive:

The disjunction of "self-representation or counsel" in Article 14(3)(d) of the ICCPR was never meant to be understood as a dichotomy. Instead, "the right to defence ensures that the accused has an active role in the proceedings, the role of a subject rather than an object." Based on a sound interpretation, the word "or" in Article 14(3)(d) of the ICCPR has to be replaced by the word "and," thus reflecting the proper approach to a holistic understanding of "defence" forming part of the fair trial guarantee.

Wolfgang, Schomburg, The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights, 8 NW. J. INT'L HUMAN RTS. 1, 17 (2009) (footnotes omitted). This interesting comment essentially suggests that standby counsel should have a broad, active role, similar to defense counsel, but one that "ensures the accused has an active role in the proceedings, the role of a subject rather than an object." This comment furthers the notion that the term "hybrid representation" and its negative connotation should be eliminated, and an expanded role for standby counsel should replace the current, restricted role which serves neither the defendant nor the court. The controversy regarding the disjunctive is relevant because most of the other treaties and charters referring to the right of self-representation contains the same or similar language as Article 14(3)(d) of the ICCPR.
[themselves] in person or through legal assistance of his own choosing, or, if [they have] not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.\textsuperscript{359} The American Convention on Human Rights ("ACHR") states that, "[d]uring the proceedings, every person is entitled, with full equality, to the following minimum guarantees," which includes "the right of the accused to defend [themselves] personally or to be assisted by legal counsel of [their] own choosing, and to communicate freely and privately with counsel."\textsuperscript{360}

The major international criminal tribunals' charters and rules also provide for the rights of self-representation and legal representation. For example, the Rome Statute of the International Criminal Court ("ICC") states that it "shall apply equally to all persons without any distinction based on official capacity."\textsuperscript{361} It further provides that the accused has the right "to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it."\textsuperscript{362} The Statute of the International Tribunal for the Former Yugoslavia ("ICTY") also provides for these same rights, using almost the same language: "All persons shall be equal before the International Tribunal"\textsuperscript{363} and the accused "shall be entitled to the following minimum guarantees, in full equality," including:

- to be tried in his [or her] presence, and to defend himself [or herself] in person or through legal assistance of his [or her] own choosing; to be informed, if he [or she] does not have legal assistance, of this right; and to have legal assistance assigned to him [or her], in any case where the interests of justice so require, and without payment by him [or her] in any such case if he [or she] does not have sufficient means to pay for it.\textsuperscript{364}

\textsuperscript{359} ECHR, \textit{supra} note 348, at art. 6(3)(c).
\textsuperscript{361} Rome Statute of the International Criminal Court, Art. 27(1), \textit{available at} \url{http://www.icc-cpi.int/nr/rdonlyres/ea9aef7f7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf}.
\textsuperscript{362} Id. at art. 67(1)(d).
\textsuperscript{364} Id. at art. 21(4)(d); \textit{see also} Statute of the International Criminal Tribunal for the Prosecution of the Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible
While explicit references to a right to standby counsel are not found in the foregoing treaties and charters, it too is now considered an international legal right, according to a recent publication of the Organization for Security and Cooperation in Europe ("OSCE"):  

The two types of representation, self-representation and representation by counsel, are not to be considered mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf, therefore exercising some degree of self-representation while defended by legal counsel.  

The trend in viewing appointment of standby counsel as a form of legal assistance to which pro se defendants are entitled is reflected in international practice. The ICC and other like tribunals have had their share of pro se defendants, and in some of these cases the tribunal has appointed standby counsel to assist them. 

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To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.


See, e.g., Prosecutor v. Milosevich, Case No. IT-02-4-AR73.6 (originating from the International Criminal Tribunal for the former Yugoslavia, on October 2, 1995).

See Schomburg, supra note 358, at 18 (asserting that amicus curiae [another name for standby counsel] can act as a liason between a judge and a pro se defendant). Judge Schomburg illustrates the ICTY's confusion caused by these terms as they relate to the meaning of self-representation by pointing out that: the ICTY's conception of the right to self-representation has undergone several shifts, from an absolute right facilitated by an amicus curiae, to a right facilitated by standby counsel, to a right facilitated by counsel imposed in the interest of justice, to an absolute right to pretend to defend oneself, and finally to a right to pretend to defend oneself while assisted both by counsel behind the scenes and by counsel in court accompanied by an amicus curiae.

Id. at 16. He cites Prosecutor v. Milosevich, Case No. IT-02-54, Order Inviting Designation of Amicus Curiae (August 30, 2011) (Order Concerning Amicus Curiae (January 11, 2002), in which the Trial Chamber order amici curiae to assist the court in its determination of the case, after which the Appeals Chamber "altered their role from friends of the court to friends of a party to the proceedings." Id. at 18 (citing Prosecutor v. Milosevich, Case No. IT-02-4-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defense Case, ¶ 4 (January 20, 2004)). The
The best recitation of the role of standby counsel by an international tribunal is in *Prosecutor v. Norman, et al.*, where the Trial Chamber for the Special Court for Sierra Leone appointed standby counsel for defendant Norman. The defendant, who was granted the right to proceed pro se, submitted a letter to the court requesting that "the Principal Defender . . . contact all members of his ‘defence team,’ national and international, to arrive at the Special Court as soon as possible and to continue assisting him as counsel, namely, ‘counsel in the interest of justice,’ ‘amicus counsel,’ ‘standby counsel’ . . ." In granting the defendant’s request, the court made the following preliminary findings:

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dissenting Judge argued that amicus curiae may not act as counsel for a party, and he (they, in Milosevich's case) were also not intervenors, as is the usual role of amici. The dispute illustrates the confusion resulting from the different definitions of the term amicus curiae. Curiously, Judge Schombug then makes the following comment about this definitional issue, which seems to contradict his earlier suggestion about finding a middle ground between pure self-representation and full representation:

In sum, the misuse of amicus curiae as a kind of mediator between the bench and the accused has proven to be a fundamental mistake. The true purpose of amici curiae is to submit arguments of states or others who do not have standing at trial, but nevertheless want the judges to hear their perspective. Amici curiae cannot serve both as pseudo-counsel for an accused pursuant to Article 14(3)(d) of the ICCPR and as pseudo-assistants to the bench. The conflict of interests in such circumstances is blatantly obvious.

*Id.* at 18 (footnotes omitted). Active standby counsel first advocated by Judge Schomburg earlier in the same article is now being referred to pejoratively as "pseudo-counsel" just because of the different understandings of the meaning of the term amicus curiae. This seems to be raising form over substance, and shouldn’t negate the importance of the concept of expanding legal assistance to other forms short of full representation. Schomburg concludes the section of his article dealing with the meaning of the ICCPR’s right to defend oneself “in person or through legal assistance” by stating:

The overly doctrinal approach to permitting self-representation must yield to the fundamental right to a fair, public, and expeditious trial. Before International Tribunals, assistance of a highly qualified counsel is a must. Nonetheless, the accused’s right to participate actively in the proceedings (that is, to defend himself or herself) must be protected. Joint efforts of accused and counsel are feasible and finally serve best the interests of justice and the accused.

*Id.* at 21 (footnotes omitted) (emphasis added).

