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The Right to Proceed *Pro Se* at Competency Hearings: Practical Solutions to a Constitutional Catch-22

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COMMENT

The Right to Proceed *Pro Se* at Competency Hearings: Practical Solutions to a Constitutional Catch-22

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I. INTRODUCTION

A. *Between a Rock and a Hard Place*

In November of 1986, five armed men robbed a branch of the Chase Manhattan Bank in Queens, New York. Edison Purnett was captured and charged with participating in the crime.¹ During arraignment and at several court appearances Purnett acted strangely,² prompting the judge to order a psychological evaluation.³ The court-appointed psychologist concluded that Purnett was compe-

1. United States v. Purnett, 910 F.2d 51, 52 (2d Cir. 1990).

2. *Id.* at 53 ("[H]e seemed to be visibly agitated for no apparent reason. Indeed he appeared to 'snap' at defense counsel without any provocation. Certainly the Court was able to make its own observations of the defendant's unusual behavior . . .").

3. *Id.*

tent to stand trial.⁴

At the pretrial "competency hearing," the judge asked Purnett whether he desired to contest the psychologist's conclusion and whether he wanted a lawyer.⁵ Purnett decided to represent himself.⁶ The judge questioned the defendant's competency, but at the same time, allowed the defendant to represent himself. Purnett represented himself at that "competency hearing" by remaining silent.⁷ Relying solely on the psychologist's report, the court found Purnett competent to stand trial.⁸ After a jury trial, Purnett was convicted of bank robbery and conspiracy to commit bank robbery.⁹ He appealed, contending that his "waiver of counsel was ineffective because it was made prior to a valid determination of his competency, and that the determination of his competency was invalid because it was made while he was not represented by counsel."¹⁰

The appellate court in *United States v. Purnett* clearly stated the issue as the "perplexing problem that district court judges face when, while questioning a defendant's competency to stand trial, the accused asserts the right to conduct his own defense without benefit of counsel."¹¹ In these situations, the judge faces a constitutional Catch-22. As the dissent in *Purnett* pointed out, "[o]n the one hand, if [the trial judge] forced Purnett to accept appointed counsel, he risked violating Purnett's right to proceed *pro se*. . . . On the other hand, if he did not force Purnett to accept counsel, he risked the instant challenge [that defendant was in fact incompetent and unable to waive counsel]."¹²

This anomalous predicament reflects the conflict between two

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 52.

8. *Id.* at 54.

9. *Id.* at 52.

10. *Id.* at 54.

11. *Id.* at 52.

12. *Id.* at 57 (Timbers, J., dissenting); see also *People v. Krom*, 458 N.Y.S.2d 693, 698 (N.Y. App. Div. 1983) ("On the one hand, an accused has a constitutional right to defend himself, founded in our respect for human dignity and the right of an individual to determine his own destiny, and the denial thereof may require reversal. On the other hand, the dictates of the concept of fair trial place limitations on that right, so that if improperly honored, it, too, may require reversal.") (citations omitted); *Pickens v. State*, 292 N.W.2d 601, 605 (Wis. 1980) ("On the one hand, [the trial judge] is required to insure that the defendant's waiver of his right to counsel is made knowingly and voluntarily, and unless the record adequately supports such a finding, any resulting conviction is subject to reversal. On the other hand, the trial judge's conclusion that the defendant does not sufficiently understand his case to make a knowing waiver, or is not competent to conduct his own defense, necessarily prevents a defendant from exercising his right of self-representation and may bring reversal on that ground. Whichever way the trial judge decides, his decision is subject to challenge.").

underlying legal principles. First, the Supreme Court held in *Faretta v. California*¹³ that the Sixth Amendment guarantees the “right to self-representation.”¹⁴ This right is so fundamental that any violation of it is *per se* reversible error.¹⁵ Conversely, “[i]t is a basic principle of due process that a defendant cannot be tried for a crime while he is mentally incompetent.”¹⁶ This principle of due process is also fundamental to the criminal justice system. The inherent conflict between these two basic principles—which arises when a possibly incompetent defendant seeks to proceed *pro se* at a competency hearing—is the subject of this Comment.

There are four possible outcomes when a possibly incompetent defendant invokes her right to proceed *pro se*. First, the court can force the defendant to have counsel during the competency hearing. If the court then finds the defendant competent, however, she can argue that the court violated her rights under *Faretta*, because a competent person has the right to refuse counsel.

Second, the court may force the defendant to have counsel at the competency hearing, find her incompetent, and then commit her to a mental hospital for treatment to restore her competency. An argument arises accordingly that mere incompetence is insufficient to justify the defendant’s loss of liberty without requiring the State to prove the defendant’s guilt in a criminal trial. Some commentators recommend that, under certain circumstances, incompetent or marginally competent individuals should be permitted to stand trial.¹⁷

Third, the court may allow the defendant to represent herself at her competency hearing. If found incompetent, she can then argue that she may have been found competent had she been forced to have counsel. Or the defendant can argue that because she was incompetent, the court should not have allowed her to waive her right to counsel.

Finally, like in *United States v. Purnett*, the court may allow the defendant to proceed without counsel at her competency hearing. If

13. 422 U.S. 806 (1975).

14. *Id.* at 820.

15. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

16. Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053 (1977); see also *State v. Furrow*, 424 A.2d 694, 698 (Me. 1981) (“The conviction of a person when he is incompetent to stand trial violates the most basic principles of due process.”).

17. See *infra* text accompanying notes 143-46. See generally Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 66-67 (1977) (advocating that when trial competence is not achieved within six months, the State should dismiss charges or proceed to a trial governed by procedures designed to compensate defendant’s disabilities).

found competent, the defendant may attack her conviction on the ground that she should have been found incompetent. The defendant could argue further that because she was without counsel and incompetent, she was wrongly allowed to proceed to trial *pro se*.

As the examples above show, a defendant may use a double-edged sword to attack her conviction, regardless of the trial court's decision. Reversals are frequent, further clogging the overburdened court system. Judge Engel, concurring in *United States v. McDowell*,¹⁸ described such reversals as a "commonly recurring abuse."¹⁹ Judge Timbers, dissenting in *Purnett*, advocated enunciation of a "bright-line rule" in resolving such dilemmas.²⁰ Without clear guidelines, Judge Timbers argued, courts will be "baffled by the same dilemma countless times in the future."²¹ The majority in *United States v. Dujanovic*²² contended that "whether it be by the design or because of misguidance or naivete on the part of the accused, the trial court lays an appeal or a collateral attack by either a denial or a granting of the request."²³ In other words, the trial court judge is damned if she does and damned if she does not.

The majority in *Purnett* decided that the proper solution to this constitutional dilemma was to force the defendant to proceed through a competency hearing with counsel.²⁴ The dissent criticized this approach, arguing that it "forces a defendant in a criminal case to accept counsel when the word 'incompetency' is even breathed in court."²⁵ The *Purnett* approach begs the question—why should a defendant not represent himself at his own competency hearing? The United States Supreme Court has neither ruled on whether the *Faretta* right extends to pretrial proceedings, nor specifically addressed the issue of self-representation at a competency hearing. This Comment contends that the right to proceed *pro se* does indeed extend to one's competency hearing, and for this reason, a method for resolving this constitutional dilemma is required.

The current lack of a bright-line solution forces trial courts to individually decide what course to select. Consequently, similarly situated defendants receive disparate treatment. As the statements of both Judges Engel and Timbers suggest, this is not an esoteric or

18. 814 F.2d 245 (6th Cir. 1987).

19. *Id.* at 252 (Engel, J., concurring).

20. *United States v. Purnett*, 910 F.2d 51, 57 (2d Cir. 1990) (Timbers, J., dissenting).

21. *Id.*

22. 486 F.2d 182 (9th Cir. 1973).

23. *Id.* at 185.

24. 910 F.2d at 56.

25. *Id.* (Timbers, J., dissenting).

purely academic issue in criminal competency law, but a difficult issue with which many courts have wrestled with differing levels of success. The purpose of this Comment is to delineate and evaluate possible solutions gleaned from a wide variety of sources. Each has inherent advantages and disadvantages. After review of the various interests at stake, this Comment suggests that the most promising option, once a defendant has requested to proceed *pro se*, is to require standby (advisory) counsel to be present with the possibly incompetent defendant during pretrial proceedings until the conclusion of the competency hearings.

