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Hybrid Representation and Standby Counsel: Let's Clear the Air for the Attorneys of South Carolina

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HYBRID REPRESENTATION AND STANDBY COUNSEL: LET'S CLEAR THE AIR FOR THE ATTORNEYS OF SOUTH CAROLINA

I. INTRODUCTION

After eighteen years, three dead, twenty-three wounded, two hundred suspects, and uncountable man hours, justice was served fifty miles north of Helena, Montana on April 4, 1996, when Theodore Kaczynski, the Unabomber, was captured.\(^1\) However, this was not the end of the road for the United States judicial system. Over the next year and a half, a procedural nightmare unfolded around Kaczynski. After his capture, Kaczynski fought an unending battle with his defense counsel that climaxed the week of January 12, 1998, the week his trial was set to begin.\(^2\) Kaczynski first attempted to dismiss his defense counsel and hire new counsel because his attorneys wanted to characterize him as mentally ill.\(^3\) However, instead of hiring new counsel, Kaczynski surprised the court and the country when he requested to represent himself (pro se representation) for the remainder of his trial.\(^4\) While not all criminal cases involving pro se defendants are so highly publicized, the issues surrounding pro se representation illustrated by the Kaczynski case are common to the judicial system.\(^5\)

Because "most pro se defendant cases disrupt the criminal justice system," it seems absurd that the practice remains. Consider, for example, United States v. Jennings.\(^6\) During the trial, the defendant assaulted his attorney with his fist, had to be restrained by six marshals, and threatened to physically harm the prosecutor, corrections officers, and former defense counsel.\(^8\) The defendant

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2. See Gibbs & Jackson, supra note 1, at 26-27.
3. Id. at 27.
4. Id. Judge Garland Burrell, Jr. denied Kaczynski's request. Id. However, the denial was based on the lateness of the request. Id. If Kaczynski had made the request earlier he would have been able to proceed pro se because a psychiatric examination determined that he was mentally capable of representing himself. See id.
5. The rising number of pro se litigants has been a recent national trend. See Tom Sowa, Rising to Their Own Defense: High Legal Bills Just One Reason for 'Pro Se' Cases, SPOKESMAN REV., Mar. 29, 1999, at A1, available at 1999 WL 6921087.
8. Id. at 1432-33.

851
also threatened to cut the former defense counsel’s throat and drink his blood. All of these threats resulted from the court’s denial of the defendant’s request for substitute counsel prior to jury selection. Due to the outburst, the court ruled that the defendant had waived his right to counsel, was competent to represent himself, and allowed him to participate via his holding cell.

Despite these and other problems, pro se representation has enjoyed a long history in this country which has culminated in the constitutional protection of the right to pro se representation. Still, pro se representation’s long history of creating difficulties has prompted courts across the country to devise creative measures such as standby counsel and hybrid representation to handle these problems.

Standby counsel is a role assumed by an attorney who agrees to assist a pro se defendant with his defense and possibly to represent him if the defendant loses or voluntarily relinquishes his pro se status. Hybrid representation arises when a defendant represents himself pro se and is also represented by counsel. In hybrid representation the self-represented defendant and the attorney act as co-counsel for the defense.

The purpose of this Comment is to identify the benefits and problems associated with standby counsel and hybrid representation. In addition, this Comment emphasizes the need to clarify this area of law and proposes a potential solution that balances the interests of pro se defendants, practitioners, and judges.

Part II of this Comment examines the history, development, benefits, and problems associated with pro se defendants. Part III compares standby counsel and hybrid representation. Finally, Part IV outlines a proposed solution to the problems associated with pro se representation utilizing the benefits of hybrid representation and standby counsel.

9. Id. at 1433.
10. Id. at 1432.
11. Id. at 1433, 1445.
13. See Decker, supra note 6, at 535-38.
15. See infra Part III.A.1.
17. While acknowledging that pro se representation is utilized frequently in civil actions, this Comment focuses only on the use of standby counsel and hybrid representation in criminal matters.
II. PRO SE REPRESENTATION

A. History

Pro se representation has its roots in the English judicial system. Under English common law, a litigant accused of a crime was required to "appear before the court in his own person and conduct his own cause in his own words." Thus, the use of counsel was prohibited in certain matters. Eventually the use of counsel was permitted, but the defendant's right "to make what statements he liked" persisted. This right was widely embraced in the American colonies. In fact, the right to self-representation was more closely guarded in the American colonies than in England due to greater notions of "self-reliance and a traditional distrust of lawyers." The distrust caused colonies such as Massachusetts, Virginia, Connecticut, and the Carolinas to prohibit "leading for hire" completely. Eventually the colonies acknowledged the value of counsel in criminal cases, but simultaneously, they maintained their system of self-representation. The American emphasis on the value of counsel and the desire to preserve self-representation culminated in the statutory and constitutional right to both.