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369 See Statute of the Special Court for Sierra Leone, U.N. Doc. S/2002/246, Appendix II, art. 17(4)(d) (Jan. 16 2002), stating that the accused has a right:

[t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

370 Consequential Order, supra note 368, at 7459.
The right to counsel and the right to self-representation do not exclude each other; the right of the Accused to self-representation must be balanced against the right to a fair and expeditious trial; it is in the overall interests of justice to assign a Standby Counsel to assist the Accused, in the exercise of his right to self-representation; Standby Counsel will provide legal assistance to the Accused and ensure the safeguard to his right to a fair and expeditious trial; a counsel-client privilege applies to any communications and correspondence between the Accused and Standby Counsel; Standby Counsel, in providing assistance to the Accused, shall be subject to: the relevant provisions of the Agreement, the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Special Court, the Headquarters agreement, the Code of Professional Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel as provided in Rule 44(B) of the Rules; and, the Accused’s right to self-representation and the appointment of Standby Counsel includes the right of the Accused to obtain legal advice from counsel of his own choosing.\textsuperscript{371}

By these findings, the Court recognized that standby counsel can assist the accused in representing themselves, and ensure they receive a fair trial by providing “legal assistance.” The court also indicated that standby counsel must comply with all statutes, rules, codes, and directives that apply to defense counsel, thus making no distinction between the former and the latter insofar as counsel’s general obligations.

Most interesting for our purposes is the set of enumerated duties assigned by the court in \textit{Norman} to standby counsel. The court ordered that the role of Standby Counsel be strictly defined as follows:

1. To assist the Accused in the exercise of his [or her] right to self-representation;
2. To assist the Accused in the preparation and presentation of his [or her] case during the trial phase, whenever requested to do so by the Accused;
3. To actively guide the Accused through the procedures of the trial in accordance with the Statute and the Rules;
4. To investigate relevant facts and law, identify possible defences and suggest steps to be taken by the Accused;
5. To receive all Court documents, filings and disclosed materials that are received by or sent to the Accused;
6. To be present in the courtroom during the proceedings;

\textsuperscript{371} \textit{Id.} at 7460–61 (footnote omitted).
(7) To offer legal advice to the Accused;

(8) To address the Court whenever requested to do so by the Accused or by the Trial Chamber;

(9) To put questions to witnesses on behalf of the Accused if called upon to do so by the Trial Chamber, in particular to sensitive or protected witnesses, or in the event of abusive conduct by the Accused, without depriving the Accused of his right to control the content of the examination;

(10) To be actively engaged in the substantive preparation of the case and to participate in the proceedings, and to be prepared to take over representation of the Accused should the Accused engage in disruptive conduct or conduct requiring his removal from the courtroom . . . ;

(11) To assemble and present information relevant to all the stages of the proceedings; [and]

(12) To refrain from conduct that may directly or indirectly impact adversely on the exercise of the Accused’s right of self representation. 372

The role of standby counsel under this Order is exceedingly broad. Standby counsel is not only required to assist the accused when requested to do so, but must also actively guide the accused through trial procedures, conduct an investigation of the law and the facts, and suggest steps to be taken. 373 Additional duties set forth include addressing the court when the defendant or the court so requests, questioning witnesses at the request of the court, being actively engaged in the substantive preparation of the case, participating in the proceedings, being prepared to take over representation of the accused, and assembling and presenting relevant information to the court at any stage of the proceedings. 374 Are there any other duties that ordinary defense counsel would perform? This comprehensive set of duties is consistent with the role standby counsel should have in all cases, namely, that counsel—with minor deviation—should engage in almost all duties required of defense counsel.

G. JUSTICE MUST NOT ONLY BE DONE, IT MUST BE SEEN TO BE DONE

Most courts refuse to provide pro se defendants with any form of assistance, relying on the language in McKaskle stating that the defendant "does not have a constitutional right to receive personal instruction from

372 Id. at 7461–62
373 Id.
374 Id.
the trial judge on courtroom procedure."375 "Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course."376 Courts must make sure that these defendants have knowingly and intelligently waived their right to representation by counsel by making a record that will establish that such defendants "know[ ] what [they] are doing and [their] choice is made with eyes open."377

But, it will be obvious to any third party observer that pro se defendants have no legal skills or training, and are ill equipped to defend themselves against a prosecutor. While some defendants have had experience in the criminal justice system and may be able to hold their own in a courtroom, others, especially defendants with any kind of mental condition, will be viewed as making a "spectacle" of themselves in defending against the government's case.378 The perception of a pro se defendant floundering in the course of a criminal trial without assistance would be disturbing. Would the sight of standby counsel silently sitting next to the defendant, offering no affirmative assistance, and speaking only when spoken to, be any less of a spectacle than defendants being totally on their own? In both cases an observer would wonder how justice is served when the parties are of such unequal strength and competence, and an attorney sitting next to the defendant is doing nothing to protect the defendant's rights.

Thus, this situation is one to which the principle that "justice must not only be done, but seen to be done" applies. This common law principle can be traced to the English case of Rex v. Sussex Justices, in which no injustice actually occurred, but the conviction was reversed nevertheless because the proceedings left an impression that there was an interference with the course of justice.379 Lord Hewart, C.J., author of the opinion, wrote: "[I]t is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done."380


376 Id. at 184.


378 Indiana v. Edwards, 554 U.S. 164, 176 (2008); see supra notes 320-21 and accompanying text (discussing the rationale of Edwards, which upheld the appointment of unwanted counsel to a mentally ill but competent pro se defendant to avoid the appearance of an unfair trial resulting from the "spectacle" that may otherwise result).


380 Id.
This principle has been applied by American courts as well: when a party in a planning commission’s zoning hearing was not permitted to cross-examine experts for the adverse party, the Washington Supreme Court held that “[i]t is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.”

The author of the concurring opinion wrote:

In my judgment, no less than the highest standards of due process must be demanded of local legislative bodies in the formulation and the implementation of zoning determinations. In making such determinations, in other words, justice not only must be done; justice must be seen to be done.

Applying this principle to the case of a pro se defendant who is given no assistance at trial, it is highly probable that a third-party observer would not perceive justice in the proceedings. Nor would a third party observer see justice in a trial in which an attorney has been appointed merely to stand by and answer questions, even assuming—as we cannot—the defendant knows what questions to ask. This lack of an appearance of justice for a defendant who is exercising a constitutional right of self-representation militates in favor of requiring standby counsel to actively assist the defendant in navigating the labyrinth of criminal procedure.

381 Chrobuck v. Snohomish County, 480 P.2d 489, 496 (Wash. 1971) (en banc).
382 Id. at 498 (emphasis added); see also, Blair v. Harris, 45 P.3d 798, 809 (Haw. 2002) ([T]he principal purpose of the argument before the [United States Supreme Court] Justices is . . . to communicate to the country that the Court has given each side an open opportunity to be heard [and, thus,] not only is justice done, but it is publicly seen to be done . . . . This consideration—that justice should be always seen to be done—is applicable to all appellate courts.”); In re James, 821 N.W.2d 144, 156 (Mich. 2012) (“A cloud of witnesses testify that ‘justice must not only be done, it must seem to be done.’ Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.”) (citing In re Del Rio, 256 N.W.2d 727, 753 (Mich. 1977)); State v. Howard, 883 N.E.2d 1077, 1092 (Ohio App. 2007) (“I agree with the majority that justice must not only be done, it must seem to be done.”) (Donovan, J., concurring in part and dissenting in part); State v. Koch, 730 A.2d 577, 582 (Vt. 1999) (same).
VI. PROFESSIONAL STANDARDS AND ETHICAL DUTIES

A. PROFESSIONAL STANDARDS

1. ABA Standards for Criminal Justice

The ABA’s Standards for Criminal Justice, The Prosecution and the Defense Function, includes Standard 4-3.9, entitled Obligations of Hybrid and Standby Counsel. This standard provides:

(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 [them], 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.

