

Standby Me: Self-Representation and Standby Counsel in a Capital Case

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I. Introduction

John Allen Muhammad (“Muhammad”), the elder of the two suspects accused of killing ten people in the 2002 “sniper” attacks, shocked a Virginia Beach courtroom when he announced on Monday, October 20, 2003 that he wanted to represent himself by proceeding pro se in his capital murder trial.¹ Muhammad’s defense team assumed the role of standby counsel and watched as he made his opening statement and began to outline his innocence to the jury.² Unable to proceed with their legal defense plan as anticipated, the defense team was not able to control what information the jury heard.³ Muhammad’s defense counsel observed somewhat helplessly as Muhammad proceeded.⁴ They provided assistance only when asked by the court or Muhammad until two days later when Muhammad requested representation.⁵

Muhammad is not the first high-profile defendant to assert his Sixth Amendment right to self-representation.⁶ Colin Ferguson, Ted Bundy, Jack

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1. Jon Frank & Kate Wiltrout, *Muhammad Defends Himself; Arguing His Own Case; Sniper Suspect’s Surprise Move Begins Day of Drama*, THE VIRGINIAN-PILOT, Oct. 21, 2003, at A1, available at 2003 WL 60261836.

2. *Id.*

3. *See id.* at A15 (describing the defense counsel sitting next to Muhammad as he made “bizarre references” to the jury).

4. *See id.* (describing “hushed conversations” that drew protest from the prosecution).

5. *US Sniper Suspect Re-instates Lawyers*, (Oct. 22, 2003), at <http://archives.tcm.ie/breaking-news/2003/10/22/story118439.asp> (on file with author).

6. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.”); U. S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”). The Sixth Amendment right to self-representation was made applicable to the states via the Fourteenth Amendment. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (stating that a state may not constitutionally hale a person into criminal court and

Kevorkian, and Zacarias Moussaoui all chose to represent themselves in their respective trials.⁷ As illustrated by each of these cases, pro se defendants often face considerable obstacles in their attempts to provide themselves an adequate legal defense.⁸

The stakes for a capital defendant proceeding pro se are high, and the decisions that such a defendant makes in this capacity truly can mean the difference between life and death. The issues that surround self-representation are amplified in the context of a capital murder trial because subjects that should be preserved for appeal can easily be procedurally defaulted by a defendant with no legal training.⁹ Additional questions also emerge. Should defendants acting as their own defense attorneys be able to forgo the presentation of mitigating evidence at sentencing and pursue death? What is the role of standby counsel during the guilt/innocence and sentencing phases of a capital trial? This Article will examine the history of self-representation, the emergence of standby counsel, and the issues that surround the role of standby counsel today. Further, this Article will identify areas in the capital context in which the role of standby counsel should be explored and perhaps be expanded in the interest of judicial integrity.

II. *Evolution of the Phenomenon of Standby Counsel*

“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”¹⁰ This statutory pronouncement is the current codification of section 35 of the Judiciary Act of

then require him to use a lawyer when the defendant insisted on conducting his own defense).

7. Amy Jeter, *Risks Are Many, Acquittals Few When Defendants Act as Attorneys*, THE VIRGINIAN-PILOT, Oct. 21, 2003, at A1, available at 2003 WL 60261838 (caption reprinted from Associated Press). Not all of these defendants were capital defendants. *Id.* Colin Ferguson was convicted of the 1993 shooting that killed six passengers on a New York commuter train. *Id.* Ted Bundy was a serial killer who was found guilty and executed. *Id.* Jack Kevorkian was the “mercy killer” convicted by a jury of second degree murder for the aid he provided in the intentional suicide of an elderly and sick man. *Id.* Zacarias Moussaoui is being tried as a co-conspirator in the September 11, 2001 attack on the World Trade Center. *Id.*

8. See Marie Higgins Williams, *The Pro se Criminal Defendant, Standby Counsel, and the Judge: A Proposal For Better-Defined Roles*, 71 U. COLO. L. REV. 789, 789–792 (2000) (describing events that occurred in the trials of Dr. Jack Kevorkian, Theodore Kaczynski, and Colin Ferguson).

9. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (holding that the respondent’s failure to assert timely an objection under Florida’s contemporaneous objection rule, absent a showing of good cause for non-compliance, precludes federal habeas corpus review of the respondent’s claim). See generally Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (advising Virginia capital defense attorneys on issues relating to procedural default and preservation of appellate and habeas issues).

10. 28 U.S.C. § 1654 (2000).

1789, which was enacted the day before the Sixth Amendment was proposed.¹¹ The statute calls attention to the fact that since our nation's beginning, the right to represent oneself in a federal court has been protected.¹² Two United States Supreme Court cases have examined the constitutionality of the right to self-representation and the rules governing the role of standby counsel.

A. *Faretta v. California*

The Sixth Amendment provides for the accused to have “Assistance of Counsel for his defence.”¹³ It is well established that the Sixth and Fourteenth Amendments provide a person charged with a crime in either federal or state court the right to counsel; however, the question raised in *Faretta v. California*¹⁴ was “[w]hether the Constitution forbids a State from forcing a lawyer upon a defendant.”¹⁵ The United States Supreme Court held that making counsel available to all defendants is one thing but it is “quite another to say that a State may compel a defendant to accept a lawyer he does not want.”¹⁶

The Court based its decision in *Faretta* on the structure of the Sixth Amendment, the history from which the Amendment emerged, and the idea of individual autonomy implicit in the personal rights guaranteed by the Sixth Amendment.¹⁷ Because the Sixth Amendment states that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,” the Court concluded that “[a]lthough not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.”¹⁸ Further, the Court explained that

11. *Faretta*, 422 U.S. at 812–13; 1 Stat. 73, 92 (1789); see U.S. CONST. amend. VI (stating “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to have the Assistance of Counsel for his defence”).

12. *Faretta*, 422 U.S. at 812.

13. U.S. CONST. amend VI.

14. 422 U.S. 806 (1975).

15. *Faretta*, 422 U.S. at 815; see *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963) (holding that the Sixth Amendment’s right to counsel provision applies to the states). *Faretta* was arrested and charged with grand theft. *Faretta*, 422 U.S. at 807. He was arraigned and a public defender was appointed to represent him. *Id.* Well before trial, *Faretta*, who had represented himself in a criminal trial previously and was worried about the public defender’s heavy workload, requested the judge to allow him to proceed pro se. *Id.* The judge preliminarily granted the request but, before trial, conducted a hearing and changed his mind declaring that *Faretta*’s waiver of assistance of counsel was not knowing and voluntary. *Id.* at 808–10. The judge ruled that he was not allowed to conduct his own defense. *Id.* at 810. *Faretta* repeatedly requested that he be appointed as co-counsel and attempted to make motions on his own behalf. *Id.* *Faretta* was convicted and sentenced to prison. *Id.* at 811.

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

17. *Id.* at 818–21.

18. *Id.* at 819.

the structure of the phrase “‘assistance’ of counsel” means purely that, a lawyer, no matter how knowledgeable, is his client’s assistant.¹⁹ “To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment” and results in counsel being seen as a master.²⁰ The Court pointed to a long history of British and colonial jurisprudence that exemplified the idea that self-representation for serious crimes was commonplace.²¹

The Court acknowledged that the right to self-representation was not without limitation.²² Recognizing that there could be situations in which an accused is incapable of understanding the benefits that accompany having legal aid and representation, the Court reiterated that the accused must competently and intelligently establish that he contemplated the danger of self-representation and that he understood his choice to represent himself and its possible implications.²³

The United States Supreme Court held in *Godinez v. Moran*²⁴ that the competency standard for waiving one’s right to counsel is the same standard of competency as that required in order to stand trial.²⁵ This standard requires that the court determine “whether [the defendant] has sufficient present ability to consult

19. *Id.* at 820. The Court further stated, “[t]he language and spirit of the Sixth Amendment contemplate that counsel . . . 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.” *Id.*

20. *Id.*

21. *Id.* at 821–23, 826. The Court found only one instance in British legal history of a court “forcing counsel upon an unwilling defendant in a criminal proceeding” and no instances of such a practice in American colonial history. *Id.* at 821, 827–28.