B. Constitutional Guarantee

The Sixth Amendment of the United States Constitution guarantees defendants in a federal criminal proceeding the right to assistance of counsel. The incorporation doctrine of the Fourteenth Amendment extends the right to

19. Id. (quoting 1 F. Pollock & F. Macland, The History of English Law 211 (2d ed. 1909)).
20. See id.
21. Id. at 824.
22. Id. at 825 (quoting S. Holdsworth, A History of English Law 195 (1927)). The right to represent oneself has existed throughout English legal history, with the exception of the Star Chamber. Id. at 821. The Star Chamber was a judiciary arm created to try "political" offenses. Id. The Star Chamber required all defendants to be represented by counsel because otherwise, through tribunal procedure, the defendant would be deemed to have confessed. Id. at 821-22.
23. See id. at 826.
24. Faretta, 422 U.S. at 826. This distrust stemmed from confrontations with the King's Court, where the attorneys and the solicitors twisted the law to secure convictions. Id.
25. Id. at 827 n.32. The colonies allowed a party to be represented if she could not represent herself provided no fee was paid. Id.
26. Id. at 827-28.
27. 28 U.S.C. § 1654 (1994); U.S. Const. amend. VI.
28. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").
counsel to defendants in state criminal proceedings.\textsuperscript{29} Section 35 of the Judiciary Act of 1789, signed one day before the Sixth Amendment was proposed, guaranteed the right to self-representation in the federal courts.\textsuperscript{30} In addition, federal decisions,\textsuperscript{31} state constitutions,\textsuperscript{32} and state judicial decisions\textsuperscript{33} have recognized that the right to assistance of counsel includes the right to self-representation during a criminal trial. However, self-representation was not an absolute right. Self-representation was a privilege reserved to the discretion of the trial judge until 1975 when the United States Supreme Court in \textit{Faretta v. California}\textsuperscript{34} unequivocally recognized a defendant’s constitutional right to represent himself at trial.\textsuperscript{35} \textit{Faretta} denied federal and state courts the power to forbid a defendant from representing himself when the defendant “knowingly and intelligently” relinquished the benefits of representation by counsel.\textsuperscript{36} In the wake of \textit{Faretta}, the trial courts have been left with a myriad of problems stemming from self-representation including a defendant’s lack of substantive knowledge, a defendant’s lack of procedural and evidentiary expertise, potential for disrupted courtrooms,\textsuperscript{37} and an increased need for judicial assistance in securing the rights of pro se defendants.\textsuperscript{38}

\textsuperscript{29} See U.S. CONST. amend. XIV; see also Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (holding the right to counsel is fundamental to fairness and is enforceable against the states by operation of the Fourteenth Amendment).

\textsuperscript{30} 28 U.S.C. § 1654.

\textsuperscript{31} See, e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942) (holding that the Sixth Amendment right to the assistance of counsel implicitly embodies a “correlative right to dispense with a lawyer’s help”).


\textsuperscript{34} 422 U.S. 806 (1975).

\textsuperscript{35} See id. at 835-36.

\textsuperscript{36} Id. at 835. The court reasoned that to force a defendant “to accept against his will a state-appointed public defender, the...courts deprived [the defendant] of his constitutional right to conduct his own defense.” Id. at 856.

\textsuperscript{37} See id. at 834 n.46.