Interestingly, this standard uses the terms hybrid and standby counsel in its title without distinguishing them, but neither term is used again in the black-letter text; instead, the term defense counsel is used. Apparently, little if any thought was given by the drafters to how the common meaning of “defense counsel” would add to the already-existing confusion about the role of standby counsel. The standard does distinguish between those defense counsel whose role is to actively assist the pro se defendant from one whose duty is to assist only when the accused requests assistance. The former’s active involvement is limited by the pro se defendant’s right to make the final decision on all matters involving strategy and tactics in the conduct of the case. The latter’s duty is to assist, and is not limited by what the pro se defendant requests; assisting counsel additionally “may bring to the attention of the accused matters beneficial to [them] . . . .”

383 The distinction between professional and ethical standards is somewhat artificial, because the professional standards discussed here are in some cases couched in terms of ethical obligations, or duties. The first standard examined is a good example, where it distinguishes between hybrid or standby counsel having a “duty” to actively assist a pro se defendant, and whose “duty” it is to render passive assistance, that is, only when requested.


385 Id.

386 Id.
But, counsel "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." 387

The principle problem with this distinction is that the drafters of the standard do not articulate the responsibilities and duties, that is, the role to be played, by either of these types of standby counsel. As noted above, 388 the role of standby counsel currently depends on many factors, and case law has provided little clear guidance on the question of the expected constitutional and ethical role of standby counsel.

Moreover, the distinction created raises many questions; for example, what if counsel in the first category—charged with actively assisting the pro se defendant without being requested to do so—is in fact asked by the defendant to assist in various ways? Does that place counsel in the second category? And what is the effect of that change vis a vis the issue of effectiveness of counsel? Do actively participating counsel have different obligations than counsel playing the assist-only-upon-request role? Does one kind of standby counsel have a duty to protect the defendant's rights and interests, while the other kind does not? Do these two types of standby counsel differ in the extent of the ethical duties they owe their client? And, is one type subject to effectiveness review, while the other is not?

The almost uniform prohibition upon hybrid representation in state and federal courts is premised upon the view that an almost co-equal relationship between defendant and counsel raises the possibility of jury confusion, or distorts or defeats the message the defendant wants to convey. 389 This view was stated in McKaskle v. Wiggins, where the Court

387 Id.
388 Id.
389 Professors LaFave and Israel note the following additional rationale for a prohibition upon hybrid representation:

Courts also characterize hybrid representation as a vehicle that will be utilized by the defendant to present what, in effect, will be an unsworn statement to the jury. The right of the defendant to make an unsworn statement was abolished during the nineteenth century when the common law rule of disqualification was rejected and defendants were held to be competent witnesses. Although a defendant acting as his own counsel can be restricted in his comments in much the same way as an attorney, it is difficult to keep those comments from taking on at least some of the character of an unsworn statement. That defendants are interested in achieving exactly this effect is evidenced by the fact that defendants utilizing hybrid representation commonly present their own closing argument. Where a defendant’s opposition to a lawyer’s assistance is so strong that he insists upon proceeding pro se, that interest outweighs the concern that he will utilize his self-representation in this fashion. The defendant requesting hybrid representation, however, acknowledges his willingness to rely on counsel’s services, and here, it is argued, the trial court’s concern that the defendant will use his
held that, "[i]f standby counsel's participation over defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded."\textsuperscript{390} This comment makes sense if a pro se defendant opposes standby counsel's participation, but would be irrelevant if counsel and the defendant have a good working relationship as far as presentation of the defense. In \textit{McKaskle}, the defendant and standby counsel did not.

More importantly, the defendant Wiggins had not requested the assistance he received. His lawyer acted in his interests, but obviously did not consult with his client sufficiently to see what he thought about what he (counsel) wanted to do. As has been noted:

\textit{Faretta} does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury... complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.\textsuperscript{391}

Courts, which have used \textit{McKaskle} as precedent for barring hybrid counsel in any form, should revisit the issue and permit hybrid representation (or "active" standby counsel) as a form of "Assistance of Counsel" guaranteed by the Sixth Amendment.

The ABA \textit{Standards for Criminal Justice: Special Functions of the Trial Judge} also has a standard applicable to appointment of standby counsel as a "guise [for presenting] an unsworn statement" should be sufficient to deny that form of representation.


\textsuperscript{390} \textit{McKaskle} v. Wiggins, 465 U.S. 168, 178 (1984) (emphasis added). Unfortunately, there is no uniform measure of the level of assistance that constitutes co-equal or almost co-equal representation. What kind of definition what it look like? Would it be a list of actions standby counsel takes during both pretrial and trial phases of a defense? How many activities go into being a standby counsel? How is each activity defined, or even measured? There is neither a uniform definition of the role of standby counsel, nor hybrid counsel, so neither can really be measured.

\textsuperscript{391} \textit{Id.} at 183.
Standard § 6-3.7 states:

(a) 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. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in trials expected to be long or complicated or in which there are multiple defendants, and in any case in which a severe sentence might be imposed.

(b) The trial judge should clearly notify both the defendant and standby counsel of their respective roles and duties.

(c) When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.393

Several features of this standard are worth noting. First, paragraph (a) recommends appointment of standby counsel in capital cases, cases in life imprisonment without parole is possible, for long trials, complicated trials, multiple defendant cases, and cases where a severe sentence is possible. This is a fairly broad category of cases, and future research is needed to determine the extent to which standby counsel are in fact appointed in these types of cases.

Second, paragraph (b) requires judges to clearly notify the defendant and standby counsel of their respective roles and duties. As indicated by the case law described above, trial judges typically provide very general, non-specific directives to pro se defendants and appointed standby counsel regarding the latter’s role and duties.394 There is no source for judges to consult regarding the specific duties standby counsel should have in any given case, and the McKaskle duties of being available to respond to specific defendant requests, and to be ready to take over the defense of the defendant’s pro se status if terminated, is very general and, as I have

393 Id.
394 Id.
argued, contradictory.

Third, paragraph (c) seems to adopt the dichotomous roles for standby counsel articulated in aforementioned Standard 4-3.9 for defense counsel, namely, the passive, assist-upon request-only role, versus the active role. This classification, as argued above, is vague and does not give clear guidance to standby counsel regarding their proper role. Therefore, Standard 6-3.7 for judges does not add any more clarity to our understanding of the proper role of standby counsel than does Standard 4-3.9.395

2. NCCUSL Uniform Rules of Criminal Procedure

The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), in Rule 711 of its Uniform Rules of Criminal Procedure, discusses both defense and standby counsel. It states that a defendant “does not waive the right to legal counsel at any stage of the proceedings . . . unless the court at that stage accepts a waiver of counsel.”396 The waiver colloquy suggested includes advising the defendant that the defense lawyer:

- can render important assistance in determining the existence of possible defenses to the charge and in preparing for and representing a defendant at trial or, in the event of a plea, in consulting with the prosecuting attorney as to the possible reduced charges or lesser penalties, and in

395 Interestingly, the early draft of the judges' standard regarding standby counsel provides as follows:

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 own motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

See Standards Relating to the Function of the Trial Judge, Recommended by the Advisory Committee on the Judge's Function, American Bar Association Project for Criminal Justice, § 6.7 (Standby Counsel for Defendant Representing Himself) (Tentative Draft of April 21, 1972, as approved by the House of Delegates, July 1971). It appears that the italicized language in this draft of the judges' standard was taken from the defense lawyers' Standard 4-3.9, which describes the duties of the upon-request-only type of standby counsel. See STANDARD FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard § 4-3.9. One could argue that the quoted language should apply to both active and passive designations. Yet, there appears to be no rationale for imposing this obligation on passive, advisory counsel. This seems counter-intuitive, in that active standby counsel is more likely to engage in communications with the court when necessary to protect the defendant’s interests, and would benefit from such express authority in professional guidelines.