22. *See Faretta*, 422 U.S. at 833 n.46 (“The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.”). *See generally* *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (articulating that the court can, after warning the pro se defendant, terminate the defendant’s right to self-representation for engaging in courtroom misconduct).

23. *Faretta*, 422 U.S. at 835; *see* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that “[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused”); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (“But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.”).

24. 509 U.S. 388 (1993).

25. *Godinez v. Moran*, 509 U.S. 388, 391 (1993); *see* *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (stating the test for competency to stand trial). In *Godinez*, the defendant pleaded not guilty to three counts of first degree murder and then, after the State announced its intent to seek death, came before the court requesting to proceed pro se and to change his initial plea to guilty. *Godinez*, 509 U.S. at 392. On the basis of psychiatric exams performed previously, the court concluded that the defendant was competent and that he knowingly and intelligently waived his right to counsel. *Id.* During the petitioner’s habeas proceedings, the United States Court of Appeals for the Ninth Circuit held that the competency standard to waive his right to counsel should be higher than the competency standard to stand trial. *Id.* at 394.

with his lawyer with a reasonable degree of rational understanding—and whether [the defendant] has a rational as well as factual understanding of the proceedings against him.”²⁶ Once it is determined that the accused is competent to waive his right to counsel, the court is required to conduct a second inquiry to ensure that he has made this decision knowingly and intelligently.²⁷ According to the Court in *Faretta*, this inquiry should not focus on the defendant’s skill or mastery of the legal issue for which he stands accused, but rather the inquiry should focus on whether the defendant understands the implications of his waiver of the right to counsel.²⁸

In response to concerns that pro se defendants would deliberately disrupt their trials, the Court in *Faretta* stated that such instances, since the beginning of federal law, had been rare.²⁹ Moreover, if a defendant deliberately engages in conduct that disrupts or obstructs the course of the trial, a trial judge can terminate the defendant’s ability to represent himself.³⁰ While recognizing the defendant’s right to proceed pro se, the Court noted that the defendant must comply with the substantive rules that govern trials.³¹ The Court went further and stated, “[o]f course, 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.”³²

26. *Dusky*, 362 U.S. at 402. This standard is often referred to as the “rational understanding” standard. *Godínez*, 509 U.S. at 397.

27. *See Adams*, 317 U.S. at 275 (stating that “an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel”).

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

29. *Id.* at 834 n.46.

30. *Id.*; *see United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972) (“The right to self-representation, though asserted before trial, can be lost by disruptive behavior during trial, constituting constructive waiver.”); *Allen*, 397 U.S. at 343 (holding that a defendant can lose his right to be present at his own trial as guaranteed under the Sixth Amendment if he is warned by the judge that he will be removed for disruptive behavior and then continues to conduct “himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom”).

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

32. *Id.*; *see Dougherty*, 473 F.2d at 1124–25 (explaining that, because of a pro se defendant’s “rudimentary acquaintanceship with the rules of evidence and courtroom protocol,” the trial judge can appoint “amicus curiae to assist the defendant”); *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971) (stating the court’s suggestion “that the district courts . . . offer as an alternative to an indigent defendant who wishes to proceed pro se the assistance of appointed counsel available as a resource to the extent that the defendant may wish to make use of his services”).

The dissent in *Faretta* voiced opposition to the majority opinion for several reasons. Most notably in the context of this Article, the dissenting justices suggested that the majority's decision undermined an "already malfunctioning criminal justice system."³³ The dissenting justices stated, "[t]hat goal [of ensuring justice] 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."³⁴ The justice system's role, according to the dissenting justices, is to ensure fair trials for both the defendant and for the benefit of society.³⁵ These concerns for the integrity of the judicial system re-emerge in a heightened sense when one considers an ill-prepared defendant representing himself against the State in a struggle over life and death.

B. McKaskle v. Wiggins

In *McKaskle v. Wiggins*³⁶ the Supreme Court considered the constitutional role and the limitations of standby counsel.³⁷ Carl Edwin Wiggins ("Wiggins") exercised his Sixth Amendment right to proceed pro se with his defense in a robbery trial.³⁸ Due to an indictment error, his first conviction was set aside.³⁹ Wiggins was subsequently tried again and convicted.⁴⁰ The trial court appointed standby counsel to assist him in both of his trials.⁴¹ Wiggins requested that standby counsel not interfere with his presentation of the case, but he constantly interrupted his own examinations to confer with standby counsel and standby counsel conducted voir dire.⁴² On appeal, Wiggins challenged his standby counsel's involvement in his second trial and claimed "they had unfairly interfered with his presentation of his defense" in violation of his constitutionally protected right.⁴³

After several failed appeals, the United States Court of Appeals for the Fifth Circuit reversed the denial of Wiggins's habeas petition and held that, due to the

33. *Faretta*, 422 U.S. at 837 (Burger, J., dissenting).

34. *Id.* at 839 (Burger, J., dissenting).

35. *Id.* at 840 (Burger, J., dissenting).

36. 465 U.S. 168 (1984).

37. *McKaskle v. Wiggins*, 465 U.S. 168, 170 (1984).

38. *Id.* at 170.

39. *Id.*

40. *Id.* *McKaskle* was sentenced to life imprisonment at both trials because of his status as a recidivist. *Id.*

41. *Id.*

42. *Id.* at 172. *See generally* Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55 (2003) (discussing the implications of standby counsel and the pro se defendant both being active participants in front of the jury in a criminal trial).

43. *McKaskle*, 465 U.S. at 170, 173; *see Faretta*, 422 U.S. at 807 (recognizing a Sixth Amendment right to conduct one's own defense).

unrequested aid by standby counsel during trial, Wiggins had been denied his Sixth Amendment right to self-representation.⁴⁴ The Fifth Circuit discussed the role of standby counsel and noted that they should “‘be seen, but not heard.’”⁴⁵ On appeal, the United States Supreme Court reversed the Fifth Circuit.⁴⁶

The Court stated that to determine if *Faretta* rights had been honored, “the primary focus must be on whether the defendant had a fair chance to present his case in his own way.”⁴⁷ The Court outlined a two-part test to determine if standby counsel’s unsolicited actions interfered with a defendant’s *Faretta* rights.⁴⁸ First, the pro se defendant must be able to control the case and how it is presented to the jury.⁴⁹ Second, standby counsel’s participation should not interfere with the jury’s perception of the defendant representing himself.⁵⁰ Implicit in this two-part standard is the idea of autonomy of the individual. If a defendant elects to proceed pro se and has competently, voluntarily, and knowingly waived his right to counsel, then standby counsel should not be a hindrance to the case the defendant wishes to put forward.⁵¹ “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.”⁵² According to the Court, a pro se defendant should be allowed to address the court on his own behalf and, if standby counsel disagrees, the conflict should be resolved in the defendant’s favor.⁵³

Outside the presence of the jury, standby counsel are given more flexibility regarding the level of their involvement.⁵⁴ Conflicts between a pro se defendant and standby counsel can be addressed before the judge where each party can address the court freely; so long as the matter is one that would normally be left to counsel’s discretion, it is resolved in the defendant’s favor.⁵⁵ This process

44. *McKaskle*, 465 U.S. at 173.

45. *Id.* (quoting *Wiggins v. Estelle*, 681 F.2d 266, 273 (5th Cir. 1982) (internal quotation marks omitted)).

46. *Id.*

47. *Id.* at 177.

48. *Id.* at 178.

49. *Id.*

50. *McKaskle*, 465 U.S. at 178.

51. *See id.* at 177 (stating that *Faretta* places some limitations on standby counsel’s unsolicited participation).

52. *Id.* at 178.

53. *Id.* at 179.