\textsuperscript{38} See Decker, supra note 6, at 553.
C. Problems

The first problem courts face due to self-representation is the defendant’s lack of substantive knowledge coupled with his inability to access legal resources necessary to mount a complete defense. 39 Currently, a judge need not assist the pro se defendant who has encountered difficulty presenting his defense. 40 While due process entitles a pro se defendant to a meaningful opportunity to prepare his defense, the court need not satisfy a defendant’s every expectation. 41 Moreover, even if a defendant is potentially capable of constructing a substantive defense, he may lack the resources to do so. 42 The Constitution does not guarantee a defendant unlimited access to law books, private phones lines, witnesses, or investigators. 43 If there is a law library in the prison, the defendant may have access to it, but such access is subject to the normal prison procedures. 44

In addition to the pro se defendant’s lack of substantive knowledge, his procedural and evidentiary inexperience also poses problems for the court. 45 Pro se status is not an excuse for a defendant to neglect the court’s procedural rules. 46 The pro se defendant is subject to the same limitations as a defendant represented by counsel, and the defendant’s lack of knowledge and inexperience place him at an extreme disadvantage. 47 Specifically, the defendant may forfeit valuable defenses or procedural rights because of his innocent failure to follow the rules. 48

The third problem courts face by allowing a defendant to proceed pro se is the potential for courtroom disruption. 49 The Supreme Court has stated that a trial court does not have to tolerate a disruptive pro se defendant. 50 Furthermore, the Court has outlined constitutionally permissible ways that a judge may respond to a disruptive pro se defendant. 51 For example, the trial judge may order the defendant to be bound and gagged, cite the defendant for

40. See Decker, supra note 6, at 552.
41. See Milton v. Morris, 767 F.2d 1443, 1445-47 (9th Cir. 1985).
42. See People v. Heidelberg, 338 N.E.2d 56, 69-70 (Ill. App. Ct. 1975) (holding that a prisoner opting for pro se representation may neither have access to legal information nor the right).
43. See id.
44. See id.
45. See Faretta v. California, 422 U.S. 806, 834 n.46 (1975).
46. See Decker, supra note 6, at 552.
47. See id.
48. See id.
49. Faretta, 422 U.S. at 834 n.46.
50. Id. “The right of self-representation is not a license to abuse the dignity of the courtroom.” Id.
51. See Illinois v. Allen, 397 U.S. 337, 343-44 (1970). Also, the court has suggested that a court may terminate a defendant’s right to self-representation when the defendant engages in disruptive behavior. Faretta, 422 U.S. at 834 n.46.
contempt, or order the defendant removed until he can conduct himself appropriately.\textsuperscript{52} However, the available remedies prevent a defendant from continuing to defend himself pro se, which causes further delay and disruption.\textsuperscript{53}

The final major problem associated with pro se representation is the increased need for assistance from the bench.\textsuperscript{54} The rules of evidence and trial procedure are integral to the judicial process, and violations of those rules must be prevented even in the absence of the pro se defendant's objection.\textsuperscript{55} Consequently, due to a pro se defendant's lack of evidentiary and procedural knowledge, the judge must assume a protective role in order to prevent the prosecutor from engaging in evidentiary or procedural misconduct; the judge must guard against the exploitation of a pro se defendant's lack of knowledge.\textsuperscript{56} The duty to prevent violations places responsibility on a judge not only to run the proceeding but also to be the personal guardian of the case, and ultimately, of the pro se defendant.\textsuperscript{57} Thus, a judge must let judicial economy and neutrality suffer to guide a pro se defendant through the trial to ensure that evidentiary and procedural rules are followed.\textsuperscript{58}

As a remedy, many courts have chosen to use either standby counsel or hybrid representation, or both, to respond to the problems associated with pro se representation.\textsuperscript{59} Part III discusses the arguments supporting and opposing these remedies.

\textsuperscript{52} See Allen, 397 U.S. at 343-44.
\textsuperscript{53} See id. at 344-46.
\textsuperscript{54} See Decker, \textit{supra} note 6, at 553.
\textsuperscript{55} See id.
\textsuperscript{56} See id. at 553-54.
\textsuperscript{57} See id.
\textsuperscript{58} See People v. Hudson, 408 N.E.2d 325, 329-30 (Ill. App. Ct. 1980) (holding that it was reversible error for the prosecutor to admit and the judge to allow the admission of improper evidence, even absent a defendant's objection); Decker, \textit{supra} note 6, at 555.
\textsuperscript{59} See Decker, \textit{supra} note 6, at 535-38.
III. CURRENT JUDICIAL REMEDIES