396 UNIF. R. CRIM. PRO., ART. VII, PT. 1, R. 711(a).
presenting to the court matters that might lead to a lesser penalty.\textsuperscript{397}

This language affirms the importance of legal assistance, and provides that the right to counsel may be invoked at any stage of the proceedings if first waived.

Paragraph (b) of Rule 711 provides that, in the case of a felony, the court "shall refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel."\textsuperscript{398} Accordingly, in this context, information—not action—is expected of counsel before and during the \textit{Faretta} colloquy. The commentary to this paragraph notes that, "[t]he consulting lawyer’s role may be quite limited; essentially it is to make sure that the defendant fully understands the consequences of electing to proceed without counsel."\textsuperscript{399} This limited, "consulting" role of a lawyer appointed to advise defendants regarding their decision to represent themselves is akin to what other courts refer to as advisory counsel. Even where standby counsel is appointed for this limited role, he or she could fail in their advisement role in various ways, and therefore should be required to possess reasonable competence and skill, and be effective, as is required of defense counsel.\textsuperscript{400}

Finally, Rule 711(c) provides that:

Notwithstanding acceptance of a waiver, the court may appoint standby counsel to assist when called upon by the defendant, to call the court’s attentions to matters favorable to the defendant upon which the court should rule on its own motion, and if it becomes necessary for a fair trial, to conduct the defense.\textsuperscript{401}

A second reference to standby counsel is in a comment on the next paragraph of the rule concerning incompetence to waive counsel. It provides:

If, after hearing, the court determines that the defendant is competent to waive counsel and to represent himself or herself, the court should proceed with the cause. The court in any such case should consider the appointment of standby counsel . . . to assist the defendant or, if it should prove necessary, to assume the representation.\textsuperscript{402}

The aforementioned statements contemplate a much broader role for

\textsuperscript{397} \textit{Id.} at R. 711(a)(2).
\textsuperscript{398} \textit{Id.} at R. 711(b).
\textsuperscript{399} \textit{Id.} at cmt.
\textsuperscript{400} \textit{See infra} notes 401–03 and accompanying text.
\textsuperscript{401} \textit{See supra} note 400.
\textsuperscript{402} \textit{Id.}
standby counsel than that contemplated by the ABA Standards. Rule 711(c) also includes the duty not only of responding to the defendant’s specific requests, but authorizes counsel to affirmatively bring “matters favorable to the defendant” to the court’s attention, and to take over the role of defense counsel “if it becomes necessary for a fair trial.” Both the breadth of standby counsel’s contemplated role and the expectation that counsel would be bringing matters favorable to the defendant to the court’s attention differ from the ABA requirement which limits counsel’s role to informing the defendant of any favorable matters. There is no reason why standby counsel should not have the same duty as defense counsel to bring such matters to both the defendant’s and the court’s attention, when necessary.

As with the ABA Standard, the broader role of standby counsel contemplated under Rule 711 is not expressly defined in either the rule or its accompanying commentaries. Rule 711, on the one hand, limits the role of standby counsel to assisting upon request of the defendant and bringing matters favorable to the defendant to the court’s attention. On the other hand, it expects counsel to be ready to take over the representation if the defendant’s pro se status is terminated, as required by Faretta. Standby counsel, pro se defendants, and trial judges need much greater guidance regarding counsel’s role and responsibilities than articulated in Rule 711.

3. ALI Restatement of the Law Governing Lawyers

The American Law Institute’s Restatement of the Law Governing Lawyers (Third) contains no reference to standby counsel. Nor does it make any distinction between lawyers in civil and criminal cases. It does, however, contain a number of references to lawyers’ duties to their clients relevant to standby counsel. One provision lists a number of such duties that are said to apply “[t]o the extent consistent with the lawyer’s other legal duties and subject to the other provisions of this Restatement, . . . , in matters within the scope of the representation.” Most relevant here are the following duties: to (1) proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation; and (2) act with reasonable competence and diligence.

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403 Id.
404 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2000).
405 Id. at § 16; see infra notes 406–24, and accompanying text (discussing the scope of representation issue).
406 Id.
While the references limiting the duties enumerated are qualified by the phrase "within the scope of representation," the difficulty in the standby counsel context is the problem of specification of counsel's role.\(^{407}\) From the defendants' point of view, the scope of representation—regardless of how standby counsel's role is defined in an appointment order—is to provide whatever assistance is possible to the defendants in their efforts to defend against the crimes charged. The phrase therefore, seems more applicable to civil cases, where there may be multiple objectives. The duties set forth, therefore, in standby counsel's case would be to do that which is reasonably calculated to advance the client's lawful objectives, using reasonable competence and diligence. These are affirmative duties that would therefore not be qualified or limited by the reference to the "scope of representation" when applied in the criminal context.

Comment (b) to § 16 adds that "A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."\(^{408}\) The comment goes on to state: "[A]dequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help... Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals."\(^{409}\) This comment indicates that lawyers, as fiduciaries, have duties of competence, diligence, and loyalty, that they must provide adequate representation to clients who are often unable either to know or secure their rights without a lawyer's help, and that they are therefore required to protect their client's interests with competence, diligence, and loyalty. Considering the criminal context and the duties of standby counsel, all of these obligations appear to be applicable.

Comment (c), regarding the goals of the representation, states: "The lawyer's efforts in a representation must be for the benefit of the client."\(^{410}\) It further states:

The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act... The lawyer must

\(^{407}\) See supra notes 386–406 and accompanying text.

\(^{408}\) Id. at cmt. (b).

\(^{409}\) Id.

\(^{410}\) Id. at cmt (c) (cross-references omitted).
keep the client informed and consult with the client as is reasonably appropriate to learn the client’s decisions... and must follow a client’s instructions.

The lawyer’s duties are ordinarily limited to matters covered by the representation. Ordinarily the lawyer may not act beyond the scope of contemplated representation without additional authorization from the client.

The goal to be pursued in the defense of any criminal case is a verdict of not guilty, or, at a minimum, an effective defense. If those goals are a measure of the scope of the representation, standby counsel under this comment is obligated to keep the client informed, consult with the client “as is reasonably appropriate to learn the client’s decisions,” and to follow the client’s instructions. All of these are possible, and required, of standby counsel.

Additional duties standby counsel have under the Restatement are set forth in § 21, entitled “Allocating the Authority to Decide Between a Client and a Lawyer.” There, the section requires that “[a] client and lawyer may agree which of them will make specified decisions,” and “[a] client may instruct a lawyer during the representation.” The rationale for these provisions states:

Allocation of authority between client and lawyer can influence both the outcome of a representation and the balances of power and respect within it. What allocation of authority a client desires may vary from client to client, from lawyer to lawyer, from case to case, and from issue to issue.

The lawyer begins with broad authority to make choices advancing the client’s interests. But the client may limit the lawyer’s authority by contract or instructions. The lawyer or the client may insist at the outset of the representation on an agreement defining the lawyer’s authority. The lawyer is also protected if the client ratifies the lawyer’s unauthorized act. Ideally, clients and lawyers will discuss decision making authority, making allocations that both understand and approve.