B. "The Pilotless Journey"²⁶

Before investigating the substantive issues involved, however, it is necessary to examine the underlying question of why defendants choose to represent themselves. The reasons are as varied as the defendants asserting the right. To thoroughly analyze the psychology of criminal defendants is beyond the scope of this Comment. Still, several basic reasons surface repeatedly in cases where defendants decide to "dance a solo, not a *pas de deux*."²⁷

A common reason is "the desire to evoke the jury's sympathy for a lone defendant pitted against the Goliath of the State."²⁸ Another reason is that *pro se* defendants may believe that they are innocent and that the criminal justice system is infallible.²⁹ These idealistic defendants are therefore surprised when their narrative tirades are cut off, their evidence ruled inadmissible, and their questioning of witnesses deemed improper.

In many cases, the demand to proceed *pro se* is triggered by the simple fact that the attorney fails to keep the defendant adequately informed. In rejecting his court-appointed attorney in *People v. Crandell*,³⁰ the defendant stated: "I didn't see him for two months."³¹ Similarly, the defendant in *State v. Antone*³² decided to proceed *pro se* because his lawyer never visited him during the four weeks he was in jail.³³

26. *Dujanovic*, 486 F.2d at 186.

27. *McKaskle v. Wiggins*, 465 U.S. 168, 188 (1984).

28. *People v. McIntyre*, 324 N.E.2d 322, 326 (N.Y. 1974); see also *State v. Gallant*, 595 A.2d 413, 416 (Me. 1991) (defendant described his decision to proceed *pro se* as a "protest" and said that he felt "the trial system is stacked against people without money.").

29. *McIntyre*, 324 N.E.2d at 326.

30. 760 P.2d 423 (Cal. 1988).

31. *Id.* at 431.

32. 724 S.W.2d 267 (Mo. Ct. App. 1986).

33. *Id.* at 271.

Frequently, the defendant is dissatisfied with the attorney's trial strategy—or lack thereof. The defendant in *Crandell* further cited the public defender's advice to plead guilty prior to making any investigation of the facts.³⁴ This can be particularly distressing to the defendant when viewed against the backdrop of recent holdings "indorsing counsel's view when a difference of opinion arises."³⁵

Because of the lack of attention afforded to many defendants by their lawyers, especially to those of borderline mental competency, such defendants view their attorneys "as an extension of the oppressive system which they distrust."³⁶ The defendant in *People v. Carl*,³⁷ diagnosed as a paranoid schizophrenic by two psychiatrists, believed that his lawyer was involved in a "plot" against him.³⁸ The fact that his attorney prepared only briefly, without any consultation from the defendant, did nothing to bolster the defendant's trust of either counsel or the system.

The reason to proceed *pro se* is different for every defendant and may include many of the rationales discussed above. Several key factors lead to the practical problems that arise in such situations. First, many defendants have perfectly understandable reasons for proceeding *pro se*. They may feel qualified to defend themselves. They may also be the only person willing to put forth a controversial or unusual defense. Moreover, they may believe it to be a tactical advantage to prove their intelligence and worth before the judge or jury. Second, many defendants are in fact in a Catch-22 of their own—they may trust neither their attorneys nor their ability to proceed *pro se*. Third, the decision to proceed *pro se* may itself be a manifestation of mental incompetence. Once the defendant decides to proceed *pro se*, how-

34. *Crandell*, 760 P.2d at 431.

35. *People v. McIntyre*, 324 N.E.2d 322, 326 (N.Y. 1974); see also *Mosby v. State*, 457 S.W.2d 836, 840 (Ark. 1970) (a criminal defendant who does not appear *pro se* has no absolute right to argue his case to the jury (citing *State v. Velanti*, 331 S.W.2d 542 (Mo. 1960)); *State v. Ward*, 608 P.2d 1351, 1354 (Kan. 1980) ("A defendant who accepts counsel has no right to conduct his own trial or dictate the procedural course of his representation by counsel." (quoting *State v. Ames*, 563 P.2d 1034, 1044 (Kan. 1977)); *Hawkins v. State*, 628 S.W.2d 71, 76 (Tex. Crim. App. 1982) ("when a defendant is represented by counsel, he does not have the right to propound his own questions to witnesses and make jury argument in his own behalf"). The decision to plead guilty, of course, is one for the defendant.

36. *McIntyre*, 324 N.E.2d at 326; see also *State v. Bauer*, 245 N.W.2d 848, 859 (Minn. 1976) ("the defendant's reason for wishing to dispense with defense counsel was his paranoid distrust of everyone connected with the judicial system"); *Commonwealth v. Davis*, 573 A.2d 1101, 1102 (Pa. Super. Ct. 1990) ("appellant stated that with regard to attorneys: 'I don't trust them'").

37. 397 N.Y.S.2d 193 (N.Y. App. Div. 1977).

38. *Id.* at 194.

ever, the constitutional Catch-22 emerges if the court has not yet determined the issue of the defendant's mental competency.

This Comment analyzes the social and legal issues surrounding the mental competency dilemma en route to offering practical solutions for its resolution. Part II delves into the background of this area of the law, discussing the right to proceed *pro se*, the right to counsel, the dangers of forced counsel, the requirement of competency to stand trial, the requirement of competency to proceed *pro se*, and the past interaction in the courts between competency and the Constitution. Part III analyzes the interests at stake in this area for both defendants and the justice system. These interests include the defendant's right to free choice and autonomy, the defendant's right to represent himself, the system's right to a "just" verdict, judicial economy, and the negative effects of competency determinations on the defendant and the justice system. Part IV outlines several practical solutions to the problem, noting the advantages and drawbacks of each. The Comment concludes that the best approach is to force standby (advisory) counsel onto the defendant during all pretrial hearings until the conclusion of the competency hearing itself, while allowing the defendant to proceed *pro se* throughout such proceedings.

II. A GENERAL OVERVIEW OF COMPETENCY AND SELF-REPRESENTATION

A. *The Right to Proceed Pro Se: Fool for a Client*

The Supreme Court announced the criminal defendant's right to self-representation in *Faretta v. California*.³⁹ The Court held that an accused possesses a constitutional right, derived from the Sixth Amendment, to conduct his own defense provided that he "knowingly and intelligently"⁴⁰ forgoes his right to counsel. The Court noted that the Sixth Amendment provides that *the accused*, not his counsel, shall have the right to confront witnesses, be accorded compulsory process for obtaining witnesses, and be informed of the nature of the charges against him.⁴¹ Justice Stewart, writing for the majority, pointed out that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused

39. 422 U.S. 806, 836 (1975). The majority's decision drew vehement objections from the dissent. Chief Justice Burger, joining with Justices Blackmun and Rehnquist, asserted that "the Court's holding . . . can only add to the problems of an already malfunctioning criminal justice system." *Id.* at 837.

40. *Id.* at 835 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)).

41. *Id.* at 819; *see also* U.S. CONST. amend. VI.

personally the right to make his defense."⁴² Moreover, because the right of self-representation is "basic to our adversary system of criminal justice," it is guaranteed by the Fourteenth Amendment to defendants in state criminal proceedings.⁴³

The Court further reasoned that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."⁴⁴ The Court recognized that offering the defendant the "assistance" of counsel was a far cry from remaking counsel into "an organ of the State interposed between an unwilling defendant and his right to defend himself personally."⁴⁵

After mandating the right to proceed *pro se*, the Court seemed to take a step back, pointing out that this right had its own particular "nature" and was therefore limited in scope. Justice Stewart admitted that "the help of a lawyer is essential to assure the defendant a fair trial."⁴⁶ He added further that "[i]t is undeniable that . . . defendants could better defend with counsel's guidance than by their own unskilled efforts."⁴⁷ However, even more important than a "fair trial," Justice Stewart noted, is the "inestimable worth of free choice," as the Framers of the Constitution were keenly aware.⁴⁸ Free choice, the Court believed, weighted the scales of justice toward the defendant's decisionmaking ability, even though it may be "ultimately to his own detriment."⁴⁹ The Court, using broad language, held that this "choice must be honored out of 'that respect for the individual which

42. *Faretta*, 422 U.S. at 819.

43. *Id.* at 818.

44. *Id.* at 819-20.

45. *Id.* at 820. See also *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (the accused in a federal criminal prosecution may waive the right to a jury trial, as well as the right to assistance of counsel if in the exercise of a free and intelligent choice and with the considered approval of the trial judge).

46. *Faretta*, 422 U.S. at 832-33.