54. *See id.* at 178 (stating that participation by standby counsel outside the presence of the jury does not destroy the jury’s perception of the defendant’s control over his own trial).

55. *Id.* at 179; *cf.* AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: STANDBY COUNSEL FOR PRO SE DEFENDANT, Standard 6-3.7 (3d ed. 1999) [hereinafter ABA

does not diminish the appearance of the defendant's control to the jury. Likewise, standby counsel does not violate *Faretta* rights when assisting a pro se defendant in conquering basic "procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony" if the defendant clearly expresses the wish for aid.⁵⁶

III. *Proceeding Pro Se*

A. *Asserting the Right*

The courts do not have an obligation at the beginning of a trial to inform a defendant of his constitutional right to proceed pro se.⁵⁷ However, once a defendant asserts this right, courts are required to ensure that the assertion is competently and intelligently made.⁵⁸ After the court determines that the defendant is competent, a key question then becomes when a court may determine that a defendant did not knowingly and intelligently waive this right. Generally speaking, a court must make the defendant aware of the dangers and potential disadvantages of self-representation and must satisfy itself that the defendant made the decision to proceed pro se voluntarily.⁵⁹ In making this

Standard 6-3.7] (stating that when a defendant is permitted to proceed without counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when requested). Additionally, the ABA recommends that standby counsel be appointed in every capital case. *Id.* The guidelines further state that:

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.

Id.

56. *McKaskle*, 465 U.S. at 183. Aid by standby counsel in this respect does not erode the defendant's actual control over the direction of the trial, nor does it threaten to impair severely the jury's perception of the defendant's representative status. *Id.*

57. *See Munkus v. Furlong*, 170 F.3d 980, 983 (10th Cir. 1999) (stating that "because, 'the right to self-representation does not implicate constitutional fair trial considerations to the same extent as does an accused's right to counsel,' it requires neither notice of the right's existence prior to legal proceedings nor a knowing and intelligent waiver" (quoting *United States v. Martin*, 25 F.3d 293, 295 (6th Cir. 1994))).

58. *See Godínez*, 509 U.S. at 396 (enunciating that the court must determine competency and that the waiver of the constitutional right to counsel is made knowingly and voluntarily).

59. *Faretta*, 422 U.S. at 835 (stating "[the defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'" (quoting *Adams*, 317 U.S. at 279)); *see also Wise v. Bowersox*, 136 F.3d 1197, 1203 (8th Cir. 1998) (holding that the defendant in a capital murder trial did knowingly and intelligently waive his right to counsel because the record reflected that not only did he say his waiver was knowing and voluntary but the court questioned him "at length about the dangers and disadvantages of self-representation"); *cf. Van Sant v. Gondles*, 596 F. Supp. 484, 489

determination, the United States Court of Appeals for the Fourth Circuit has stated that the court should “entertain every reasonable presumption against the waiver of this fundamental constitutional right.”⁶⁰ Some courts require a written waiver of the right to counsel, while others merely require that the record reflect the free choice of the defendant.⁶¹

B. Obligations and Limitations on the Right to Self-Representation

When a defendant asserts and is granted the right to proceed pro se, *Faretta* and *McKaskle* make it clear that the pro se defendant controls the organization and content of his defense.⁶² Implicit in this determination is the finding that the defendant can make motions to the court on his own behalf, argue points of law and fact to both the judge and the jury, participate fully in voir dire, and address the court and jury directly. Of course, the defendant’s demeanor must not stray outside appropriate courtroom etiquette nor may he disregard courtroom protocols and procedures.⁶³ The court may appoint standby counsel to assist the pro se defendant but is not required to do so.⁶⁴ Additionally, it is not reversible

(E.D. Va. 1983) (stating that the trial judge’s failure to inform the defendant about the hazards of pro se defense and failure to inquire about whether this choice was voluntarily made constituted error that deprived the defendant of his Sixth Amendment rights). Courts have suggested important *Faretta* considerations for the defendant including:

(1) that “presenting a defense is not a simple matter of telling one’s story,” but requires adherence to various “technical rules” governing the conduct of a trial; (2) that a lawyer has substantial experience and training in trial procedure and that the prosecution will be represented by an experienced attorney; (3) that a person unfamiliar with legal procedures may allow the prosecutor an advantage by failing to make objections to inadmissible evidence, may not make effective use of such rights as the voir dire of jurors, and may make tactical decisions that produce unintended consequences; (4) that a defendant proceeding pro se will not be allowed to complain on appeal about the competency of his representation; and (5) “that the effectiveness of his defense may well be diminished by his dual role as attorney and accused.”

State v. Van Sickle, 411 N.W.2d 665, 666–67 (S.D. 1987) (quoting *R. LaFave*, Criminal Procedure, § 11.5 (1984)).

60. United States v. Johnson, 659 F.2d 415, 416 (4th Cir. 1981) (citing *Zerbst*, 304 U.S. at 464).

61. See, e.g., VA. CODE ANN. § 19.2-160 (Michie 2000) (stating that if the court determines the accused voluntarily and intelligently waived his right to counsel, then a statement shall be executed to document his waiver and that statement will then be a part of the record).

62. *Faretta*, 422 U.S. at 836; *McKaskle*, 465 U.S. at 177.

63. See *McKaskle*, 465 U.S. at 178 (stating that the defendant has a right to appear before the jury and present his own defense on his own behalf); *Faretta*, 422 U.S. at 834 n.46 (stating that a trial judge can terminate a pro se defendant’s right to self-representation if the defendant engages in disruptive and obstructionist conduct).

64. *Faretta*, 422 U.S. at 834 n.46 (citing *Dougherty*, 473 F.2d at 1125); see *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997) (rejecting the pro se defendant’s assertion that the court was required to appoint standby counsel to aid with the presentation of his defense); *Spencer*, 439 F.2d at 1051 (advocating that trial courts appoint standby counsel when defendants choose to

error for a judge to decline to appoint standby counsel.⁶⁵ Further, courts possess the ability to terminate the defendant's right to self-representation in the interest of judicial integrity and judicial economy if the defendant's conduct unduly delays or obstructs the trial.⁶⁶

If a pro se defendant with standby counsel abandons his right to self-representation, or the court takes this right away, then standby counsel assumes the role of defense counsel. A pro se defendant is unlikely to succeed in asserting ineffective assistance of counsel for either his own involvement in his defense or the aid that standby counsel provided or failed to provide.⁶⁷ Because of the foggy constitutional status of standby counsel, "[t]he courts have difficulty accepting the proposition that a defendant who has no constitutional right to the assistance of standby counsel can complain if that assistance, granted by the trial court as a discretionary act, fails to meet some minimum standard."⁶⁸

IV. Role of Standby Counsel

A. Why Do We Need Standby Counsel?

A capital murder trial best illustrates the need for standby counsel because the stakes are so high. When courts fail to appoint standby counsel in capital cases, the integrity of the judicial system is more vulnerable to attack. The public will question the "justness" of verdicts rendered in cases in which a defendant, unschooled in the intricacies of the law or courtroom protocol, is sentenced to death.⁶⁹ The courts now face the problem of defining a more specific role for standby counsel in capital cases. In order to avoid the public viewing the criminal justice system as no longer just and impartial, the defendant's right to self-representation and the need for judicial integrity must be balanced.⁷⁰ The current lack of standards illuminates the fact that standby counsel is not constitutionally

proceed pro se).

65. Because there is no constitutional right to standby counsel and the appointment of standby counsel is discretionary, it is implicit that one cannot claim reversible error if counsel is not appointed. *See, e.g., State v. Small*, 988 S.W.2d 671, 673–75 (stating that a pro se defendant does not have a constitutional right to the appointment of standby counsel).

66. *Faretta*, 422 U.S. at 834 n.46.

67. *See McKaskle*, 465 U.S. at 177 n.8 (stating that a pro se defendant cannot claim ineffective assistance of counsel for the inadequacy of his own representation).