A. Hybrid Representation

1. Background

Hybrid representation has developed as a means of addressing the problems associated with pro se defendants.\(^{60}\) Hybrid representation allows a defendant to direct the course of his defense and to participate in the trial while retaining the ability to resort to the use of counsel when problems arise.\(^{61}\) Essentially, hybrid representation creates a relationship of co-counsel between the attorney and the pro se defendant.\(^{62}\) Thus, the attorney represents the defendant in the proceeding, but the defendant also represents himself.\(^{63}\) Typically, this arrangement cannot be assumed or implied; to enter into the arrangement, a defendant must make a request to the court.\(^{64}\) The ultimate decision concerning whether to allow the arrangement is within the discretion of the presiding judge.\(^{65}\)

The roots of hybrid representation extend back to English common law, beginning with the incompetency doctrine.\(^{66}\) Under the incompetency doctrine, a criminal defendant was “incompetent to testify on his own behalf.”\(^{67}\) However, the defendant “was permitted to make an unsworn statement to the jury in order to argue his case.”\(^{68}\) Thus, even though he was represented by counsel, a defendant could address the jury as if he were representing himself. The incompetency doctrine was initially adopted in the United States.\(^{69}\) However, it was eventually abrogated in each state, beginning with Maine in 1864 and ending with Georgia in 1962.\(^{70}\)


\(^{61}\) See Decker, supra note 6, at 537.

\(^{62}\) See id. at 540.

\(^{63}\) In contrast, standby counsel is not considered to represent the defendant in the proceeding. See infra Part III.B.1.

\(^{64}\) See DeFoor & Mitchell, supra note 60, at 223. But see Anne Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, 75 N.Y.U. L. REV. 676, 693-96 (2000) (discussing the possibility of the standby counsel relationship drifting into a hybrid representation arrangement).

\(^{65}\) See DeFoor & Mitchell, supra note 60, at 223.

\(^{66}\) See id. at 193 n.10.

\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) See id.

\(^{70}\) See id.
Out of the ashes of the incompetency doctrine came hybrid representation, which appeared in the state courts and continues to exist today.\(^71\) The federal courts gave little notice to the concept until the 1984 Supreme Court decision of *McKaskle v. Wiggins*.\(^72\) In the time since the *McKaskle* decision, the Supreme Court has not mentioned hybrid representation, but various federal courts of appeals have frequently discussed it.\(^73\)

Of the states that recognize hybrid representation, not all use it,\(^74\) but few have specifically abrogated it.\(^75\) The clear inference is that hybrid representation is still widely regarded by the federal and state courts as a valid solution to the problems created by pro se representation.


\(^72\) 465 U.S. 168, 183 (1984) (recognizing the existence of a hybrid representation arrangement but indicating that the decision to allow such an arrangement rests within the discretion of the presiding judge).

\(^73\) *See United States v. O'Neal*, No. 97-50498, 2000 U.S. App. LEXIS 5242 (9th Cir. 2000), *cert. denied*, No. 97-50501, 2000 U.S. LEXIS 5638 (2000) (deciding whether it was an abuse of discretion to allow the defendant to proceed under hybrid representation); *United States v. Ogbonna*, 184 F.3d 447, 449 (5th Cir. 1999) (denying defendant's right to submit a pro se brief when represented by counsel); *United States v. Morrison*, 153 F.3d 34, 47 (2d Cir. 1998) (addressing pro se representation in connection with competency); *United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir. 1998) (holding there is no constitutional right to hybrid representation); *United States v. Singleton*, 107 F.3d 1091, 1095-97 (4th Cir. 1997) (discussing waiver of right to self-representation).

\(^74\) Some states recognize the doctrine, but there is no indication that it has ever been allowed. *See supra* note 71.

\(^75\) Neither Maryland, *Parren v. State*, 523 A.2d 597 (Md. 1987), nor North Carolina, *State v. Thomas*, 484 S.E.2d 368 (N.C. 1997), recognizes hybrid representation. However, both states accept the use of standby counsel. *Parren*, 523 A.2d at 602 (stating "defendants were 'free to accept or reject [the] advice' of counsel ... [but defendants] had only the right to self-representation or to representation by counsel" (quoting *Bright v. State*, 509 A.2d 1227, 1231 (1986))); *Thomas*, 484 S.E.2d at 369 (indicating that use of standby counsel is protected by statute).
Of most interest to South Carolina practitioners, South Carolina courts permit hybrid representation\(^76\) as does the United States Court of Appeals for the Fourth Circuit.\(^77\) There is even a possible argument that hybrid representation is guaranteed under the South Carolina Constitution because Article I states that a defendant is entitled "to be fully heard in his defense by himself or by his counsel or by both."\(^78\) The language "or both" could guarantee the right to hybrid representation.\(^79\) However, the Supreme Court of South Carolina has rejected this interpretation.\(^80\) Instead, the current practice in South Carolina is to follow the federal courts, which hold that hybrid representation is permissible but is granted only at the discretion of the trial judge.\(^81\)