While probably written with the civil context in mind, this comment would appear to be consistent with the admonitions in *McKaskle* v.

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411 *Id.* (cross-references omitted).
412 *Id.* (cross-references omitted).
413 *Id.* § 21(1) (regarding Allocating the Authority to Decide Between a Client and a Lawyer).
414 *Id.* § 21(2).
415 *Id.* at cmt. (b) (Rationale) (cross-references omitted).
Wiggins to the effect that pro se defendants have full control over the extent to which standby counsel participates in their trial.\textsuperscript{416} Standby counsel has the expanded duties set forth in the Restatement, but these are indeed qualified by the defendant’s instructions. If a defendant does not wish standby counsel to do certain things, then counsel would be well advised to make a record of such limiting instructions, and allow the pro se defendants to proceed as they will.\textsuperscript{417}

Finally, § 23, entitled “Authority Reserved to a Lawyer,” provides in relevant part that in certain circumstances “a lawyer retains authority that may not be overridden by a contract with or an instruction from the client.”\textsuperscript{418} In addition to the lawyer’s right to refuse to undertake actions reasonably believed to be illegal,\textsuperscript{419} the lawyer may “make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal.”\textsuperscript{420} This provision gives standby counsellors wide latitude to do whatever they believe to be in their client’s best interests and lends further support to the argument made here to expand their role and responsibilities.

This review of the ABA, the NCCUSL, and the ALI standards for performance of standby counsel reveals that they provide scant guidance to counsel, pro se defendants, or courts regarding standby counsel’s role and responsibilities. The ABA and NCCUSL attempt to track the Faretta description of the role of standby counsel as being both an advisor to pro se clients when they request assistance, and also one who has to be ready to convert their role to defense counsel when necessary. One difference is

\textsuperscript{416} See \textit{supra} notes 36–41 and accompanying text.

\textsuperscript{417} \textit{RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS}, § 21 cmt. (e) (emphasis added). Comment (e) to § 21 addresses the problem of communicating with counsel when it is impossible to do so, such as in the middle of a hearing:

\begin{quote}
A lawyer often must make a decision without sufficient time to consult with the client. During a hearing, for example, a decision must be made whether to object to another party’s question, probe further answers of a witness, or seek a curative instruction. Such matters often involve technical legal and strategic considerations difficult for a client to assess. Sometimes a lawyer cannot reach a client within the time during which a decision must be made. \textit{In the absence of a contrary agreement or instruction, lawyers have authority to make such decisions}. Generally, in making such decisions, the lawyer properly takes into account moral considerations and appropriate courtroom and professional decorum.
\end{quote}

\textit{Id.} (emphasis added). The italicized language therefore gives standby counsel the authority to act in the midst of a hearing to protect their client’s interests, without the necessity of prior consultation.

\textsuperscript{418} \textit{Id.} § 23 (regarding the Authority Reserved to a Lawyer).

\textsuperscript{419} \textit{Id.} § 1.

\textsuperscript{420} \textit{Id.} § 2.
the authority under NCCUSL Rule 711 to bring matters favorable to the
defendant to the court’s attention, rather than just the defendant’s as the
ABA standard provides.\footnote{Compare National Conference of Commissioners on Uniform State Laws, Uniform Rules of
Criminal Procedure, Art. VII, Pt. 1, Rule 711(a), with \textit{Model Rules of Prof’l Conduct R.}
2.1 (1983) (Amended 2002). Even if these professional standards were clear and detailed in so
far as the expected role of standby counsel as being one similar to defense counsel, and therefore
with the same competency expectations, they would not persuade the Supreme Court. \textit{Jones v.}
Barnes, 463 U.S. 745, 753 n.6 (1983) (“In any event, the fact that the ABA may have chosen to
recognize a given practice as desirable or appropriate does not mean that that practice is
required by the Constitution.”).}

The ALI Restatement, however, provides ample support for the
proposition that standby counsel have multiple professional obligations as
lawyers with respect to their pro se clients in criminal matters. These
obligations require a broader and more in-depth role than contemplated by
the Court in \textit{Faretta}, \textit{McKaskle}, or either the ABA or NCCUSL standards.
They cast doubt on the Supreme Court’s view of standby counsel’s role as
a passive provider of information only upon the defendant’s request. The
Restatement also clarifies the Court’s second view of the role of standby
counsel, namely, to be ready to step into the defense counsel role in the
event it becomes necessary to do so, by reciting counsel’s obligations up
to that potential juncture in a criminal trial.\footnote{Restatement (Third) of Law Governing Lawyers § 16 cmt. C (2000).}

\section{B. Ethical Duties}

\subsection*{1. Judicial Obligation to Ensure Fair Trial}

groups/professional_responsibility/publications/model_code_of_judicial_conduct.html, (last
visited April 19, 2014) [hereinafter MCJC].} contains
no judicial obligation to ensure a fair trial, as such. The code does,
however, require a number of other ethical obligations which in their
totality would ensure a fair trial.\footnote{See infra text accompanying notes 433–39.}
Thus, the Preamble of the Code states
that “the judiciary plays a central role in preserving the principles of
justice and the rule of law.”\footnote{\textit{Id.} at Preamble, \S 1.} Judges are obligated to promote public
confidence in the courts: “A judge shall act at all times in a manner that
promotes public confidence in the independence, integrity, and
impartiality of the judiciary, and shall avoid impropriety and the
appearance of impropriety." 426

Under another rule, judges must "uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." 427 Several years ago a comment was added to the preceding rule: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." 428 This gave judges the authority to provide reasonable accommodations to a pro se litigant, and to do so is explicitly not grounds for disqualification for apparent bias. Time will tell how judges interpret this language, that is, whether they will take it to mean that judges themselves may provide some assistance to pro se parties, as they do in Canada, 429 or whether the phrase "reasonable accommodations" will be interpreted to mean that other means such as appointment of standby counsel are permissible.

Elements of a fair trial are also derived from the MCJC rule which states "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." 430 A comment to this rule states, "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." 431

Thus, a trial judge under the MCJC must preserve justice and the rule of law, must act impartially, must uphold and apply the law, may make reasonable accommodations for pro se litigants so as to ensure that they have an opportunity to have their cases fairly heard, and must protect all persons' right to be fairly heard. 432 These obligations, considered in the context of a pro se criminal defendant, provide ample justification, not merely for a discretionary authority to appoint standby counsel, but for

426 Id. r. 1.2: Promoting Confidence in the Judiciary; r. 1.2 cmt. 4 ("Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.") (emphasis added).
427 Id. r. 2.2: Impartiality and Fairness.
428 Id. r. 1.2 cmt. 4.
429 See Jona Goldschmidt, Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience, 17 MICH. ST. J. INT'L LAW 601 (2008-09) (describing the Canadian judicial duty to provide reasonable assistance to self-represented litigants and defendants, and giving examples from Canadian case law of required, permissible, and impermissible forms of assistance).
430 MCJC 2.6(A) (2011).
431 Id. r. 2.6 cmt. 1.
432 See supra text accompanying notes 427–31.
making such appointment a matter of right.