68. Ann Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 679, 726 (2000).

69. *See Williams*, *supra* note 8, at 805 (stating that "the most compelling justification for the practice of appointing standby counsel is that the defendant generally has not received a legal education").

70. *See id.* at 789 (offering commentary and proposed guidelines to define more clearly the roles of a pro se defendant, standby counsel and the judicial interests at stake in a criminal trial).

required; rather, appointment is discretionary and most court decisions allow a trial court to refuse to appoint standby counsel.⁷¹

Some commentators argue that the appointment of standby counsel should be compulsory in capital murder trials.⁷² Mandatory appointment of standby counsel would serve the overarching policy of judicial efficiency because a trained defense attorney could step in immediately upon a defendant's relinquishment of his right to self-representation. Standby counsel could carry on the trial with minimal delay. Additionally, mandatory appointment of standby counsel could, depending on the level of preparedness required of them, help the courts legitimize jury verdicts to the public. In order to focus properly on the level of interaction and limitations imposed on standby counsel, the courts need to determine what role and what level of involvement standby counsel will be permitted to assume in the criminal trial.

B. Models of Standby Counsel

There are three different models that represent the roles and limitations courts have placed on standby counsel.⁷³ These models range from having standby counsel literally just stand by in case the pro se defendant loses his right to continue to represent himself, to having standby counsel serve as a resource, to having co- or "hybrid" representation in which the defendant and standby counsel both actively participate during all stages of the criminal trial.⁷⁴ The multiplicity of acceptable practices not only confuses judges, defendants, standby counsel, and juries but ultimately results in unfairness with respect to how individual defendants are treated. A uniform system and a defined role for standby counsel should be articulated, and the role and limitations should be understood not only by the attorney assigned as standby counsel but also by the defendant asserting his right to proceed pro se.

1. Idle

Courts could advocate that standby counsel maintain a very passive role, assuming trial obligations only when the defendant relinquishes his right to self-representation or when the court no longer allows the defendant to represent

71. Poulin, *supra* note 68, at 68; *see, e.g.*, *McQueen v. Blackburn*, 755 F.2d 1174, 1178 (5th Cir. 1985) (concluding that the appointment of standby counsel is not mandatory); *Small*, 988 S.W.2d at 673–75 (stating that a pro se defendant does not have a constitutional right to the appointment of standby counsel).

72. *See Williams*, *supra* note 8, at 809–812 (advocating the mandatory appointment of standby by counsel when criminal defendants choose to exercise their Sixth Amendment rights).

73. *See Poulin*, *supra* note 68, at 707–08 (discussing the three established roles of standby counsel); John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 713 (1984) (discussing three different views of standby counsel).

74. Poulin, *supra* note 68, at 708–09.

himself.⁷⁵ It can be argued that the defendant's Sixth Amendment right to self-representation is best protected by this model because the defendant likely will not be interrupted or have an attorney affect the jury's perception of the defendant being in control of his own defense. However, having standby counsel play such an idle role could encourage laziness and potentially have a debilitating effect on the defendant's criminal trial. Should idle standby counsel assume the role of defense attorney, trial delay would most certainly occur. One of the justifications for appointing standby counsel is to minimize trial delay should the pro se defendant not be allowed or not wish to continue in such a capacity. Maintaining standby counsel that has not been encouraged to follow the defendant's trial strategy and prepare daily as if he were going to take over nullifies that justification.

2. Hybrid

Hybrid representation has been referred to as co-counsel and results when both the pro se defendant and standby counsel actively and concurrently participate in all aspects of the criminal trial.⁷⁶ While some courts and scholars have endorsed this practice, it has met equal opposition.⁷⁷ Those that endorse hybrid representation argue, among other things, that the jury is presented with a humanized pro se defendant who would otherwise not have taken the stand.⁷⁸ For Virginia practitioners trying federal cases it is important to recognize that the Fourth Circuit has not made a distinction between hybrid counsel and standby counsel.⁷⁹ Those that oppose hybrid representation urge pro se defendants and standby counsel to be aware that this type of representation has the potential of confusing the jury. Jurors do not always understand that a defendant has the right to proceed pro se, and could find it confusing that an attorney and the defendant himself are jointly presenting different parts of the defense case.⁸⁰ Additionally, a judge could be uncertain about the level of involvement that standby counsel should have and, being acutely aware that too much interference could result in the perception on appeal that the defendant's *Faretta* rights were unconstitutionally infringed, the trial judge may not allow standby counsel to

75. *Id.* at 707–08.

76. *See generally* Colquitt, *supra* note 42, at 75–115 (advocating that courts refrain from allowing hybrid representation).

77. *Compare id.*, at 75–115, with Joshua L. Howard, *Hybrid Representation and Standby Counsel: Let's Clear the Air for the Attorneys of South Carolina*, 52 S.C. L. REV. 851, 857–65 (2001) (advocating the use of hybrid representation in South Carolina after exploring its benefits and detriments).

78. Howard, *supra* note 77, at 862–63.

79. *See Singleton*, 107 F.3d at 1097 n.2 (noting that because the type of assistance the defendant requested was unclear, and because the court did not believe that advisory counsel's participation was significant, the court decided to use “advisory counsel,” “standby counsel,” and “hybrid representation” synonymously).

80. Williams, *supra* note 8, at 808.

appear to be aiding the defendant at all.⁸¹ To add confusion to the myriad of issues standby counsel faces, “[s]ome courts have held that, as soon as the defendant requests the assistance of standby counsel, he has relinquished his waiver of counsel and has waived his right to self-representation completely.”⁸² Conflicting case law on the amount of aid standby counsel can provide illuminates the need for a more unified standard to serve as guidance.

3. *At the Ready*

“At the ready” standby counsel prepares for each day of trial as if it was the last day the pro se defendant would be able to represent himself.⁸³ In this situation, standby counsel serves as a resource to the pro se defendant and can change trial strategy based on the defendant’s daily actions. Standby counsel would be available to answer questions for the pro se defendant, aid in successfully hurdling routine procedural barriers, and argue motions outside the presence of the jury. By preparing daily for the chance that the defendant’s right to self-representation might end, judicial economy is saved as standby counsel can easily and efficiently continue the defendant’s representation. Counsel appointed to “stand by” in this manner could see this model of representation as too demanding. It is likely that complaints would be made that, in practice, there is no lowered obligation to being appointed standby counsel. All counsel, standby, appointed, or retained, should serve their clients zealously and should, more broadly speaking, work to assure proper judicial resolution of matters before the court. By adopting the “at the ready” model, attorneys, the courts, pro se defendants, and society in general would be best served.

V. *Pro Se Defendants in the Capital Context*

In 1976 the United States Supreme Court reinstated the death penalty after upholding new procedural safeguards that were meant to avoid its arbitrary imposition.⁸⁴ These safeguards were intended to narrow the class of defendants

81. *McKaskle*, 465 U.S. at 177–78.

82. *Williams*, *supra* note 8, at 808 (citing *Smith v. State*, 588 A.2d 305, 306 (Me. 1991)); *see Smith*, 588 A.2d at 306 (noting that during plea negotiations the defendant requested assistance from standby counsel and his right to self-representation was considered waived).

83. *Poulin*, *supra* note 68, at 707–08, 725.