47. *Id.* at 834; see also *James v. State*, 730 P.2d 811, 814 n.1 (Alaska Ct. App. 1987) ("Except in the most unusual circumstances, a trial in which one side is unrepresented by counsel is a farcical effort to ascertain guilt."); *State v. Kennedy*, 586 A.2d 1089, 1091-92 (R.I. 1991) (criminal defendant has an unequivocal right to proceed *pro se* regardless of whether defendant could better defend himself with an attorney). But see *supra* notes 26-38 and accompanying text (questioning the presumption that a defendant assisted by counsel is better off than if he had represented himself).

48. 422 U.S. at 833-34.

49. *Id.* at 834; see also *Johnson v. State*, 507 A.2d 1134, 1148 (Md. Ct. Spec. App. 1986) ("We know of no law that requires a defendant be wise in order to waive important rights; it is only required that he understand the possible consequences."); *State v. Sheppard*, 310 S.E.2d 173, 188 (W. Va. 1983) ("The test in such cases is not the wisdom of the accused's decision to represent himself or its effect upon the expeditious administration of justice, but, rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by electing to proceed *pro se*.").

is the lifeblood of the law.'"⁵⁰ Because of the constitutional importance of the right of self-representation, reviewing courts have not delved into the effect that the denial of the defendant's right to proceed *pro se* has upon the verdict. Instead, courts consistently hold that wrongful denial is *per se* reversible error.⁵¹

The right to represent oneself in criminal proceedings, however, is balanced against society's interests in an orderly and efficient judicial process. First, when a defendant proceeds *pro se*, she surrenders the benefits associated with the right to counsel.⁵² For example, the *pro se* defendant forgoes the benefits of a comprehensive cross-examination conducted by trained counsel.

Second, the court may terminate the right to proceed *pro se* if the defendant "deliberately engages in serious and obstructionist misconduct."⁵³ Self-representation does not allow the defendant to destroy the courtroom's traditional dignity.⁵⁴ Consequently, the trial judge has latitude in balancing the defendant's right to appear *pro se* against the ordered atmosphere required for an effective courtroom.

Third, the *pro se* defendant is required to follow the procedural and substantive law that governs the conduct of a certified attorney.⁵⁵ Where the defendant is unsure of how to preserve an objection, for example, the trial judge is not required to lecture her on proper advocacy techniques.⁵⁶ The defendant is responsible for utilizing whatever scant skills she may possess to mount a successful defense. Specifically, knowledge of "technical legal matters" is not required to proceed *pro se*.⁵⁷ Clearly, if the right to proceed *pro se* was based upon

50. *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

51. Eric Rieder, Note, *The Right to Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 139-40 (citations omitted); see also *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973).

52. *Faretta*, 422 U.S. at 835.

53. *Id.* at 834-35 n.46.

54. *Id.*; see also *United States v. Dougherty*, 473 F.2d 1113, 1126 (D.C. Cir. 1972) (right of self-representation "rests on an implied presumption that the court will be able to achieve reasonable cooperation."); *Tait v. State*, 362 So. 2d 292, 293 (Fla. 4th DCA 1978) (judge has duty to keep the trial from turning into a "roman circus").

55. *Faretta*, 422 U.S. at 836.

56. *McKaskle v. Wiggins*, 465 U.S. 165, 183-84 (1984); see also *State v. Bebb*, 740 P.2d 829, 834 (Wash. 1987) ("the court is under no duty to inform a *pro se* defendant of the relevant rules of law").

57. *State v. Imus*, 679 P.2d 376, 378 (Wash. Ct. App. 1984); see also *People v. Holcomb*, 235 N.W.2d 343, 346 (Mich. 1975) (Appellate court reversed trial court because it denied defendant's motion to proceed *pro se* on the grounds that "it would not be in the best interest of the defendant, would not afford him a proper defense, would not satisfactorily protect his constitutional rights if he were permitted to represent himself and not have the benefit of a trained experienced and skilled counsel, [and] that if he were to attempt to defend himself his demeanor before the jury would probably result in irreparable prejudice against him.");

knowledge of legal skills, the right to self-representation would be an empty one because few defendants possess any actual legal training.⁵⁸ The defendant is entitled to know of the dangers associated with self-representation and the waiver of trained counsel,⁵⁹ but "mere ignorance of the law cannot vitiate an effective waiver of counsel."⁶⁰

Fourth, the defendant who elects to proceed *pro se* relinquishes her right to claim ineffective assistance of counsel.⁶¹ As the *Faretta* court stated, "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.'"⁶² It would be a strange system indeed that allowed a defendant to freely select self-representation and thereby create a safety net for reversal based on her legal ineptitude.

The nature of the right to proceed *pro se*, therefore, is limited. Clearly, the defendant must not abuse the dignity of the courtroom by engaging in disruptive behavior. Most importantly, the defendant must follow the same procedural and legal standards as a certified attorney. Because of the importance of able counsel at the defendant's side, the accused "must 'knowingly and intelligently' forego those relinquished benefits."⁶³ Once the trial court finds the waiver of counsel is both knowing and voluntary, the court must then permit the defendant to proceed on his own.⁶⁴ The *pro se* defendant is in the precarious position of having to act as an adept, skillful attorney, while at the same time having "a fool for a client."⁶⁵

Coleman v. State, 617 P.2d 243, 245 (Okla. Crim. App. 1980) ("Lack of knowledge of the law is not a valid reason for the trial court to refuse to grant defendant's motion [to proceed *pro se*]."). *But see* State v. Christensen, 698 P.2d 1069, 1072 (Wash. Ct. App. 1985) (Defendant was "not advised of the technical aspects of conducting a defense nor the rules regarding procedures used to preserve error. . . . Thus, we find [the defendant] did not make a knowing and intelligent waiver of his right to have counsel represent him.") (footnote omitted).

58. *See* People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974).

59. *Faretta v. California*, 422 U.S. 806, 835 (1975).

60. *McIntyre*, 324 N.E.2d at 327.

61. *Faretta*, 422 U.S. 834-35 n.46; *see also* United States v. McDowell, 814 F.2d 245, 251 (6th Cir. 1987) ("The only thing that was 'unfair' about McDowell's trial was that he did not represent himself very well"); United States v. Dujanovic, 486 F.2d 182, 188 (9th Cir. 1973) ("one of the penalties of the appellant's self-representation is that he is bound by his own acts and conduct and held to his record").

62. 422 U.S. at 834-35 n.46.

63. *Id.* at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).

64. *See Faretta*, 422 U.S. at 835; State v. Lankford, 781 P.2d 197, 202 (Idaho 1989) ("Ultimately, the decision of whether to exercise the right to counsel or proceed *pro se* is for the defendant to make. The role of the trial court is simply to ensure that where the defendant waives the right to counsel he or she does so knowingly and intelligently.").

65. Leonard v. State, 573 N.E.2d 463, 466 (Ind. Ct. App. 1991).

B. *The Right to Counsel vs. The Right to Proceed Pro Se*

The Sixth Amendment right to counsel is a fundamental safeguard that is crucial "to insure fundamental human rights of life and liberty."⁶⁶ Justice Black, writing for the majority in *Johnson v. Zerbst*,⁶⁷ penned that "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights."⁶⁸ The defendant, without the assistance of trained counsel, has a difficult—if not impossible—task in attempting to prove her innocence or setting forth mitigating circumstances. Counsel, through his knowledge of trial procedure, avenues of defenses, and oft-practiced advocacy skills, is in most cases a critical element to absolving a defendant from criminal liability.

Because the right to counsel is "one of the most important elements of constitutional due process,"⁶⁹ the trial judge has the "serious and weighty responsibility"⁷⁰ of determining whether the accused has knowingly and intelligently waived this right. Once the trial judge is satisfied that the defendant understands the importance of the right to counsel but desires to forego those advantages, the defendant is permitted to proceed *pro se*. At least one court recognized, however, that although an accused has both the right to counsel and the right to represent herself, "it is manifest that any such two constitutional rights cannot actively co-exist."⁷¹ Only the "intentional relinquishment or abandonment"⁷² of the right to counsel can give rise to the correlative right of self-representation.⁷³

The trial court must be keenly aware of the intertwined relationship of these two constitutional rights so as not to deny either right to a particular defendant—especially when that defendant is of questionable mental competency. Both rights are crucial to the administration of justice. Some courts have held, however, that the right to counsel is preeminent. If the right to counsel is "wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed *pro se*."⁷⁴

The belief that the right to counsel is supreme, however, has the

66. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

67. *Id.* at 459.

68. *Id.* at 465.

69. *Pickens v. State*, 292 N.W.2d 601, 604 (Wis. 1980).

70. *Zerbst*, 304 U.S. at 465.