2. **Opposing Arguments**

While there are arguments in favor of hybrid representation, a court allowing a case to move forward under hybrid representation may be confronted with major problems stemming from the relationship between the attorney/co-counsel and the defendant/co-counsel.\(^82\)

To understand the potential problems hybrid representation might present, one must first fully understand the typical attorney-client relationship. The field of law is considered to be a profession, and therefore an attorney is characterized as a professional.\(^83\) The traditional notion is that the title of professional comes with a self-proclaimed perception of expertise and a position of complete autonomy over work-product.\(^84\) This perception has traditionally lead to a professional-dominated, professional/client relationship in which it is assumed both parties are best served when the professional


\(^78\) S.C. CONST. art. I, § 14. For other states that have similar language, see ALA. CONST. art I, § 6; FLA. CONST. art. I, § 16; GA. CONST. art. I, § 1 para. 9; ME. CONST. art I, § 6; MISS. CONST. art. I, § 26; and TEX. CONST. art. I, § 10.

\(^79\) See DeFoor & Mitchell, supra note 60, at 199-206.

\(^80\) Sanders, 269 S.C. at 217-18, 237 S.E.2d at 54 (holding the "or both" language does not grant a constitutional right to hybrid representation).

\(^81\) DeFoor & Mitchell, supra note 60, at 223-24.

\(^82\) See infra text accompanying notes 98-99.


\(^84\) See id. Sociologist Howard Becker characterized a professional in the following way: Professionals, in contrast to members of other occupations, claim and are often accorded complete autonomy in their work. Since they are presumed to be the only judges of how good their work is, no layman or other outsider can make any judgment of what they can do. If their activities are unsuccessful, only another professional can say whether this was due to incompetence or to the inevitable workings of nature or society by which even the most competent practitioner would have been stymied.

"assume[s] broad control over solutions to the problems brought by the client."\textsuperscript{85}

The dominating professional has been the prevailing view of the professional/client relationship since the time of Hippocrates,\textsuperscript{86} and continues to be the prevailing view today.\textsuperscript{87} This model of professional/client relationship is termed the "Traditional Model." It makes the following assumptions:

Lawyers give adequate and effective service; [l]awyers are able to be disinterested and make objective decisions; [t]he solutions to legal problems are primarily technical; [o]rdinarily, there is a correct solution to a legal problem; and [l]awyers are experts in the technical information that is needed to arrive at the correct conclusion.\textsuperscript{88}

The typical lawyer "take[s] charge of legal representation and . . . tell[s] clients what they should do."\textsuperscript{89} The result is that the average attorney dominates the relationship and takes "predominant control" over the case which is "delegated to him rather passively by the client."\textsuperscript{90}

Hybrid representation creates a foreign situation for the attorney because of the co-counsel relationship between lawyer and defendant.\textsuperscript{91} The defendant in this type of situation is not the typical defendant.\textsuperscript{92} The defendant has chosen to have a say in the direction of his defense. Like the pro se defendant, a defendant who elects to enter into a hybrid representation arrangement wishes to feel in control, to retain his dignity, and to establish his autonomy.\textsuperscript{93} However, unlike the pro se defendant, the defendant who chooses hybrid representation recognizes that if he were to give up counsel, he would be giving up knowledge and experience that he lacks.\textsuperscript{94} In light of this unconventional relationship, the attorney in a hybrid representation arrangement cannot be the typical attorney. However, in all likelihood, an attorney will not so easily change, and a defendant who chooses to proceed under hybrid representation is not impervious to the forcefulness of the typical attorney.\textsuperscript{95} This will likely result in the defendant's taking second chair to the typical attorney's theory of