84. *See* Eric Rieder, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 132–33 (1985) (describing the attributes of a constitutional sentencing scheme in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)). The United States Supreme Court held in *Furman* that the death penalty, under the Georgia capital sentencing procedures that existed at the time, violated the Eighth Amendment. *Furman*, 408 U.S. at 240. In *Gregg*, the Court stated that:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures

for whom the death penalty was applicable and to ensure that individualized determinations on sentencing were made after considering the aggravating and mitigating circumstances in each case.⁸⁵ Because of the finality of death, the court should equip the jury with the facts, circumstances, and mitigating evidence to guide its decision-making.⁸⁶

In *Faretta*, a non-capital case, the Court stated that the voluntary and knowing waiver of the right to counsel in advance of trial in order to proceed pro se was constitutionally protected.⁸⁷ In *People v. Bloom*,⁸⁸ the Supreme Court of California was confronted with a capital case in which a defendant, after the conclusion of the guilt/innocence phase, was allowed to proceed pro se through the penalty phase.⁸⁹ Despite the advice of his trial counsel, the defendant announced that he preferred a verdict of death.⁹⁰ On appeal from his death verdict, the defendant argued that the trial court abused its discretion in granting his midtrial motion to proceed pro se.⁹¹ The Supreme Court of California denied the defendant's appeal and stated that "it would be incongruous to hold that a trial court lacked power to grant a midtrial motion for self-representation in a capital case merely because the accused stated an intention to seek a death verdict."⁹² Further, the court reasoned that if a capital defendant was able to proceed pro se and the death penalty was thus unavailable because the defendant chose not to pursue mitigating evidence, there would be no effective way to compel the defendant to make an affirmative death penalty defense.⁹³

Bloom illustrates the issue of whether a pro se defendant seeking the death penalty meets the competency standard. *Bloom* also illustrates the precarious position of standby counsel once their control over a capital case is relinquished

that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195 (plurality opinion).

85. *Gregg*, 428 U.S. at 195 (plurality opinion).

86. *Id.*

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

88. 774 P.2d 698 (Cal. 1989).

89. *People v. Bloom*, 774 P.2d 698, 712-13 (Cal. 1989).

90. *Id.*

91. *Id.* at 713.

92. *Id.* at 715.

93. *Id.* at 716. *See generally* *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988) (holding that "all competent defendants have a right to control their own destinies" even if they are capital defendants who wish not to present mitigating evidence or argue against death). For a more complete discussion of Virginia cases dealing with capital defendants who affirmatively seek death, *see* Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001).

to the defendant before the presentation of mitigating evidence.⁹⁴ If society has an interest in a death verdict being reliable and “just,” then a minimal additional procedural safeguard should be put in place. Courts should be required to conduct mental evaluations of death-seeking defendants before the time for presentation of mitigating evidence. Such a safeguard would ensure that even if a court had earlier found the defendant to be competent to waive his right to counsel and proceed on his own, his mental health had not deteriorated into incompetency over the course of the trial.

The dissent in *Bloom* found that a capital defendant’s ability affirmatively to seek death “subvert[ed] the process and thereby undermine[d] the reliability of its result.”⁹⁵ According to the dissenting justice, *Faretta* was not intended to be a sword for use by the pro se defendant but rather a shield to defend himself and the integrity of the judicial system.⁹⁶ According to the dissent, the majority, by granting the defendant’s request, dismantled the reliability of the system and allowed a defendant effectively to prosecute himself.

A. *Voir Dire*

Capital cases are different from other criminal cases in two important ways. Each difference illustrates an area in which standby counsel’s presence would make a difference. First, in the capital context voir dire takes on added significance. One “life-juror” can make the difference between a life and a death sentence because a jury must unanimously reach a verdict in order for death to be imposed.⁹⁷ Having a firm grasp on the law surrounding voir dire is essential to ensure that the jury is properly chosen and free from bias. If a capital defendant requests and is granted pro se status and standby counsel are appointed before voir dire takes place, then the defendant’s failure to utilize standby counsel’s aid in picking a jury could literally prove fatal. Additionally, a trial court’s failure to appoint standby counsel, which would leave the pro se defendant without any form of legal assistance, could prove equally as fatal.

Because of the significance of voir dire, it arguably constitutes the most important component of a capital murder trial. Substantial law, both federal and

94. See generally Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988) (analyzing the precarious situation counsel is put in when a capital defendant expresses a preference for execution).

95. *Bloom*, 774 P.2d at 726 (Mosk, J., concurring and dissenting in part).

96. *Id.* at 727 (Mosk, J., concurring and dissenting in part). Justice Mosk pointed to the fact that the motion to proceed pro se was made “shortly before the opening of the penalty phase,” which was certainly too late for the majority to rely on *Faretta* for controlling guidance. *Id.*

97. See, e.g., FED. R. CRIM. P. 31(a) (stating that “[t]he jury must return its verdict to a judge in open court” and “[t]he verdict must be unanimous”); VA. SUP. CT. R. 3A:17(a) (Michie 2004) (stating that “[i]n all criminal prosecutions, the verdict shall be unanimous, in writing and signed by the foreman, and returned by the jury in open court”).

state, surrounds the determination of who can serve on a jury, and a pro se defendant's failure to recognize potential juror eligibility issues and call the court's attention to them can prove fatal to a capital defendant.⁹⁸ The Sixth Amendment grants the criminally accused the right to "an impartial jury."⁹⁹ Additionally, the Eighth and Fourteenth Amendments may be implicated when a jury is improperly seated.¹⁰⁰ The Eighth Amendment, applied to the states through the Fourteenth, protects the accused from cruel and unusual punishment; this protection includes safeguards against death verdicts rendered by biased juries.¹⁰¹

A potential capital juror must be able to consider both the possibility of a life sentence and a death sentence.¹⁰² A voir dire inquiry, therefore, is at its most basic an inquiry into the life/death impartiality of potential jury members. The Supreme Court of the United States in *Morgan v. Illinois*¹⁰³ stated that clearly under the standard set forth in *Wainwright v. Witt*¹⁰⁴ "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."¹⁰⁵ Similarly, the court in *Morgan* held that jurors who automatically will vote for death in every case fail to consider the evidence of aggravation and mitigation as the jury instructions require.¹⁰⁶ Be-

98. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (allowing the defense to exclude jurors if they would automatically vote for death); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids racially motivated use of peremptory strikes); *Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (allowing the state to exclude jurors whose views will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (alteration in original) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980))); *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) (holding that a juror who makes "unmistakably clear" that he or she will "automatically vote against" death is excludable for cause).

99. U.S. CONST. amend. VI.

100. The Eighth Amendment provides a protection from inappropriate death sentences that could result from a biased jury. Such a death sentence could be considered "cruel and unusual punishment." See U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

101. U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); U.S. CONST. amend. XIV (stating in part "nor shall any State deprive any person of life, liberty, or property, without due process of law"). See generally *Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment right to be free from cruel and unusual punishment to the states via the Fourteenth Amendment).

102. See e.g., *Witherspoon*, 391 U.S. at 522–23 (illustrating that the jury cannot be organized so that the State can rely on it to return a verdict of death).

103. 504 U.S. 719 (1992).

104. 469 U.S. 412 (1985).

105. *Morgan*, 504 U.S. at 728; see *Wainwright*, 469 U.S. at 420 (stating that the state can exclude a juror if the juror's views will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (alteration in original) (quoting *Adams*, 448 U.S. at 45)).

106. *Morgan*, 504 U.S. at 729.

cause of the juror's pre-determined opinion, the absence or presence of mitigating evidence becomes irrelevant.¹⁰⁷ Due to the constitutional guarantee of the right to an impartial jury, a capital defendant is able to "challenge for cause any prospective juror who maintains such views."¹⁰⁸ A pro se defendant who chose not to utilize the assistance of appointed standby counsel, or for whom standby counsel was not appointed, likely would not know the proper phrasing of questions that would eliminate death-voting jurors while retaining potential life-voting jurors.¹⁰⁹ Because of the importance of voir dire in capital cases, attorneys appointed as standby counsel need standards that detail the extent to which they can aid the pro se defendant without violating the defendant's *Faretta* rights.