71. *See United States v. Dujanovic*, 486 F.2d 182, 185 (9th Cir. 1973).

72. *Zerbst*, 304 U.S. at 464.

73. *Dujanovic*, 486 F.2d at 185.

74. *Tuitt v. Fair*, 822 F.2d 166, 177 (1st Cir. 1987).

danger of making courts uninhibited in forcing counsel upon unwilling defendants. Courts and commentators have written about the danger of forced counsel since the formation of the United States. The most compelling historical example of such an institutional policy was the English Star Chamber.

C. *Forced Counsel: The Star Chamber Experience*

In the late 16th and early 17th centuries in England, misdemeanor defendants were forced to have counsel in order to appear before the court, known as the Star Chamber.⁷⁵ The court would not accept the defendant's response to the criminal charge until it was signed by counsel. Unless counsel took responsibility for the answer and signed it, the court deemed the indictment to be admitted. Furthermore, the court sat without a jury and was permitted to administer any penalty but death once the defendant was found guilty. The purpose of such a system was not justice, but "swiftness and power."⁷⁶ It allowed professional counsel to steer the defendant in any direction that he wished, because he was controlled more by the tribunal than by the client. Counsel's primary loyalty was to the court. Thus, the court was the central player in the days of the Star Chamber. The colonies soon rejected this notorious practice and replaced forced counsel with a system that allowed the accused to choose whether or not to retain counsel for his defense.⁷⁷ The Framers of the Constitution "conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself."⁷⁸

Despite attempts to end the problem of forcing counsel upon a defendant, it continues to affect modern-day defendants, particularly those deemed "incompetent" to represent themselves.⁷⁹ The evil of forced counsel is that "[i]n 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 [Sixth] Amendment insists."⁸⁰ Furthermore, when courts force counsel on unwilling defendants, many view

75. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 51 (1971). The Star Chamber received its name because the ceiling of the room in which the court heard cases was covered with stars. It was abolished because its jurisdiction grew enormously, making it much too onerous for the English people.

76. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 23 (1973).

77. Rieder, *supra* note 51, at 137.

78. *Faretta v. California*, 422 U.S. 806, 832 (1975).

79. *See infra* part IV.A.

80. *Faretta*, 422 U.S. at 820 (footnote omitted); *see also Moore v. Michigan*, 355 U.S. 155, 161 (1957) ("The constitutional right [to representation], of course, does not justify forcing counsel upon an accused who wants none.").

it as another example of the omnipotent state taking away these defendants' autonomy and freedom. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him."⁸¹ When the accused is uncooperative, the possible advantage of having an attorney can only be realized to a limited extent.⁸² When this limited advantage, if any, of having unwanted counsel is balanced against the deeply rooted and long-standing belief that forcing counsel upon an unwilling defendant is contrary to his basic, fundamental rights,⁸³ it is clear that only in unusual circumstances should a court force an accused to accept counsel.⁸⁴

D. Pro Se Representation and the Competency Requirement

1. THE REQUIREMENT OF COMPETENCY TO STAND TRIAL

Before analyzing the requirements for competency that must be satisfied before a court allows a particular defendant to proceed *pro se*, it is necessary to briefly review the basic competency level required to stand trial.

It is a fundamental principle, derived from the traditional rule against trials *in absentia*, that the conviction of an accused while she is mentally incompetent violates the right to due process of law.⁸⁵ A defendant present in body, but not in mind, has no real chance to present her defense—even with the aid of counsel—against the resources and preparation of the State.⁸⁶

In *Dusky v. United States*,⁸⁷ the Supreme Court created a two-part test to determine the competency of a defendant to stand trial. The test is: (1) "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;" and (2) "whether [the defendant] has a rational as well as factual understanding of the proceedings against her."⁸⁸ This inquiry places emphasis on the defendant's mental capacity to assist his attorney and to understand the nature of the proceedings and the charges

81. *Faretta*, 422 U.S. at 834; see also *supra* notes 36-38 and accompanying text.

82. *Faretta*, 422 U.S. at 834.

83. *Id.* at 817.

84. Part IV.A addresses whether or not possible mental incompetency should be one of those "unusual circumstances."

85. *Silten & Tullis*, *supra* note 16, at 1053.

86. *Id.*; see also Clark D. Stith, Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90*, 79 GEO. L.J. 743, 901 (1991) (the conviction of an incompetent defendant also deprives him of his constitutional right to a fair trial).

87. 362 U.S. 402 (1960).

88. *Id.* at 402.

against her.⁸⁹ The issue of competency focuses on the accused's mental condition during trial—not at the time the criminal act transpired.⁹⁰ The bottom line is that the accused must be sufficiently competent to “follow the proceedings, evaluate the evidence, and understand the significance of what is transpiring in the courtroom.”⁹¹

2. LEVELS OF INCOMPETENCY: THE SPECTRUM REALITY

The test enunciated in *Dusky* does not, however, attempt to discover whether the defendant is “mentally ill.” Courts have found mentally ill defendants competent to stand trial when the individual's mental state satisfied *Dusky*'s two-pronged test.⁹² The accepted reality today is that a particular defendant's mental condition may fall at any point along a broad spectrum. This makes it particularly difficult for legislatures or courts to draw a clear line between competency and incompetency of a defendant to stand trial, to represent oneself, or to plead guilty. With the modern recognition of functional disorders and the advances in psychiatric medicine, “the view that there is a clear, qualitative division between the sane and the mentally ill has largely been abandoned in favor of the quantitative view, that there is no such clear line between the two; there is rather an unbroken continuum from normal to abnormal.”⁹³

This spectrum of mental illness has a specific effect on a trial court's determination of whether an individual defendant is compe-

89. *Pate v. Robinson*, 383 U.S. 375, 388 (1966) (Harland, J., dissenting).

90. *Drope v. Missouri*, 420 U.S. 162, 172 (1974); *Pate*, 383 U.S. at 378.

91. *Siltan & Tullis*, *supra* note 16, at 1060.

92. *See Shaw v. Martin*, 733 F.2d 304, 314 (4th Cir. 1984) (“Although there was testimony that Shaw abused drugs and alcohol, had been emotionally disturbed, and perhaps had latent schizophrenia, the psychiatrist that he called at trial explained in the post-conviction hearing that Shaw was not psychotic. This psychiatrist and the State's psychiatrist testified that Shaw was competent to participate in the plea and sentencing proceedings, to assist his attorney in his defense, and in general to stand trial.”); *Clyburn v. United States*, 381 A.2d 260, 263 (D.C. Cir. 1977) (being a “troubled man” does not mean that the defendant lacks the competency to stand trial); *Cowan v. State*, 579 So. 2d 13, 15 (Ala. Crim. App. 1990) (“the fact that a defendant is mentally ill does not necessarily mean that he is legally incompetent to stand trial”) (quoting 22A C.J.S. *Criminal Law* § 550 (1989)); *State v. Galbraith*, 723 S.W.2d 55, 65 (Mo. Ct. App. 1986) (“suspicion or actual presence of some degree of mental illness or need for psychiatric treatment does not equate with incompetency to stand trial”); *State v. Smith*, 749 P.2d 202, 205 (Wash. Ct. App.) (“Even a criminal defendant who is mentally ill may waive his right to counsel if the [*Dusky*] standards are met.”); *see also Chichakly v. United States*, 926 F.2d 624, 635 (7th Cir. 1991) (defendant was taking large amounts of prescription medication for depression and insomnia, but was found competent to plead guilty).

93. Henry Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 4 (1960); *see also Ronald Roesch & Stephen L. Golding, Who is Competent to Stand Trial*, TRIAL, Sept. 1985, at 40, 42.

tent to stand trial. A court, in applying the *Dusky* test, cannot simply find that a defendant has hallucinations, delusions, or other abnormalities.⁹⁴ Instead, it must show that these problems will affect the defendant's chances of success before the court.⁹⁵ Once this can be established, it must declare the defendant "incompetent" and suspend the proceedings against her.⁹⁶ The state should then give the defendant mental health treatment to restore her competency, at which time the proceedings can continue.⁹⁷

3. COMPETENCY HEARINGS

The United States Supreme Court, in *Pate v. Robinson*,⁹⁸ articulated the standard for determining whether the trial judge must hold a hearing to determine the defendant's competency to stand trial. The Court stated that, "[w]here the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion"⁹⁹ must hold a hearing to ascertain whether the defendant has sufficient competency to stand trial under the *Dusky* test.¹⁰⁰ The evidence may be discovered either by the judge's own observation or the indication of counsel.¹⁰¹

If the judge feels the evidence raises a "bona fide doubt," the usual response is to order a psychiatric examination of the defendant.¹⁰² Typically, the court will then hold a hearing in which each party with information concerning the defendant's mental condition appears before the court to testify.¹⁰³ The court must then determine

94. Roesch & Golding, *supra* note 93, at 42.

95. *Id.*

96. Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 243 (1987).