2. Legal Ethics

The ABA Model Rules of Professional Conduct ("MRPC") contains numerous ethical obligations for lawyers. For the most part, especially with respect to the ethical obligations set forth in the preamble, no distinction is made between lawyers who provide full representation, limited-scope representation, or standby counsel. The preamble provides

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433 MODEL RULES OF PROFESSIONAL CONDUCT (1983) (Amended 2002) [hereinafter MRPC], available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. (last visited February 21, 2015). I am not the first to advocate a right to effective standby counsel with an expanded role, based in part on legal ethics obligations. See Ann Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, 75 N.Y.U. L. REV. 676, 678-79 (2000) (arguing that "standby counsel's role should be strengthened and more clearly delineated," and courts should expand their role to preparing their 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."). On ethics, Professor Poulin writes:

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 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.

Id. at 735-36.

434 Standby counsel is not exempted from the MRPC; they are much like lawyers offering limited scope representation under MRPC, Rule 1.2. It could be argued that lawyers who provide unbundled legal services are analogous to standby counsel. But the two roles are distinguishable. Standby counsel is working on a criminal case where life or liberty are at stake, in contrast to the legal ghostwriter, for example, who aids a pro se plaintiff in drafting a complaint to, say, recover a debt. In addition to the difference in the gravity of the cases, the work of standby counsel and the civil lawyer are substantially and qualitatively different. Standby counsel has court attendance obligations, where limited scope lawyers rarely do. But, what if someone suggested the idea of unbundled legal services in criminal cases? Most people would find the idea ludicrous, given the seriousness of criminal cases, and the necessity of having effective counsel as a representative or assistant during the entire proceedings. Yet, that is exactly the view courts currently have of standby counsel. That is, counsel are assigned specific, limited duties that they must not go beyond, and if they do exceed those parameters, they may—under Fareira and McKaskle—be subject to a claim of excessive interference with the pro se defendant's defense. However, as I argue herein, standby counsel’s role must be re-conceptualized and become a broader one, similar to that of defense counsel, because they must be ready to take over the defense; they are akin to the theatrical understudy who must be ready to stand in for one of the main actors, or a standby passenger at an airport who is ready to take
that lawyers are not only representatives of their clients; each lawyer is considered to be "an officer of the legal system and a public citizen having special responsibility for the quality of justice." In addition, lawyers are considered to have four different "functions": they are (1) an advisor who provides clients with an informed understanding of their legal rights and obligations, and explains their practical implications to them; (2) an advocate who "zealously asserts the client's position under the rules of the adversary system"; (3) a negotiator who seeks "a result advantageous to the client but consistent with the requirements of honest dealings with others"; and (4) an evaluator who "acts by examining a client's legal affairs and reporting about them to the client or others." As a public citizen, lawyers should also "seek improvement of the law, access to the legal system, the administration of justice and the quality of services rendered by the legal profession," and "should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." The lawyer's obligation is "zealously to protect and pursue a client's legitimate interests...." Some duties exist before a client-lawyer relationship has been established, including the duty of confidentiality, which attaches "when the lawyer agrees to consider whether a client-lawyer relationship shall be established."

These principles apply to standby counsel as well as defense counsel. Noteworthy is every lawyer's obligation to improve access to the legal system and equal access to our system of justice. That is essentially why standby counsel are appointed, to assist the pro se defendants (who are precisely "those who because of economic or social barriers cannot afford or secure adequate legal counsel") to exercise their constitutional right of self-representation, and to assist the court—as an officer of the legal system—to ensure a fair and orderly trial.

Under the MRPC any disciplinary assessment imposed by the rules: presupposes that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a

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435 MRPC, Preamble ¶ 1.
436 Id. ¶ 2.
437 Id. ¶ 7 (emphasis added).
438 Id. ¶ 9.
439 Id. Scope ¶ 17.
lawyer often has to act upon uncertain or incomplete evidence of the situation.\footnote{440 Id. § 19.}

This provision may be relevant to the evaluation of ineffectiveness claims against standby counsel under the prevailing model, in which their duties are limited by the court’s appointment order, case law, or instructions and requests (or lack thereof) from their client.

As to the issue of competence, Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\footnote{441 Id. r. 1.1 cmt. § 1. The rule further states that “[i]n many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some instances.” Id.}

A comment to the rule states that:

[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, [and whether it is feasible to refer the matter to another lawyer]\footnote{442 Id. r. 1.1 cmt. § 1. The rule further states that “[i]n many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some instances.” Id.}

What, then, is the competence that is reasonably necessary for standby counsel’s representation? At present, courts presumably appoint counsel competent in criminal law, and in death penalty cases when necessary. But, since standby counsel in each case currently receives different instructions regarding their expected level and scope of involvement in a given case, it is difficult for them to know what degree and scope of competence they are expected to achieve. As noted above,\footnote{443 See supra notes 20–51 and accompanying text.} their conflicting obligations under McKaskle to both limit their assistance to what their client requests, and to be ready to step in and take over the representation if the client’s pro se status is terminated, creates a conundrum for standby counsel.

A further comment to the Competence rule states:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake;
major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.444

What is "the matter" referred to in the rule in standby counsel's situation? Is it the limited role assigned by the court or case law? Is it the limited role—or a broad one—determined by the client? Or, is it the entire defense, which counsel has to be ready to undertake in the event the client's pro se status is terminated or relinquished? The rule's last sentence specifically contemplates the possibility of a limited representation by virtue of an agreement between the lawyer and the client, but, as this Article argues, standby counsel's duties must go well beyond what assistance the pro se client requests.

VII. PROPOSAL FOR IMPLEMENTING RIGHT TO EFFECTIVE STANDBY COUNSEL

A. ELIMINATION OF ADVISORY AND HYBRID DESIGNATIONS

An argument could be made to retain the separate role models of standby counsel formulated by the ABA Standards, that is, passive, advisory counsel (the phone psychic) versus active standby counsel (the theatrical understudy).445 In theory, this distinction brings clarity to the role, duties, and standards for evaluating effectiveness. Counsel given the advisory counsel designation would provide limited scope assistance, primarily upon the defendant's request. The court and the defendant's expectations regarding advisory counsel's participation and effectiveness would be minimal and even further limited by the court's appointment order, or by the pro se defendant's instructions.

In practice, however, it will be a rare pro se defendant who does not need legal assistance in making his defense, whether standby counsel is requested or appointed by the court over defendant's objection. It is hard to conceive of a situation in which advisory counsel only responds to questions posed by the defendant, when the defendant has no legal knowledge or skill sufficient to even know what questions to ask and when to ask them. Given all lawyers' ethical duties to zealously advocate for their clients with reasonable competence, and their legal and ethical

445 See supra note 1 and accompanying text.
duties to protect their clients' interests, it is hard to imagine a situation in which advisory counsellors would ignore some miscarriage of justice of which they are aware and that occurs before, during, or after the trial. Simply put, advisory (speak when spoken to) counsel cannot undertake both the passive advisory role, and at the same time be ready to take over the case as defense counsel should the defendant's pro se be status be terminated, as Faretta requires. Nor can the active standby counsel be expected to defer in all matters to the defendant where it becomes necessary to act in the defendant's best interests. The Court in McKaskle specifically noted:

[N]o absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear pro se 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. Both of these objectives can be achieved without categorically silencing standby counsel. . . . [T]he primary focus must be on whether the defendant had a fair chance to present his case his own way. Faretta itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement. 446

The ABA Standards' distinction between advisor and standby counsel cannot stand in the face of these realities. Rather than create two such roles, the notion of a mere advisory function for standby counsel should be eliminated. Standby counsel must protect the defendants' interests by not only bringing matters to their attention upon request, but also by affirmatively bringing up matters that may affect the outcome of their case to their attention, or that of the court where necessary. The scope of standby counsel's role should be practically the same as defense counsel's, and therefore the same Strickland test for the latter's effectiveness should be applied to the evaluation of claims of ineffectiveness of standby counsel.