B. Mitigation

The second way capital cases differ from other criminal cases is that in capital cases evidence in mitigation and aggravation is presented following conviction but before sentencing. As illustrated by cases like *Bloom*, capital trials typically proceed through two stages: a guilt/innocence phase and a sentencing phase.¹¹⁰ During sentencing, the prosecution puts on evidence of aggravating factors that, if proven, increase the potential penalty from life to death and the defense is given the opportunity to present mitigating evidence to try to persuade the jury that there are reasons that the death penalty should not be imposed.¹¹¹ Because this is the final chance that the defendant will have to show the jury that he possesses characteristics, qualities, and life circumstances that weigh in favor of a sentence of life imprisonment rather than death, having assistance in the presentation of mitigating evidence is critical. Thus, this opportunity to present mitigating evidence to the jury becomes crucial to a "just" verdict and to the preservation of the judicial system's integrity.¹¹²

As seen in *Bloom*, a capital defendant who represents himself pro se and refuses to present evidence in mitigation of the offense denies the jury the

107. *Id.*

108. *Id.*

109. Jury selection experts have assisted trial attorneys with selecting favorable juries. These experts understand the complexity of unraveling jurors' views. The existence of these experts serves to re-emphasize the undertakings of a pro se defendant. *See generally* JEFFERY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY* (American Bar Association 1995).

110. *See Bloom*, 774 P.2d at 702, 709 (containing the headings that divide the court's opinion into the guilt and penalty phases of the trial).

111. *See, e.g.*, VA. CODE ANN. § 19.2-264.4 (Michie 2000) (containing procedures for the sentencing proceeding).

112. *See, e.g.*, *Wiggins v. Smith*, 123 S. Ct. 2527, 2543 (2003) (stating that if the jury had been presented with a more complete picture of mitigating evidence the probability that the jury could have returned a different result increased); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (stating that counsel's limited investigation of mitigating evidence could not be justified as a tactical decision).

chance to hear a full evaluation of his social history. A defendant who proceeds pro se during the sentencing phase of his trial could find it difficult to present his own mitigating evidence. Mitigation evidence often includes pre-trial mental status, evidence of IQ and low or sub-average intelligence, and evidence of a rotten social history. A defendant exercising his *Faretta* rights will not likely be able to put on evidence effectively or completely of a troubled family life. This evidence could include such things as family physical and mental abuse, drug usages by family members, illegal activities performed by family members and friends in and around the home, and a host of other topics the defendant might wish to leave partially or completely unexposed. In capital murder trials, mitigation specialists are hired to aid the defense team in the proper investigation, analysis, and presentation of mitigating evidence. Because of the considerable time and energy it takes to prepare a mitigation case, and the fact that capital defenders identify and employ these specialists themselves, it is unlikely that a defendant could prepare an equally strong mitigation case on his own.¹¹³

VI. Standby Counsel in Virginia and Pro Se Defendants in the Capital Context

If history is any indicator of future events, then it is clear that capital defendants in Virginia are ill-advised to proceed pro se in their own defense.¹¹⁴ Included in the list of capital defendants who proceeded pro se are Joseph O'Dell, who was convicted of capital murder and executed on July 23, 1997, and Richard Townes, who was convicted of capital murder and executed on January 23, 1996.¹¹⁵ While standby counsel were appointed in both cases, it is not clear what level of involvement standby counsel had in the respective trials.¹¹⁶ However, if given guidance on the issue, one would not be forced to speculate if standby counsel did all they could within the limits of the law to aid their respective defendants.

113. See generally Daniel L. Payne, *Building the Case for Life: Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003) (explaining the role and importance of a mitigation specialist and the constitutional and statutory authority in Virginia mandating that a specialist be appointed when requested in a capital case).

114. Kerry Dougherty, *History Shows Muhammad Has Picked a Bad Lawyer*, THE VIRGINIAN-PILOT, Oct. 21, 2003, at B1, available at 2003 WL 60261710.

115. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, EXECUTION INFORMATION, at <http://www.vadp.org/exinfo.htm> (on file with author) (last visited Feb. 2, 2004).

116. See generally O'Dell v. Commonwealth, 364 S.E.2d 491 (Va. 1988) (affirming O'Dell's conviction and sentence); Townes v. Commonwealth, 362 S.E.2d 650 (Va. 1987) (affirming Townes's conviction and sentence).

A. Right to Counsel in Virginia

The Virginia Constitution does not have language that directly speaks to the right of the accused to have any assistance of trial counsel.¹¹⁷ However, an implied right to counsel was articulated in *Barnes v. Commonwealth*,¹¹⁸ in which the Supreme Court of Virginia held that “[e]very person convicted of [a] crime has a constitutional right to have counsel to aid him in making his defense, but no one is compelled to have counsel.”¹¹⁹ Later, in *Watkins v. Commonwealth*,¹²⁰ the court reaffirmed its holding from *Barnes* and stated that the right to counsel was “fundamental . . . one of the rights guaranteed to an accused under our Bill of Rights.”¹²¹

In defining appointed counsel’s obligation to an indigent criminal defendant, the Supreme Court of Virginia stated that appointed counsel’s “service should be of such character ‘as to preserve the essential integrity of the proceedings as a trial in a court of justice.’”¹²² The Supreme Court of Virginia has not articulated rules and procedures different from those announced in *Faretta* and *McKaskle* as it relates to standby counsel’s affirmative role and obligations. It would seem that standby counsel should be held to the same standard of preparedness as appointed or privately obtained counsel.

117. VA. CONST. art. I, §8 (Michie 2000). The Virginia Constitution states:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the attorney for the Commonwealth and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

Id.

118. 23 S.E. 784 (Va. 1895).

119. *Barnes v. Commonwealth*, 23 S.E. 784, 787 (Va. 1895).

120. 6 S.E.2d 670 (Va. 1940).

121. *Watkins v. Commonwealth*, 6 S.E.2d 670, 671 (Va. 1940); *see Cottrell v. Commonwealth*, 46 S.E.2d 413, 417 (Va. 1948) (stating the court’s jurisprudence on assistance of counsel).

122. *Whitley v. Cunningham*, 135 S.E.2d 823, 828 (Va. 1964) (quoting *United States ex rel. Weber v. Ragen*, 176 F.2d 579, 586 (7th Cir. 1949)).

B. *Mid-Trial Issues of Competency*

What are standby counsel supposed to do when a pro se defendant does not want to present mitigating evidence in the penalty phase of a capital murder trial? This question raises complex issues of ethics and justice.¹²³ In Virginia, the Virginia State Bar Ethics Council states that retained and appointed trial counsel must honor a defendant's wishes even though this has the likelihood of resulting in death.¹²⁴ However, a tenable argument can be made that standby counsel are not under the same ethical restrictions as appointed or retained counsel. Additionally, one could argue that any capital defendant who seeks death is incompetent.

In Virginia, the trial court, the prosecution, and the defense have an obligation before the end of the trial to bring issues relating to the defendant's competency to the court's attention.¹²⁵ When a competency issue is raised, an evaluation is conducted, and the trial court must determine whether the defendant is mentally competent to stand trial.¹²⁶ Added complexity appears when a pro se defendant actively seeks to forfeit his life and counsel has been relegated to the role of standby counsel. In order to preserve the defendant's appearance of control before the jury, a motion for a competency evaluation should be made outside the jury's presence.¹²⁷ However, *McKaskle* warns that although standby counsel will not undermine the defendant's appearance of self-representation if proceedings occur outside the presence of the jury, the court is obligated to resolve disputes between standby counsel and the pro se defendant "in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel."¹²⁸ One could posit that in the interests of justice, any person with knowledge or reason to believe that a defendant in the criminal justice system is incompetent should be able to bring this issue to the court's attention. If one takes this position, then standby counsel would not be acting in violation of the defendant's *Farretta* right by raising a competency issue, but rather standby counsel would be acting in the interests of justice.

123. See Linda E. Carter, *Maintaining Systemic Integrity In Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 148 (1987) (arguing that because of the finality of death in capital cases, it is in the best interest of judicial integrity to appoint an attorney to present mitigating evidence when the capital defendant affirmatively seeks death).

124. Va. Legal Ethics Opinion, Formal Op. 1737 (Michie 2002). See generally Eisenberg, *supra* note 93, at 63 (outlining ethical and other issues for retained and appointed defense counsel when defendants affirmatively seek death).