97. *Id.* at 243-44.

98. 383 U.S. 375 (1966).

99. *Id.* at 385. As for the "bona fide doubt" standard necessary to hold a competency hearing, one court held that "the right to a competency hearing is not absolute. A competency hearing is required . . . only when the trial court has 'reasonable grounds' for believing the defendant may not be competent to stand trial." *Adams v. State*, 509 N.E.2d 812, 814 (Ind. 1987) (citations omitted).

100. Silten & Tullis, *supra* note 16, at 1054-55; *see also* *Johnson v. State*, 507 A.2d 1134, 1140 (Md. Ct. Spec. App. 1986) ("[T]he trial court's duty to determine the competency of an accused to stand trial is triggered in one of three ways: (1) upon an allegation by the accused himself that he is incompetent; (2) upon an allegation by defense counsel that the accused is incompetent; or (3) upon the court's *sua sponte* decision that the accused appears to be incompetent.").

101. Silten & Tullis, *supra* note 16, at 1055. The Seventh Circuit held, in a similar vein, that the trial judge is "entitled to rely upon representations from an attorney that his client is competent . . ." *Chichakly v. United States*, 926 F.2d 624, 634 (7th Cir. 1991).

102. Silten & Tullis, *supra* note 16, at 1055.

103. *Id.*; *see also* *Nall v. State*, 465 P.2d 957, 959 (Kan. 1970) (psychiatrist not required to examine the defendant for a finding of competency or incompetency to be upheld).

whether or not the defendant is fit to stand trial. The court will find the defendant competent to stand trial unless a preponderance of the evidence introduced at the hearing shows that she is mentally incompetent.¹⁰⁴

E. *Competency to Stand Trial vs. Competency to Proceed Pro Se*

There is a vast difference of opinion as to whether competency to waive counsel and conduct a defense is different from competency to stand trial. Two lines of thought pervade this issue: one argues that the level of competency required to proceed *pro se* is higher than the level of competency required to stand trial, while the other vehemently attacks any such distinction.

Traditionally, most courts have come down on the side that "the standard of competence for making the decision to represent oneself is *vaguely higher* than the standard for competence to stand trial."¹⁰⁵ The typical definition for competency to waive counsel and proceed *pro se* is a two-part determination, which includes: "(1) competency to stand trial and (2) a knowing and intelligent waiver with 'eyes open', which includes an awareness of the dangers and disadvantages of the decision."¹⁰⁶ After a trial court finds the defendant competent to stand trial through the application of the *Dusky* test, most courts attempt to make some meaningful use of the amorphous standard quoted above by informing the defendant of the dangers and disadvantages of self-representation. After completing this on the record, the court will then usually try to satisfy itself that the defendant understands what she has been told, and that she is entering into this decision "knowingly and intelligently"¹⁰⁷ and with "eyes open."¹⁰⁸

104. Silten & Tullis, *supra* note 16, at 1055-56.

105. Commonwealth v. Wertheimer, 472 N.E.2d 266, 268 (Mass. App. Ct.) (emphasis added) (quoting United States *ex rel.* Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975)); see also People v. Burnett, 234 Cal. Rptr. 67 (Cal. Ct. App. 1987) (the competence required to stand trial is quite different than that needed to participate without counsel); People v. Kessler, 447 N.E.2d 495, 500 (Ill. App. Ct. 1983) ("The competence to waive counsel is generally considered to require a stricter scrutiny than the standard to stand trial or to plead."); Smith v. State, 524 A.2d 117, 120 (Md. Ct. Spec. App. 1987) (competency to stand trial not the same standard as competency to waive counsel and proceed *pro se*). But see Medina v. California, 113 S. Ct. 19 (1992) (statute requiring that party asserting incompetency of defendant to stand trial had burden of proving status did not violate procedural due process rights of defendant).

106. State v. Hahn, 726 P.2d 25, 30 (Wash. 1986).

107. Farett v. California, 422 U.S. 806, 835 (1975).

108. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942). The trial judge must be sure to "open[] the defendant's eyes" by informing the defendant of the many disadvantages of representing himself. If the judge fails in this respect, it is reversible error. See People v. Arguello, 772 P.2d 87, 95-96 (Colo. 1989) (judge's lack of explanation of the dangers of proceeding *pro se* was reversible error); Martin v. State, 588 N.E.2d 1291, 1293

Those two phrases do not have any talismanic qualities, however. It is up to the individual judge to determine the difference between that standard and the traditional standard for competency to stand trial.

The courts opting to utilize this "vaguely higher" standard for waiver of counsel have done so because, "[i]n this situation, it is clear that the defendant must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney."¹⁰⁹ These courts rely on the per curiam opinion issued by the Supreme Court in *Westbrook v. Arizona*.¹¹⁰ The Court vacated the judgment of the Supreme Court of Arizona, which affirmed the conviction of a defendant who received a hearing to determine his competence to stand trial but not one concerning the issue of his competence to waive counsel and conduct his own defense.¹¹¹ The common interpretation is that because the Court found error in the lower court's failure to make a distinct inquiry into competence to waive counsel, the waiver standard must be somewhat higher than the standard of competency to merely stand trial.

Other courts, however, interpret *Westbrook* as standing for a completely different proposition: that the competency standards are not different. The Supreme Court of Washington, sitting en banc in *State v. Hahn*,¹¹² called the "vaguely higher" standard a "mischaracterization of *Westbrook v. Arizona*."¹¹³ The court noted that the *Westbrook* court did not hold that the trial judge had to make an "enhanced probe"¹¹⁴ into the defendant's competency to proceed *pro se*, but merely that the trial judge must make a "separate inquiry"¹¹⁵ regarding this issue of competency. The court pointed out that as long as the defendant is competent to stand trial and makes the decision to proceed *pro se* "knowingly and intelligently," she may proceed without any further competency review.¹¹⁶

Courts from several other states have also agreed with this logic. The Court of Appeals of New York in *People v. Reason*,¹¹⁷ for exam-

(Ind. Ct. App. 1992) (judge must advise the defendant of the "nature, extent, and importance" of the right to counsel and the consequences of waiving this right before allowing the defendant to proceed *pro se*).

109. Silten & Tullis, *supra* note 16, at 1068; see also *Ford v. State*, 515 So. 2d 34, 41 (Ala. Crim. App. 1986) ("greater care must be taken in allowing a person to waive his right to an attorney than it does in finding him competent to stand trial").

110. 384 U.S. 150 (1966).

111. *Id.*

112. *State v. Hahn*, 726 P.2d 25 (Wash. 1986).

113. *Id.* at 29.

114. *Id.*

115. *Id.*

116. *Id.*

117. 334 N.E.2d 572, 574 (N.Y. 1975).

ple, held that the standard of competency to stand trial is exactly the same as the standard of competency to waive counsel and proceed *pro se*. The court stated that, in order to permit a defendant to proceed *pro se*, the law "does not require a further psychiatric examination and yet another formal hearing to determine mental competency to defend *pro se*, whatever that may mean."¹¹⁸

Federal courts have also occasionally held the standard to be equal. In *United States v. Hafen*,¹¹⁹ the First Circuit wrote that the "[a]ppellant does not dispute that he was competent to stand trial; from this fact the trial court was entitled to infer that he was also competent to waive his right to counsel."¹²⁰ Other federal courts, however, have held that an accused suffering from paranoid delusions was competent to stand trial, but incompetent to waive the right to counsel and represent herself.¹²¹ The lack of uniformity at both the federal and state level indicates the widespread difficulty that courts have with determining whether the standard for competency to proceed *pro se* is any different than the standard for competency to stand trial. Moreover, if the standard for proceeding *pro se* is higher, it is questionable whether the courts can apply a workable standard of competency.

III. THE CONFLICTING INTERESTS OF THE INDIVIDUAL AND STATE: THE DEVIL AND THE DEEP BLUE SEA

A. *In General: A Search for Balance*

When a criminal defendant attempts to invoke her right to proceed *pro se*, the scales of justice are subject to an interplay of constitutional, social, and ethical weights and measures. The individual and the State, both involved in a complex struggle for survival, each have a multitude of conflicting interests. Furthermore, when a defendant may be mentally incompetent to handle her own defense, the stakes for both the State and the defendant run even higher.