B. TREND TOWARD EXPANDED ROLE FOR STANDBY COUNSEL

In many cases, standby counsel assumes a broader role than that envisioned or specified by the defendant or the court. In McKaskle, the defendant complained of standby counsel's excessive participation. 447 But, the legion of complaints of ineffectiveness of standby counsel allege

446 MRPC, Preamble § 2 (1983).
448 Id. at 168.
inaction or neglect.\textsuperscript{449} Competent and ethical counsel cannot realistically assist in a passive mode pretrial, or sit through a trial and not want to participate as much as possible in order to protect their clients’ rights. They respect the client’s right to be self-represented, on the one hand, but as counsel they want to participate to the extent the defendant permits them to do so. If not constrained by a narrowly-crafted appointment order, or unrealistic designations like advisory counsel, or having hybrid representation, standby counsel could be true assistants to their defendant clients just as they were at common law, and in some cases participate to the extent of becoming co-counsel. Courts have traditionally restricted standby counsel’s participation,\textsuperscript{450} resulting in counsel’s hesitation to do anything exceeding the scope of the appointment order, or perhaps what instruction the client defendant provides. Rather than rejecting them, many pro se defendants have gotten to know standby counsel because they were previously their public defenders.\textsuperscript{451} They would be inclined to favor standby counsel’s assistance, not reject it. Deprivation of counsels’ assistance by designating them as advisory therefore deprives pro se defendants of much-needed assistance, and disregards the trust and confidence that defendants may have established with their counsel before they elected to proceed pro se.\textsuperscript{452}

In one case in which standby counsel affirmatively exceeded his advisory role, he moved the court to reevaluate the competency of the pro se defendant, and he also moved for an unrelated curative instruction; the instruction was directed at a statement in the prosecutor’s closing argument that left the jury with the belief that it could “either sentence

\textsuperscript{449} See infra notes 457–66 and accompanying text.
\textsuperscript{450} See supra text accompanying notes 145–48.
\textsuperscript{451} See supra note 159.
\textsuperscript{452} Morris v. Slappy, 461 U.S. 1 (1983) (affirming trial court’s denial of defendant’s request for continuance of trial based on defense counsel’s hospitalization, over defendant’s desire to have the attorney of his choice to maintain their “meaningful relationship”). In response to the majority opinion’s questioning the authority for the Ninth Circuit’s finding of a right to a “meaningful relationship” with one’s attorney, Justices Brennan’s and Marshall’s concurring opinion in Slappy noted:

Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney. . . . [C]ounsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel’s duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.

Id. at 20–21.
petitioner to death or turn him loose on the streets to kill again." Many other examples of standby counsel acting beyond the scope of duties assigned them occur daily. But cases in which counsel actively assists and protects the defendant’s interests would not ordinarily be the subject of appellate case law. It is a rare case that involves the pro se defendant, like Wiggins, who complained of unwanted, excessive participation. The body of case law described above concerns complaints of ineffectiveness revolving around inaction or neglect of some kind.

New issues and rulings regarding effectiveness of counsel have direct relevance to the role of standby counsel. As discussed earlier, the Strickland test for effectiveness of defense counsel includes two prongs: (1) whether counsel acted with reasonable professional competence, and (2) whether counsel’s act or omission had a likelihood of affecting the outcome of the case. Assuming, that standby counsel plays practically the same role as defense counsel, the Strickland test should be applied, as it has been already applied by a number of courts. Those courts, however, applied Strickland to assistance, or lack thereof, within the limited scope of standby counsel’s appointment order. The difference with that approach and the one advocated here is that under this proposal the test of effectiveness will be applied not only to the specific duties expressly assigned, but also to the implied duties imposed upon standby counsel by the Sixth Amendment, the Due Process Clause, international human rights law, professional standards, and legal ethics. The outer limits of assistance remain those established in McKaskle, namely, that standby counsel may not participate to the extent that it overcomes pro se defendants’ control over their defense, and it may not negate the jury’s perception that defendants are self-represented.

In two recent decisions, the Supreme Court expanded the scope of permissible ineffectiveness claims against defense lawyers involving their conduct during plea bargaining. In Missouri v. Frye, an appointed public defender failed to communicate the prosecutor’s plea offer, which by its
terms expired after six weeks.\textsuperscript{457} As a result, the defendant was sentenced to three years imprisonment, when he could have plead guilty under the original offer to plead guilty to a misdemeanor and serve 90 days in jail.\textsuperscript{458}

The majority held that the right to effective “Assistance of Counsel” extends to the plea bargaining stage in order to ensure reliable convictions.\textsuperscript{459}

Justice Kennedy’s majority opinion in \textit{Frye} noted that the Court’s previous decision in \textit{Hill v. Lochart} required that the prejudice prong of the \textit{Strickland} test be modified for ineffectiveness claims arising from plea bargains.\textsuperscript{460} In such cases the defendant has to show that he relied upon his attorney’s advice—in \textit{Hill} it was counsel's erroneous information about the potential sentence he was facing—which resulted in his pleading guilty rather than going to trial. In \textit{Missouri v. Frye}, the Court ruled that in the case of ineffectiveness claims arising from uncommunicated plea offers, the defendant must show a reasonable probability that the outcome would have been different, and that this can be shown if it can be established that the defendant would have accepted the plea offer; but, in addition, the defendant would be required to show that the prosecutor would not have withdrawn the offer before sentencing, and the trial judge would not have refused to accept the plea agreement.\textsuperscript{461}

In \textit{Lafler v. Cooper}, another plea bargaining case, the defense counsel erroneously advised his client that he could not be convicted of the pending charge of assault with intent to murder since the victim had been shot below the waist.\textsuperscript{462} In reliance upon this erroneous information, and on advice of counsel, the defendant rejected the prosecutor’s plea offer, went to trial, and was convicted and sentenced to a term of imprisonment three-and-a-half times longer than the original plea offer.\textsuperscript{463} The Court held that “here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused

\textsuperscript{457} Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012); Padilla v. Kentucky, 559 U.S. 356, 369 (2010) (holding that plea bargaining is a “critical stage” of the prosecution, entitling an indigent defendant to appointment of counsel, and that defense counsel has a duty to provide reasonable advice to the defendant upon the impact a guilty plea will have, including collateral consequences such as deportation).

\textsuperscript{458} Frye, 132 S. Ct. at 1401.

\textsuperscript{459} \textit{id}. at 1407.

\textsuperscript{460} \textit{id}. at 1402–03.

\textsuperscript{461} The Court remanded the case for a determination of these facts. \textit{Lafler v. Cooper}, 132 S. Ct. 1376, 1380 (2012).

\textsuperscript{462} \textit{id}.

\textsuperscript{463} \textit{id}.
the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance. The Court ruled that the defendant had shown a reasonable probability under the second prong of the Strickland test that is that he would have accepted the prosecutor’s plea offer and benefitted from a shorter sentence.

It is predictable that in every criminal case standby counsel—especially so-called advisory counsel—will participate in the plea bargaining process. Defense counsels’ failures as described in the aforementioned decisions could just as easily have been committed by standby counsel. There is no just reason, therefore, for permitting ineffectiveness claims to be brought by represented defendants, but not by those having the assistance of standby counsel.

Id. at 1388.