125. VA. CODE ANN. §19.2-169.1 (Michie 2003) (setting forth procedures for raising questions of competency to stand trial or to plead).

126. *Id.*

127. See *McKaskle*, 465 U.S. at 178 (stating that standby counsel should not be allowed to destroy the jury's perception of the pro se defendant).

128. *Id.* at 179.

An alternative to standby counsel raising the competency issue would be for the court to appoint amicus curiae to present mitigation evidence to the jury if a pro se capital defendant seeks death.¹²⁹ By appointing an impartial third-party to present mitigation evidence in the interest of the court, possible loyalty and role conflicts could be avoided.¹³⁰ However, appointing amicus curiae could result in complex problems of logistics and impartiality. If the court calls witnesses in mitigation, then the court no longer appears neutral in front of the jury.¹³¹ Additionally, the time it takes to investigate and prepare mitigation evidence for a capital crime is substantial, and pro se capital defendants might not voice their plan to pursue death until the guilt/innocence phase is completed.¹³² The interests of society, when examined against the possible pitfalls of appointing amicus curiae, weigh in favor of appointment. Although unusual, appointment would ensure the jury has all the relevant information to make a “just” decision while still preserving the appearance of a traditional adversary trial.¹³³

Another variation of the complex issues that arise when examining standby counsel and death-seeking pro se defendants can be seen in *Appel v. Horn*.¹³⁴ In *Appel*, a capital defendant filed a federal habeas petition claiming a violation of his Sixth Amendment right to assistance of counsel when he was assigned public defenders and then asked the court to allow him to waive his right to counsel.¹³⁵ The court ordered a competency hearing before ruling on the motion.¹³⁶ Counsel did nothing to investigate competency nor did they look for any evidence before the competency hearing took place.¹³⁷ Counsel thought they were under

129. See Carter, *supra* note 123, at 148. Pro se defendants potentially could raise Constitutional challenges to the appointment of amicus counsel, and claim their Sixth Amendment right to defend themselves as they wished had been violated. See U.S. Const. amend. VI (stating “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence”).

130. See Carter, *supra* note 123, at 148.

131. *Id.* at 149.

132. *Id.* at 150.

133. *Id.* at 151.

134. No. CIV. A. 97-2809, 1999 WL 323805, at *1 (E.D. Pa. May 21, 1999).

135. *Appel v. Horn*, No. CIV. A. 97-2809, 1999 WL 323805, at *1, *2 (E.D. Pa. May 21, 1999).

136. *Id.*

137. *Id.* at *3. Both counsel affirmed at Appel’s Post Conviction Relief Act hearing that neither had, in the time between Appel’s entry of appearance and his hearing to establish competency to waive counsel (10 days), attempted to secure Appel’s military history, employment record, or any other record regarding Appel. *Id.* at *3 n.8. Additionally, counsel asserted that Appel instructed them not to contact family members and made it clear that he did not authorize them to act as his attorneys. *Id.* at *3 n.9. Believing that they must be his attorneys to investigate defenses, counsel did nothing. *Id.*

no obligation to investigate competency because the defendant had made a request to proceed pro se.¹³⁸ Counsel asserted that they believed they would then be appointed as standby counsel.¹³⁹ Counsel interpreted this request by the defendant to proceed pro se to mean that they were no longer appointed counsel and were not under an obligation to take any affirmative steps toward preparing any aspect of the defendant's case before the competency hearing.¹⁴⁰ The court granted the habeas petition because the defendant effectively had no counsel prior to the competency hearing, which ultimately resulted in the court allowing him to represent himself, to plead guilty, and to receive the death penalty.¹⁴¹ Because of counsel's confusion with respect to the role of standby counsel, what activates the role, and what obligations the role of standby counsel entails, Appel's writ of habeas corpus was granted and a new trial was ordered.¹⁴²

In *Appel*, the competency issue arose before trial, and counsel's confusion ultimately caused the need for a retrial.¹⁴³ Thus, *Appel* illustrates the considerable confusion that surrounds self-representation and standby counsel even before the penalty phase of a capital trial. This case makes clear the need for guidance by the courts and legislature in defining standby counsel's affirmative duties, roles, and limitations.

C. *Voir Dire*

The Virginia Constitution provides the right to an impartial jury both during guilt/innocence and during the sentencing phase of a trial.¹⁴⁴ During voir dire, the court and counsel for both the Commonwealth and the defense have the right to question potential jurors under oath.¹⁴⁵ At the time of questioning,

138. *Id.* at *3.

139. *Id.* at *3 n.8.

140. *Id.* at *3. The court noted that a competency hearing is a "critical stage" in the prosecution of a criminal defendant, and as a "critical stage" the defendant is entitled to the assistance of counsel. *Id.* at *8; *see also* *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (stating that a proceeding is a "critical stage" if "potential substantial prejudice to defendant's rights" could occur because of the absence of trial counsel's presence (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967))).

141. *Appel*, 1999 WL 323805, at *15.

142. *Id.* at *17.

143. *Id.* at *15, *17.

144. VA. CONST. art. 1 § 8 (stating "[t]hat in criminal prosecutions a man hath a right to . . . enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty"). *See generally* *Martin v. Commonwealth*, 271 S.E.2d 123, 129 (Va. 1980) (stating that the defendant has a constitutional right to an impartial jury); *Justus v. Commonwealth*, 266 S.E.2d 87, 90 (Va. 1980) (standing for the same proposition); *Gosling v. Commonwealth*, 376 S.E.2d 541, 543 (Va. Ct. App. 1989) (standing for the same proposition).

145. VA. CODE ANN. § 8.01-358 (Michie 2000) (stating the procedures for voir dire examination of potential jurors); VA. SUP. CT. R. 3A:14(a)(7) (2004) (stating that the court must question prospective jurors to determine if there is "reason to believe [the juror] might not give a fair and impartial trial to the Commonwealth and the accused").

counsel for both the Commonwealth and the defense can ask if the potential juror “has expressed or formed any opinion, or is sensible of any bias or prejudice” as to guilt and, equally as important in a capital case, as to sentence.¹⁴⁶ While there is no limitation on the number of “for cause” challenges, such challenges must be made immediately on one of the four grounds listed in section 8.01-358 of the Virginia Code.¹⁴⁷

In a Virginia capital case, the goal of voir dire is to obtain twenty-five jurors who have survived challenges for cause.¹⁴⁸ Assuming twenty-five potential jurors are left, typically both the Commonwealth and the defense will have five peremptory strikes to utilize, which leaves a jury that consists of twelve members and three alternates. Capital defense attorneys, therefore, must seat a jury with nine “life-jurors” in order to ensure that one “life-juror” will be placed in the seated jury.¹⁴⁹ When utilizing peremptory strikes, both the prosecution and defense are subject to the limitations pronounced in *Batson v. Kentucky*¹⁵⁰ and its progeny.¹⁵¹

Considerable law also surrounds the denial by the court of defense challenges for cause. For example, the defense is required to object twice to the seating of a juror in order to avoid procedural default.¹⁵² Defense counsel must first object when the judge refuses to dismiss the juror for cause and then defense counsel must object again when the jury is sworn.¹⁵³

146. VA. CODE ANN. § 8.01-358; *see* *Green v. Commonwealth*, 580 S.E.2d 834, 845 (Va. 2003) (stating that “[a] prospective juror is properly excused for cause when that person’s views concerning the death penalty would substantially impair or preclude the performance of his or her duty in accordance with the court’s instructions and the juror’s oath”); *Green v. Commonwealth*, 546 S.E.2d 446, 451–52 (Va. 2001) (holding that Virginia Code § 8.01-358 includes questions about sentencing impartiality in capital trials); *Patterson v. Commonwealth*, 283 S.E.2d 212, 215 (Va. 1981) (requiring jurors to be impartial as to punishment).