118. *Id.* at 574; *see also* *State v. Drobelt*, 815 P.2d 724, 731-32 n.11 (Utah Ct. App. 1991) ("We prefer the term 'knowingly' to 'competently,' because the latter term may imply a separate psychiatric assessment of competence, beyond that used to determine competence to stand trial, that . . . we do not believe is necessary to invoke the right of self-representation."). *But cf.* *State v. Contreras*, 542 P.2d 17, 19 (Ariz. 1975) (competence to plead guilty is the same as competence to stand trial); *People v. Siler*, 506 N.E.2d 756, 761 (Ill. App. Ct. 1987) ("[O]ur determination that defendant was competent to proceed *pro se* necessarily includes a determination that defendant was also fit to stand trial").

119. 726 F.2d 21 (1st Cir. 1984).

120. *Id.* at 25; *see also* *United States v. McDowell*, 814 F.2d 245, 248 (6th Cir. 1987); *United States v. Odom*, 423 F.2d 875, 877 (9th Cir. 1970).

121. *Government of V.I. v. Niles*, 295 F. Supp. 266 (D.V.I. 1969).

Whose interest should control? Which interest, in a democratic system of government, should be granted more deference? The solutions to this Catch-22, as delineated in Part IV, depend on the hierarchy of values that a particular court espouses. Both viewpoints offer logical contentions, but it may be that only by combining particular elements of each into a unified doctrine can a workable solution be formulated.

B. *The Individual's Interest*

Justice Richardson, concurring and dissenting in *People v. Chadd*,¹²² laid out the crux of the argument in favor of allowing the individual to control her own destiny. Citing *Faretta*, he noted, " 'The right to defend is personal.' These words hold the key to the issue before us."¹²³ This personal right—to refuse the services of an attorney no matter how unwise the decision may be—is "deeply ingrained"¹²⁴ in our common law and legal tradition. The initial weight of the scales, therefore, must tip toward recognizing the inherent freedom given to defendants in our criminal justice system.

The next most often cited rationale for allowing the defendant to proceed *pro se* is "to affirm the accused's individual dignity and autonomy."¹²⁵ *Faretta*'s original rationale was similar, based on the "respect for the individual which is the lifeblood of the law."¹²⁶ The Supreme Court of Alaska noted that it is "mindful that ours is a society valuing the autonomy of the individual and his freedom of choice."¹²⁷ This notion of choice—whether described in terms of respect, dignity, or autonomy—has always been foremost in the eyes of the court. The right to proceed *pro se*, then, is not just a right that can be invoked only with approval of the state, but "one of the most cherished ideals of our culture: the right of an individual to determine his own destiny."¹²⁸

Although such idealism is more *dicta* than a practical rule of law, it is further supported by the realistic—but rare—possibility that the defendant may be her own best representative. By allowing the defendant to proceed *pro se*, the defendant is permitted to present to the court "what may, at least occasionally, be the accused's best possi-

122. 621 P.2d 837 (Cal. 1981).

123. *Id.* at 849 (quoting *Faretta v. California*, 422 U.S. 832, 834 (1975)).

124. *People v. Carl*, 397 N.Y.S.2d 193, 197 (N.Y. App. Div. 1977).

125. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

126. *Faretta*, 422 U.S. at 834.

127. *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974).

128. *People v. McIntyre*, 324 N.E.2d 322, 325 (N.Y. 1974).

ble defense."¹²⁹ Defense counsel, if utilized, has the job of choosing the theory upon which to proceed at trial. A defendant who wishes to use a novel or unusual approach may quickly find her ideas silenced by her own counsel, unless she is the sole manager of her own defense. "Under some circumstances, he may indeed be the only person who will forcefully advance arguments in an unpopular cause."¹³⁰ The *pro se* defendant, then, has the unique ability to steer her own defense down whatever path she chooses, unfettered by the chains of counsel's approval.

The defendant's interest, however, does not extend only to those activities that fulfill his desire to be a self-determining entity. The definition of "interest" must be so broad as to include self-protection. Even a child knows that the right to touch the stove comes concurrently with the right to get burned. One of the obvious end results of a failure to successfully defend *pro se* is the "complete loss of liberty or life."¹³¹ Courts have long recognized that professional counsel provides the best protection for the defendant's freedom interests: "It is only through an appreciation for and an ability to use these technical rules, gleaned from three years of specialized legal education and in many instances, years of criminal defense experience, that one is assured of a proper legal defense."¹³² Thus, the defendant has an interest in remaining out of prison and out of the electric chair, even if she believes that her primary interest lies elsewhere.

The most important interest that a defendant has at stake, it has been argued, is to avoid the serious burdens imposed on defendants by the competency determination process.¹³³ First, defendants found incompetent to stand trial often find themselves caught in a vicious circle of psychotropic drugs, clinical evaluations, and courtroom hearings.¹³⁴ Serious counseling is rarely utilized, resulting in a situation in which the defendant is continually being found incompetent, and perpetually sent back to the mental facility for further "treatment."¹³⁵ One result is that the defendant, confined for as much as

129. *McKaskle*, 465 U.S. at 177.

130. *McCracken*, 518 P.2d at 91.

131. *State v. Christensen*, 698 P.2d 1069, 1073 (Wash. Ct. App. 1985). Of course, the end result of an unsuccessful defense *with counsel* is also the loss of life or liberty. Whether the individual stands a better chance with or without counsel depends on whether one is asking the defendant or the attorney. The bottom line is that "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." *State v. Nix*, 327 So. 2d 301, 354 (La. 1976).

132. *Christensen*, 698 P.2d at 1072.

133. See generally Winick, *supra* note 96.

134. *Id.* at 248.

135. *Id.* at 248-49. "One recent study found that incompetent defendants were hospitalized

thirty to sixty days (and in some cases, for a matter of several months) for a routine evaluation—without the applicable concept of “bail”—is painfully separated from her family and community.¹³⁶ This also may result in the loss of employment, further exacerbating problems that may have initially caused her confinement.¹³⁷

Second, the period of hospitalization can make the collection of evidence and the questioning of witnesses difficult if not impossible.¹³⁸ This hampering of trial preparation prejudices the defendant from providing a substantiated account of the facts. The state’s self-appointed position as *protector* thus destroys the defendant’s key interest—proving innocence.

Finally, the defendant has an interest in avoiding “unwarranted confinement.”¹³⁹ The defendant has the undeniable right to contest all charges and to have their substantive basis determined by a court of law.¹⁴⁰ The incompetent defendant may be unable to effectively battle the state’s legal arsenal, but such inability is the same whether the defendant is confined through civil or criminal actions.¹⁴¹ “Of the two, the criminal trial is more likely to afford the defendant protection against unwarranted confinement.”¹⁴² Denied the ability to fight what may be false charges, the defendant loses the basic presumption of innocence until proven guilty. Such a presumption is of questionable value to an individual strapped to a hospital bed.

Although some commentators admit that “[t]he trial of an incompetent may, indeed, be unfair,”¹⁴³ they remain convinced that it is actually more unfair to withhold a criminal trial.¹⁴⁴ “Withholding trial often results in an endless prolongation of the incompetent defendant’s accused status, and his virtually automatic civil commitment.”¹⁴⁵ The cruel irony is that this system is designed to insure that incompetent defendants are treated fairly.¹⁴⁶

Any proposed solution must take into account all of the defendant’s foregoing interests. As the Supreme Court cautioned in *Adams*

for an average period of two or three years, and that many defendants were held for considerably longer periods.” *Id.* at 249.

136. *Id.* at 256-57.

137. *Id.* at 257.

138. *Id.*

139. Burt & Morris, *supra* note 17, at 73.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 75.

144. *Id.*

145. *Id.*

146. *Id.*

v. *United States ex rel. McCann*,¹⁴⁷ "[w]hen the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."¹⁴⁸

C. *The State's Interest*

The defendant's stake in the proceedings against her, while important to her on a personal level, stands in stark contrast to the interests possessed by the state. Respect for the defendant's right to self-representation must "be tempered by concern"¹⁴⁹ for the many other rights and interests involved. The first of these societal interests that should be analyzed when formulating a solution is the "interest of society . . . that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness."¹⁵⁰ The basic principle of the justice system is to determine whether the defendant committed the crime as charged within the confines of procedural and substantive due process. A system that allows a possibly incompetent defendant to fight unaided against the powerful state, however, is fundamentally unfair.¹⁵¹ "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."¹⁵² Without the "guiding hand of counsel," even the individual with a perfect defense¹⁵³ may end up in a prison cell.