\textsuperscript{85} Id. at 7.
\textsuperscript{86} Id. "Hippocrates concerns himself with the difficulties posed for physicians in manipulating patients made uncooperative by their illness." Id. at 7 n.2.
\textsuperscript{87} See Robert F. Cochran, Jr. et al., The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling 2 (1999). However, this is not the only view. In addition to the traditional (authoritarian) model, there exists the client-centered model and the collaborative model. See id. at 2-6.
\textsuperscript{88} Id. at 2 (citing Rosenthal, supra note 83, at 169).
\textsuperscript{89} Id. at 169.
\textsuperscript{90} Rosenthal, supra note 83, at 2.
\textsuperscript{91} See supra text accompanying notes 82-90.
\textsuperscript{92} See DeFoor & Mitchell, supra note 60.
\textsuperscript{94} See DeFoor & Mitchell, supra note 60, at 221.
\textsuperscript{95} See supra text accompanying notes 89-90.
defense and strategy direction. Herein lies the major problem with the doctrine of hybrid representation: It poses a risk of clashing wills, putting both the attorney and the client in an unfamiliar relationship.

Consider the following situation: A defendant is charged with the murder of his ex-wife, and the defendant chooses knowingly and intelligently to proceed pro se, but wishes his attorney to remain in the case as co-counsel. During the early part of the trial, the prosecutors repeatedly fail in their attempts to implicate the defendant. The defendant’s co-counsel makes the strategic decision to put a witness on the stand who could corroborate the defendant’s alibi. The defendant, who is guilty but has successfully hidden this fact from his attorney, believes this to be a bad strategy because the witness is lying for the defendant, and the defendant believes the prosecutor might bring out the incriminating information. The defendant objects to the use of the witness. The attorney proceeds over the objection. Direct examination goes well, but the prosecutor destroys the defendant’s case on cross-examination, and the jury returns a guilty verdict in one hour, sending the defendant to jail for two consecutive life sentences. If this were the typical attorney/client relationship, no grounds would exist for overturning the conviction on account of ineffective assistance of counsel, because the attorney acted reasonably given the information available.

However, hybrid representation creates its own unique ground for ineffective assistance of counsel. If an attorney/co-counsel dominates a defendant/co-counsel over the defendant’s objections by not conceding to the strategy decisions of the defendant, a guilty verdict could possibly be

96. An appeal for “ineffective assistance of counsel” is the logical outgrowth of a defendant’s Sixth Amendment right to effective assistance of counsel. See Glasser v. United States, 315 U.S. 60, 76 (1942). There are three broad topics upon which a defendant may bring a claim of ineffective assistance. First, a defendant may bring a claim based upon state interference. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.8(c) (2d ed. 1992). Second, claims may be based upon attorney conflicts of interest. Id. at § 11.9(a). Finally, a claim may be based upon lawyer incompetence. Id. at § 11.10. Lawyer incompetence is characterized as an actual ineffectiveness claim, as opposed to the state interference claims. The United States Supreme Court, in the decision of Strickland v. Washington, 466 U.S. 668 (1984), created standards that must be established by the defendant to justify reversal of a conviction. First, a defendant must show that “counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed by . . . the Sixth Amendment” and “that the ‘deficient performance prejudiced the defense.’” LAFAVE & ISRAEL, supra, at 11.10(a) (quoting Strickland, 466 U.S. at 668). Second, the standard by which a counselor will be judged is whether she performed “‘reasonably effective assistance,’ as guided by ‘prevailing professional norms’ and consideration of ‘all the circumstances’ relevant to counsel’s performance.” Id. (quoting Strickland, 466 U.S. at 668). Third, more specific guidelines are not appropriate. Id. Finally, “the proper standard of prejudice is whether there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would be different.’” Id. (summarizing the holding of Strickland, 466 U.S. at 687-88 (1984)).

97. Under the standard expressed in Strickland, the attorney most likely performed “reasonably effective assistance.” Strickland, 466 U.S. at 687.

98. Landers v. State, 550 S.W.2d 272, 280 (1977); see also DeFoor & Mitchell, supra note 60, at 223-26.
overturned for ineffective assistance of counsel.\textsuperscript{99} Hybrid representation takes the role of the traditional attorney out of the traditional attorney/client relationship and forces the attorney into a relationship that runs counter to her instincts. Therefore, either the lawyers must change, or the profession must change.