147. Additionally, counsel in Virginia can strike a juror for cause if it is discovered that the potential juror is related within the ninth degree of consanguinity or affinity to either the defendant or the victim. *Gray v. Commonwealth*, 311 S.E.2d 409, 410 (Va. 1984) (citing *Jaques v. Commonwealth*, 51 Va. (10 Gratt.) 690 (1853)).

148. The defense needs nine life-jurors in the final pool of twenty-five because the prosecution could strike five with peremptory strikes and at least three will be alternate jurors.

149. *See supra* note 148.

150. 476 U.S. 79 (1986).

151. *See* *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (stating that utilizing peremptory strikes for race based discrimination is prohibited); *see also* *J.E.B. v. Alabama*, 511 U.S. 127, 130–31 (1994) (prohibiting peremptory strikes based on gender).

152. *See generally* *Beavers v. Commonwealth*, 427 S.E.2d 411, 418–19 (Va. 1993) (stating that because “Beavers did not object at the time the trial court excused each of the three individual [venire persons] for cause” he “waived any objections he had to the exclusion for cause of these three jurors”).

153. *See* VA. SUP. CT. R. 5:25 (2004) (stating that “[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice”); *Spencer v. Commonwealth*, 384 S.E.2d 785, 793

The preceding paragraphs serve to illustrate a portion of the substantial volume of law that surrounds capital voir dire. Because of the life or death magnitude of a capital trial and the extremely precise rules governing, among other things, procedural default, standby counsel should be mandatory in capital cases. A pro se capital defendant with little to no legal training would surely expose himself to considerable error if an experienced attorney could not guide him through the process. Standby counsel should consult frequently with a defendant who asks for aid to ensure that the defendant has a grasp of the issues and implications of voir dire procedures. Such discussions would take place outside of the presence of the jury, as a jury has yet to be selected. Additionally, because capital voir dire is often done individually or in small groups, the relative effect of consultation between the pro se defendant and standby counsel would be minimized. Standby counsel should make every effort to assist the defendant in asking relevant questions, spotting potential *Batson* issues, and preserving denials of for-cause strikes for appeal.

In a situation in which the pro se defendant may consult with standby counsel but chooses not to, an argument can be made that counsel does have the ability and obligation to communicate with the defendant about what motions and strikes to make. Standby counsel can communicate instructions to the pro se defendant before the potential jurors are present, give subtle instructions to the pro se defendant during voir dire—so long as his aid was not specifically denied—and play a role in assuring that motions made during voir dire are handled properly to avoid procedural default. As established, voir dire is a critical stage of a criminal trial and therefore standby counsel should be able to give advice to the defendant.¹⁵⁴ This communication can be made outside the presence of the jurors to avoid interfering with how the jury perceives the pro se defendant.¹⁵⁵

D. Mitigation

The importance of presenting mitigating evidence in capital cases cannot be underestimated. The United States Supreme Court has held that capital defendants are entitled to present evidence in mitigation during the penalty phase

(Va. 1989) (stating that “[i]f a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections”).

154. *Gomez v. United States*, 490 U.S. 858, 873 (1989) (affirming that voir dire is a critical stage in a felony trial); *see also* *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) (stating that “[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored”); *Reynolds v. Commonwealth*, 367 S.E.2d 176, 180 (Va. Ct. App. 1988) (standing for the same proposition).

155. *McKaskle*, 465 U.S. at 179.

of a capital trial.¹⁵⁶ Courts provide such strong protection for mitigation because it serves as another procedural safeguard to ensure a “just” determination of sentencing. When a defendant decides to proceed pro se, the same issues respecting the pro se defendant’s knowledge of the law, ability to make motions in a timely manner, and preserve issues for appeal, arise in mitigation as in voir dire. When standby counsel properly assumes the “at the ready” model of representation, standby counsel should be preparing for the defendant’s mitigation case prior to trial and as the trial progresses, in light of the pro se defendant’s defensive strategy. This level of preparation is a heavy but necessary burden on standby counsel. As discussed in the context of *Bloom*, standby counsel and the court are put in awkward positions when a pro se defendant refuses to present mitigating evidence.¹⁵⁷ The court may appoint standby counsel as amicus curiae or order a competency re-evaluation before the sentencing phase if no mitigating evidence will be offered.¹⁵⁸

Additionally, in Virginia, standby counsel placed in the situation of having a pro se defendant refuse to offer mitigating evidence can utilize section 19.2-264.5 of the Virginia Code in order, ultimately, to have mitigating evidence considered before a death sentence is accepted. Section 19.2-264.5 states:

156. See, e.g., *Williams*, 529 U.S. at 396 (stating that because defense counsel did not uncover substantial mitigating evidence, they “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (stating “that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence”); *McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987) (concluding that a constitutional death penalty scheme must allow a sentencer to consider any and all relevant materials and circumstances that could result in the sentencer declining to punish the accused with death); *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (holding that during the sentencing phase, counsel must make reasonable investigations and arrive at reasonable conclusions when determining what investigations are unnecessary); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (holding that a sentencer may not “refuse to consider, as a matter of law, any relevant mitigating evidence”); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding “testimony . . . highly relevant to a critical issue in the punishment phase of the trial” cannot be excluded based on Georgia’s hearsay rule); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality) (arguing that both the Eighth and Fourteenth Amendments preclude a sentencer from being unable to consider, as mitigating evidence, any evidence or circumstances of the accused’s character or record that could result in a sentence less than death); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (stating “that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death” (citation omitted)). See generally *Payne*, *supra* note 113, at 43 (explaining the role and importance of a mitigation specialist and the constitutional and statutory authority in Virginia mandating that a specialist be appointed upon request in a capital case).

157. See *supra* notes 87–96 and accompanying text (examining the problems associated with a pro se defendant’s refusal to present mitigating evidence).

158. See *supra* notes 129–33 and accompanying text (discussing the appointment of amicus curiae in a capital case).

When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statement. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements prepared pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.¹⁵⁹

Because 19.2-264.5 requires the post-sentence report to contain evidence of the defendant's history, if standby counsel has adequately prepared and compiled materials for a mitigation case, these documents can be given to the probation officer to aid him in the compilation of the post-sentence report.¹⁶⁰ If the pro se defendant does not want any mitigating evidence presented and refuses standby counsel's assistance, the judge could order the probation officer to consult with standby counsel. If substantial mitigation appears in the post-sentence report and the judge determines that the defendant's failure to allow standby counsel to aid in the presentation of mitigation evidence is "good cause shown," section 19.2-264.5 allows the court to set aside a sentence of death imposed by the jury and instead to sentence the defendant to life imprisonment.¹⁶¹

VII. Conclusion

The courts should adopt, and standby counsel should proceed under, the role of standby counsel "at the ready." Implicit in this posture is constant preparation to assume the role of counsel if requested by the defendant or required by the court. Because of the stakes of a capital murder trial and the possibly deadly consequences, a defendant's competency and knowing and intelligent waiver of his right to counsel should be consistently monitored. Additionally, added procedural safeguards should be considered in the areas of voir dire and presentation of mitigating evidence. By making the presentation of mitigation evidence mandatory and assuring that an impartial jury is selected, these safeguards will help to ensure that the criminal justice system's integrity is

159. VA. CODE ANN. §19.2-264.5 (Michie 2000).

160. *See id.* (requiring a probation officer "to thoroughly investigate the history of the defendant").

161. *See id.* ("After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.").

not compromised by a pro se defendant's choice to proceed relying on his own representational skill.

The obligations and limitations of standby counsel are not clearly defined. Absent clearer roles, standby counsel are left to proceed acting under the minimal guidance articulated in *McKaskle*. *McKaskle* provides some guidance, but does not clearly articulate the obligations of standby counsel in a criminal trial. With several variations of the "role" standby counsel should play in assisting—or not assisting—pro se defendants, but no national, and in most cases no jurisdictional standards, standby counsel and the pro se defendants are proceeding at their own peril. When the criminal trial is capital, this lack of statutory and case law guidance jeopardizes the criminal justice system.