Clearly, our society views the imprisonment of an innocent person as a grave injustice, and "[n]either the state, nor the defendant, is in any sense served when a wrongful conviction is easily obtained as a result of an incompetent defendant's attempt to defend himself."¹⁵⁴ Society, therefore, also has an interest in forcing the State to prove each element of the criminal charge, thereby keeping innocent persons from erroneous imprisonment. In most cases, this protection comes from skilled counsel, and not the defendant acting on her own.¹⁵⁵

147. 317 U.S. 269 (1942).

148. *Id.* at 280.

149. *State v. Imus*, 679 P.2d 376, 387 (Wash. Ct. App. 1984) (Ringold, J., dissenting).

150. *People v. McIntyre*, 324 N.E.2d 322, 325 (N.Y. 1974).

151. *Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980) (recognizing that the right to proceed *pro se* "is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings").

152. *Massey v. Moore*, 348 U.S. 105, 108 (1954).

153. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

154. *Pickens v. State*, 292 N.W.2d 601, 611 (Wis. 1980).

155. *Faretta v. California*, 422 U.S. 806, 834-35 (1975).

The competence requirement is especially important in protecting the defendant because it "ensures that each defendant is a conscious, rational participant at trial; otherwise a criminal trial 'loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object.'"¹⁵⁶ No sane system wields its power against mere objects, especially ones with human faces.¹⁵⁷

The second major societal interest involved is the orderly administration of justice. Allowing the defendant to "commit judicial suicide"¹⁵⁸ before the court is one thing, but to allow her to waste precious judicial resources is quite another. As one judge stated:

Society's interest in the integrity of the truth-determining process and the need to have the trial proceed in an orderly fashion require that there be some qualification on the right. This concern is based upon the principle that only through an "orderly exposition of the issues" can society be adequately assured that the truth has been determined.¹⁵⁹

The system's interest, then, extends not only to conserving resources, but also to insuring that its first major interest—protecting the fairness and integrity of its proceedings—can be carried out in an orderly manner. Without order, the system effectively breaks down, causing the courts to become three-ring circuses.¹⁶⁰ This is one of the risks inherent in allowing a defendant, unskilled in the trial process, to proceed *pro se*: that her lack of legal knowledge will cause the system to lose its efficiency and fact finding abilities, bringing it down to a level that it constantly battles to rise above.

Furthermore, the "procedural rules in this area must . . . prevent the manipulative defendant from fashioning a record which seems to reflect an unconstitutional denial of the path not chosen."¹⁶¹ The

156. Note, *Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Counsel*, 68 VA. L. REV. 1139, 1141-42 (1982).

157. Even when courts do not consider criminal defendants "objects," they usually consider these individuals "frail," thus requiring protective measures against unfair treatment. "Judicial experience with human frailties has long since taught the necessities of safeguarding the accused in criminal proceedings." *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973).

158. *Burks v. State*, 748 P.2d 1178, 1182 (Alaska Ct. App. 1988) (Coats, J., dissenting).

159. *People v. Reason*, 334 N.E.2d 572, 576 (N.Y. 1975) (Jasen, J., dissenting).

160. See *Russell v. State*, 383 N.E.2d 309, 312 (Ind. 1978) ("Finally, there is the state's interest in preserving the orderly processes of criminal justice and courtroom decorum."). *But see Scarbrough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989) ("[T]hat its exercise may cause some inconvenience or even disruption in the trial proceedings, so long as it is not a calculated obstruction, cannot deprive the accused of the right [to proceed *pro se*], once asserted.").

161. *Russell*, 383 N.E.2d at 312.

criminal justice system has the responsibility to protect itself against such abusive practices, and the procedures used must be sufficient to prevent the precise Catch-22 situation described in this Comment. The solution must include a method for balancing the defendant's right to counsel and right to self-representation to avoid the defendant's use of this "heads I win, tails you lose"¹⁶² proposition.

This review of the major interests of both the defendant and the state suggests that "[t]here is no necessary hierarchy among these interests, and they are not necessarily antithetical."¹⁶³ The secret to formulating a workable solution for self-representation during one's competency hearing is to protect as many interests as feasible, while compromising obviously incongruous positions for the ultimate good of the individual defendant and society as a whole.

IV. SOLUTIONS: SOLVING THE PUZZLE

A. *Forcing Counsel on the Defendant*

All of these background issues point to one overriding truth: that the competency question, when it interacts with the right of self-representation, creates a "trap" of constitutional proportions that challenges both courts and scholars. The question presented is how to devise a solution to the problem of defendants who assert their right to proceed *pro se* before their competence has been determined that upholds the benefits and importance of the right to self-representation, while at the same time preserving the state's interest in protecting the defendant and maintaining the dignity of its own system.

The *Purnett* solution is to force counsel onto the defendant.¹⁶⁴ This system forces the defendant to proceed at the competency hearing (and all pre-competency hearings once a doubt as to the defendant's competency is raised) with defense counsel at the helm. Several courts go even further and suggest that a competency hearing should be held and counsel forced onto the defendant *anytime* a defendant desires to proceed *pro se*.¹⁶⁵

The advantages to this solution are three-fold. First, if one assumes that the *Faretta* right to self-representation does not include pretrial proceedings, then this solution is easily integrated into the present legal system. "In *Faretta*, our high court declined to make the right of a defendant to represent himself in proper person absolute

162. *State v. Imus*, 679 P.2d 376, 382 (Wash. Ct. App. 1984) (quoting *People v. Sharp*, 499 P.2d 489 (Cal. 1972), *cert denied*, 410 U.S. 944 (1973)).

163. *Russell*, 383 N.E.2d at 312.

164. *United States v. Purnett*, 910 F.2d 51, 56 (2d Cir. 1990).

165. *See, e.g., Leonard v. State*, 573 N.E.2d 463 (Ind. Ct. App. 1991).

and assertable at any stage of the trial proceeding.”¹⁶⁶ Second, this solution allows the court to run smoothly and efficiently by utilizing professional counsel at least through the competency hearing, thereby saving time and money. Third, this method is not as radical a departure from constitutional standards as appears at first glance. *Purnett* noted that “the unwanted participation of appointed counsel during pretrial hearings and conferences is much less intrusive on the right to self-representation than such participation at trial.”¹⁶⁷ Since forcing counsel on an unwilling defendant prior to trial is only a minor intrusion, the constitutional right of self-representation is not violated.

The primary disadvantage of forcing counsel onto an unwilling defendant, even if only for pretrial hearings, is that it directly subverts the individual’s interests of autonomy, dignity, freedom of choice—those same interests that *Faretta* referred to as “the lifeblood of the law.”¹⁶⁸ Moreover, as one court has noted, “[u]nwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction.”¹⁶⁹ Where counsel is forced on the defendant prior to the conclusion of the competency hearing, there still exists, for all practical purposes, an “unrepresented” defendant standing before the court.

B. *Deferring the Competency Hearing*

The second possible solution is to defer the competency hearing until after the trial. This proposal would ignore competency as a barrier to self-representation unless the defendant is found guilty. Once the defendant is found guilty, the fact-finder would evaluate the defendant’s competency. One advantage to this solution is that it allows the defendant to prove her innocence, as well as test the State’s evidence, in order to put the State “to its burdens.” This is impossible when the defendant is committed to a mental treatment facility for an indefinite period of time.¹⁷⁰ The second advantage is that this gives the defendant his dignity and autonomy by initially presuming competence and allowing her to conduct her own defense.¹⁷¹

There are, however, disadvantages to such a system. First, this system could waste valuable resources because the conviction might be overturned after completion of the entire process. Second this system would increase the probability that the judge or jury would impermissibly consider the defendant’s courtroom conduct in passing

166. *State v. Nix*, 327 So. 2d 301, 353 (La. 1975).

167. 910 F.2d at 56.

168. *Faretta v. California*, 422 U.S. 806, 834 (1975).

169. *Nix*, 327 So. 2d at 354.

170. *Winick*, *supra* note 96, at 257.

171. The Supreme Court suggested this solution in *Drope v. Missouri*, 420 U.S. 162 (1974).

on her competency. The Ninth Circuit, in *Cooley v. United States*, held that "the manner in which the defendant conducts his defense cannot conclusively establish his state of mind at the time" he opted for self-representation.¹⁷² It would seem almost impossible to instruct the fact-finders to ignore the defendant's conduct that they personally witnessed for weeks or months, and contain their investigation to what transpired before the trial.