Id. at 1385. These decisions were followed by Rompilla v. Beard, 545 U.S. 374, 393 (2005), which established another statement of the prejudice test for an ineffectiveness claim, i.e., whether there is a probability “sufficient to undermine confidence” that the outcome would have been the same had proper advice been given. Additional issues arise from this series of Supreme Court decisions, including whether legal advice should be treated as a strategic decision, and thus outside the scope of ineffectiveness claims; whether and to what extend defense counsel must conduct an investigation of the facts prior to the entry of the plea; and whether a failure to investigate the facts should be treated differently from a failure to investigate the law. See Laurence A. Benner, Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora’s Box?, CRIMINAL JUSTICE 4, 8-9 (Fall, 2012). On the investigation issue, some federal district courts have expanded the role of standby counsel by their local rule pertaining to access to—and duty to review—trial transcripts: “An attorney serving as ‘standby’ counsel appointed to assist a pro se defendant in his or her defense in a criminal case must review the same portions of the transcript as if the pro se defendant were his or her client.” U.S. DIST. CT. RULES S.D. ALA., ECF Transcripts; see also D. N.M. LOCAL R.15(b), CM/ECF ADMINISTRATIVE PROCEDURES MANUAL (Rev. 2011) (“An attorney serving as ‘standby counsel’ to assist a pro se defendant in his or her defense has the same responsibilities as if he or she were the pro se party’s attorney of record in the case.”); D. D.C. Orders and Notices, Transcript Filing Instructions for Attorneys and Pro Se Litigants (“An attorney serving as court appointed standby counsel for a pro se defendant in defense of a criminal case must review the same portions of the transcript as if the pro se defendant were their client.”); D. M.Ga. Policy With Regard to the Availability of Transcripts of Court Proceedings (“An attorney serving as appointed ‘standby’ counsel for a pro se litigant must review the transcript as if the pro se party were his/her client.”). cf. D. S. Ohio Local Rules, Electronic Case Filing, Notice to Members of the Bar Regarding Electronic Availability of Transcripts, Attachment I (“In cases where ‘standby’ counsel is appointed to be available to assist a pro se defendant in his or her defense, such counsel is only responsible for reviewing for redaction and providing any redactions to the court reporter for, the testimony of the witnesses the defendant called and the defendant’s opening and closing statements.”). Interestingly, the latter rule states that standby counsel “is only responsible for” reviewing and redacting personal information from the trial transcript, seemingly in an effort to assure standby counsel of their limited role in this court.

See also Kimmelman v. Morrison, 477 U.S. 365, 377–78 (1986) (holding that defense counsel was ineffective for failing to file timely motion to suppress or to request discovery). Standby counsel’s failure to suggest to the pro se defendant that a motion to suppress should be
What disadvantages are there to this approach? To be sure, standby counsel who in the past assumed the scope of their duties were limited by their appointment order (or by being characterized as a mere "advisory counsel") must now broaden their assistance to defendants. But, in many cases these lawyers would otherwise be acting as defense counsel anyway. And, it would make no sense to broaden the scope of required assistance, as many courts are to ensure a fair trial, yet retain the prevailing view that no claims of ineffectiveness may lie because there is no constitutional right to effective standby counsel. Upon eventual recognition of such a right, however, there would be no grounds for retaining the bar to ineffectiveness claims.

C. PROPOSED APPOINTMENT ORDER

What would a standby counsel appointment order look like under this proposal? It need not be as elaborate as the ICTY’s order in Prosecutor v. Norman. It need not articulate with specificity the wide range of possible forms of assistance, advice, and affirmative participation that any defense counsel would be expected to provide. It would include the following elements:

1. That standby counsel is appointed to assist defendants in their defense, and be ready through the exercise of due diligence and reasonable competence to take over the defense in the event any defendants’ pro se status is terminated or relinquished.

2. That the assistance may be in the form of:
   a. answers to questions posed by defendants;
   b. information affirmatively provided by standby counsel to defendants, or the court if necessary, relevant to issues affecting a defendant’s rights or culpability;
   c. making of oral or written motions or objections relevant to the aforementioned issues; and,
   d. communicating with the prosecution or the court upon a defendant’s request or instruction where necessary to protect the defendant’s rights.

3. That the assistance and affirmative participation taken should be consistent with the non-frivolous defense the defendant seeks to present,

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filed, not filing such a motion, not recommending that certain discovery be requested, or not requesting such discovery on behalf of the defendant would be equally likely to occur, and equally prejudicial to the defendant, as if committed by defense counsel.

See supra note 368 and accompanying text.
4. That standby counsellors may only participate in a trial to the extent that they and the defendant have a co-equal role in the defense; and that participation by counsel may neither affect the defendant's control over the defense, nor negate the jury's perception that the defendant is self-represented, with legal assistance.

Under this proposal no distinction will be made any longer between advisory and standby counsel. Whatever the designation, their authorized scope of assistance will be determined by the appointment order, the law, and professional ethics, and it will no longer be the narrow role of providing answers to questions or assistance when requested. Likewise, the term "hybrid representation" should be eliminated. It refers to what is currently forbidden by most courts, namely, almost co-equal representation between the pro se defendant and standby counsel. Given the expanded role standby counsel must have to protect the defendant's rights and interests, this type of representation—well known at common law—should be permitted and may at some point become the norm for pro se defendants who find that they can work better by having the "Assistance of Counsel," rather than "Representation by Counsel," as guaranteed by the Sixth Amendment.

VIII. CONCLUSION

The proper role and responsibilities of standby counsel are important issues in light of ever-increasing public defender caseloads. Currently, standby counsel's role is unclear to judges, pro se defendants, and counsel themselves. As those case loads increase, judges will encounter more pro se defendants dissatisfied by their appointed attorney's effectiveness. It is even possible that more claims of ineffectiveness will be brought against standby counsel than defense counsel because of the contradiction between the quality of assistance expected by the pro se defendant and that which is provided by counsel, who don't even know their role.

Standby counsel is a form of assistance that existed at common law before counsel evolved to become the defendant's sole representative. The Sixth Amendment right to have the assistance of counsel was based upon the common law conception of the limited role counsel had at the time of

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468 See Jones v. Barnes, 463 U.S. 745 (1983) (finding that appointed appellate counsel has no duty to raise all of a client's non-frivolous issues on appeal). On questions of effectiveness, standby counsel by analogy would have no duty to raise all non-frivolous issues sought to be raised by the pro se defendant.
the passage of the Bill of Rights. Defendants exercising their Sixth Amendment right to represent themselves do not waive their right to legal assistance merely because they waive their right to be represented by counsel. Courts should recognize pro se defendants' Sixth Amendment right to appointment of effective standby counsel to ensure trial fairness, as the right is plainly set forth in the text of the amendment; courts should also inform prospective pro se defendants of their right to have the assistance of standby counsel, just as defendants are advised of their right to defense counsel.

The growing use of standby counsel by trial courts is a product of trial judges' concern with the fairness of trials involving pro se defendants. The Supreme Court of the United States described their dual role as being available to assist the defendant only upon request, while at the same time being expected to be ready to take over the defense if the defendant's pro se status is terminated. Judges, however, are increasingly giving standby counsel a greater role in pro se trials. Thus, the answer to the question in the title of this Article is "Both." Given this expectation, and given the professional and ethical responsibilities of judges and lawyers, justice requires that courts appointing standby counsel evaluate their effectiveness, and do so using the traditional test enunciated in Strickland v. Washington to provide pro se defendants effective assistance of counsel for their defense. The Sixth Amendment would be a hollow right if it were interpreted in only one way. That is, full representation, or no representation at all.