C. *Allowing Waiver of Incompetency Status*

The third alternative is to allow the defendant to waive her incompetency status. This system would allow a possibly incompetent defendant to waive her incompetence status and proceed *pro se*. The trial judge would need to exercise more control to make sure the proceedings run smoothly, and higher courts could not reverse solely on the basis that the defendant was incompetent. Some expert commentators favor applying this solution to the vast range of competency problems that arise, not merely to this one situation alone.¹⁷³ One advantage of allowing a defendant to waive her incompetency status is that this avoids both the costs and the impact of competency evaluations. Rather than helping the defendant, such evaluations can cause huge burdens to the defendant.¹⁷⁴

The second advantage is that this alternative may, in fact, enhance our system's goal of administering justice. As one commentator notes, "the appearance of justice is furthered by respecting the wishes of defendants . . . to face their charges rather than denying them that right out of a false paternalism."¹⁷⁵ The bottom line here is that incompetent defendants already may waive valuable rights—for example, the right to remain silent—as explained by the Supreme Court in *Colorado v. Connelly*.¹⁷⁶

The biggest disadvantage to this approach is that the view that the system has a duty to protect incompetent defendants is much too ingrained in our present system to make this an acceptable solution. Clearly, there are situations where treatment and evaluations play a positive role in the defendant's life.¹⁷⁷ Before moving toward such an aggressive solution, courts should attempt to find a simpler and more integratable proposition.¹⁷⁸

172. 501 F.2d 1249, 1252 (9th Cir. 1974).

173. See generally Winick, *supra* note 96, at 259-64.

174. See *supra* notes 133-146 and accompanying text.

175. Winick, *supra* note 96, at 264.

176. 479 U.S. 157, 164-54 (1986).

177. See generally Winick, *supra* note 96, at 258-59.

178. Legal scholarship must offer realistic, practical alternatives to the status quo. "Pie in

D. *Standby Counsel: The Best Alternative*

The best alternative, after weighing the interests of the defendant versus the interests of the system, and viewing the entire situation in light of historical and judicial precedents, is to allow the defendant to proceed *pro se* before her competency hearing with mandatory standby counsel at her side. In other words, if a bona fide doubt exists as to defendant's competency (or even possibly whenever a defendant wanted to proceed *pro se*), then the court should appoint advisory counsel.

The chief advantage to this solution is that it enables the defendant to maintain control of her own defense, keep a sense of dignity and autonomy, and exercise her freedom of choice (the original aims of *Faretta*),¹⁷⁹ while at the same time relieving "the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."¹⁸⁰

One of the major problems with *pro se* representation is that it hurts the "orderly administration of a criminal trial."¹⁸¹ Standby counsel basically alleviates this problem by providing the defendant with professional counsel to answer procedural questions and make suggestions, while allowing the defendant to control the strategy and direction of her own defense.¹⁸²

This solution does have several inherent difficulties. With carefully drawn boundaries, however, they do not present insurmountable obstacles. First, there is the very real possibility that standby counsel will overstep her role as "advisory" counsel and attempt to direct the movement of the case. The defendant's right to proceed *pro se* must be carefully guarded because, "[i]f 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 defend-

the sky" changes, which attempt to radically alter hundreds of years of jurisprudence with a single pen stroke, do more to badger the courts than to assist them in solving their (our) problems.

179. *Faretta v. California*, 422 U.S. 806, 834 (1975).

180. *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984).

181. *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973).

182. See *McKaskle*, 465 U.S. at 183 ("*Faretta* rights are also not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. In neither case is there any significant interference with the defendant's actual control over the presentation of his defense.").

ant on any matter of importance, the *Faretta* right is eroded.”¹⁸³

Second, no affirmative right exists under present law to force an appointment of advisory counsel for an indigent defendant.¹⁸⁴ A court *may*, however, appoint standby counsel to assist the *pro se* defendant if it so desires.¹⁸⁵ In fact, the *Faretta* court noted that the trial court may, “even over objection by the accused[,] appoint a ‘standby counsel’ to aid the accused if and when the accused requests help.”¹⁸⁶ In a positive sense, therefore, the judicial precedent already exists to allow courts to force standby counsel onto the defendant, as long as counsel’s performance remains within the boundaries of *reasonable* assistance. This solution would only require judicial expansion from the present concept of *permitting* the trial court to appoint standby counsel to *forcing* standby counsel upon a *pro se* defendant when her competency is in question.¹⁸⁷

Third, courts have held that “appointment of standby counsel is not a substitute for appointed counsel where a person is incapable of making a constitutional waiver of counsel.”¹⁸⁸ It can be argued, however, that such courts were referring to standby counsel *at trial*, not merely at pre-competency hearing proceedings as advocated here. Clearly, in order for appointment of standby counsel to be an effective

183. *Id.* at 178.

184. *People v. Crandell*, 760 P.2d 423, 439 (Cal. 1988) (“the right to the assistance of counsel, guaranteed by the state and federal constitutions, has never been held to include a right to the appointment of advisory counsel to assist a defendant who voluntarily and knowingly elects self-representation”); *see also McKaskle*, 465 U.S. at 951-52; *Ford v. State*, 515 So. 2d 34, 43 (Ala. Crim. App. 1986) (standby counsel not required to be appointed when client opts to represent himself); *In re Haskins*, 551 A.2d 65, 66 (Del. 1988) (no right to “hybrid representation”); *State v. Williams*, 352 S.E.2d 428 (N.C. 1987) (no right to appear both *in propria persona* and by counsel).

185. *State v. Antone*, 724 S.W.2d 267, 274 (Mo. Ct. App. 1986).

186. *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975); *see also Ball v. State*, 337 So. 2d 31, 38 (Ala. Crim. App. 1976) (trial court, after granting defendant’s motion to proceed *pro se*, required standby counsel to sit with the defendant throughout the proceedings); *Scarborough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989) (“participation of standby counsel does not infringe upon *Faretta*’s guarantee of self-representation, and may even be imposed upon the accused consistently with the Sixth Amendment”); *State v. Watkins*, 606 P.2d 1237, 1239 (Wash. Ct. App. 1980) (“Standby counsel may be appointed even over objection by the accused to aid the accused if and when he or she requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation becomes necessary.”).

187. Or, as previously noted, this could be expanded so as to force *any* defendant who wishes to proceed *pro se* before or during his own competency hearing to appear only with standby counsel.

188. *Burks v. State*, 749 P.2d 1178, 1181 (Alaska Ct. App. 1988); *see also McKaskle v. Wiggins*, 465 U.S. 168 (1989). *But cf. State v. Barker*, 667 P.2d 108, 112-13 (Wash. Ct. App. 1983) (hybrid representation—defendant as co-counsel with his attorney—does not amount to *pro se* representation and no waiver of the right to counsel is involved).

solution, appellate courts must find that it affords sufficient due process to avoid reversals on that basis.

The overriding advantage to this solution is that it effectively balances the concerns of the state—accuracy, efficiency, and procedural control—with the original ideals of *Faretta*. The Supreme Court of Alaska in *McCracken v. State*,¹⁸⁹ although discussing a situation in which the defendant was “competent,” said that “where the court is *not completely satisfied* that the defendant is capable of *pro se* representation, [the court] may insist that the prisoner accept consultative assistance by appointed counsel.”¹⁹⁰ Analytically, that same situation exists here: the judge is not completely comfortable allowing the defendant to wander alone into the minefield of a criminal trial but wants to protect her constitutional right to proceed *pro se*. *McCracken* suggests that forcing standby counsel to be at the defendant’s disposal is indeed a workable, viable option, given the weighty interests at stake.

V. CONCLUSION

The final rationale for adopting the solution of standby counsel as sufficient protection of the rights of a *pro se* defendant of questionable competency (or even sound competency), is that, in the words of Judge Enright, dissenting in *United States v. Aponte*,¹⁹¹ this gives the defendant the “best of both worlds.”¹⁹² “The defendant had whatever advantages [that] accru[ed] to his interest under *Faretta* together with all the advantages appointed counsel could bring to his case.”¹⁹³

In conclusion, this Comment hopes to spur the courts to adopt a solution that takes into account their own needs of efficiency and accuracy, while at the same time recognizing the defendant’s rights as a member of this society and as a human being.

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189. 518 P.2d 85 (Alaska 1974).

190. *Id.* at 92.

191. 591 F.2d 1247 (9th Cir. 1978).

192. *Id.* at 1251 (Enright, J., dissenting).

193. *Id.*