3. Supporting Arguments

There are several reasons hybrid representation should be used regularly by state and federal courts.\textsuperscript{100} First, the defendant has special knowledge of the facts of the case or of a particular facet of the case.\textsuperscript{101} Therefore, the hybrid arrangement is better because the defendant/co-counsel will be better equipped than his attorney/co-counsel to present those facts or that issue at trial, while the attorney/co-counsel will be better equipped to handle other aspects of procedural and substantive matters.\textsuperscript{102} Second, there is a tactical consideration. If a defendant chooses to exercise his Fifth Amendment privilege and not take the witness stand, the defendant may be dehumanized in the eyes of the jury.\textsuperscript{103} The jury will know the defendant merely by appearance and will be unable to be swayed by personality and mannerisms. Alternatively, hybrid representation allows the jury to witness the complete defendant.\textsuperscript{104} Third, hybrid representation may best suit the defendant's desires. A defendant may be aware of what he loses when he chooses to proceed pro se, but he might prefer that loss over the complete surrender of control.\textsuperscript{105} Hybrid representation thus allows the defendant to compromise. Finally, hybrid representation may alleviate a defendant's mistrust of the legal system. Many defendants choose to proceed pro se because they perceive their "attorney to be overburdened with a heavy caseload, or not fully prepared," or they see a defense attorney, particularly a public defender, as merely an extension of the prosecutor's office.\textsuperscript{106} Thus, hybrid representation enables the defendant to have the advice of counsel while still retaining a major role in the unfolding of his case.

\textsuperscript{99} See Landers, 550 S.W.2d at 280. Judge Douglas eloquently summarizes the major problem with hybrid representation in the majority opinion:
[If hybrid representation were a mainstay of trial] one would have to pity the plight of the defense counsel who would have to put up with an unruly or untrained defendant. In case of a disagreement on a tactical matter, who would control? If the lawyer prevailed in his view of strategy and a defendant were to be convicted, many claims of ineffective assistance of counsel would be raised. No doubt many civil suits against lawyers would be filed if such a hybrid type of representation were required.

\textit{Id.}

\textsuperscript{100} See DeFoor & Mitchell, \textit{supra} note 60, at 213-16, 220-22.

\textsuperscript{101} See \textit{id.} at 213.

\textsuperscript{102} See \textit{id.}

\textsuperscript{103} See \textit{id.} at 214.

\textsuperscript{104} See \textit{id.}

\textsuperscript{105} See \textit{id.} at 216.

\textsuperscript{106} DeFoor & Mitchell, \textit{supra} note 60, at 220.
The above reasons supporting hybrid representation are persuasive; however, they are not compelling because the same goals can be achieved by competent defense counsel or some other alternative, such as standby counsel. As to the first reason, it may be true in some cases that a defendant would harbor special knowledge about a case. However, the use of pro se representation with standby counsel allows the pro se defendant to present the facts while standby counsel is available to advise on procedural and evidentiary matters and on substantive law.\textsuperscript{107} It may also be true that hybrid representation is beneficial to the defendant for tactical reasons. However, tactics by definition are the implementation of a plan to achieve a particular goal.\textsuperscript{108} It is not the job of the court to aid a defendant in achieving his goals. Furthermore, if the tactical reason for hybrid representation is for the jury to see the human side of the defendant without cross-examination, this can be accomplished through pro se representation with standby counsel. As to the third reason, the defendant may desire this arrangement of hybrid representation. However, it is not up to the court to fulfill every desire of the defendant, especially one that has the potential to create confusion.\textsuperscript{109} The court outlines the framework of the judicial system, and the defendant then works within the framework. Finally, the fourth reason may be valid because a defendant with a great mistrust for the legal system would benefit from hybrid representation. However, a defendant’s mistrust for the legal system can be alleviated by allowing pro se representation with standby counsel.

4. Future of Hybrid Representation

Overall, hybrid representation creates more serious problems than it solves. As stated above, there are arguments in favor of the use of hybrid representation that may all be true and deserving of serious consideration;\textsuperscript{110} however, these arguments are not compelling enough to warrant the continued use of a form of representation which is not constitutionally protected, often results in a combative relationship between the attorney and defendant, needlessly subjects a hard-fought, guilty verdict to the possibility of reversal for ineffective assistance of counsel, and is unnecessarily employed given the option of standby counsel. Therefore, in light of the unnecessary confusion and problems associated with the use of hybrid representation, the Supreme Court of South Carolina or the General Assembly should completely abrogate the use of hybrid representation.

\textsuperscript{107} See infra Part III.B.1.
\textsuperscript{108} See \textit{WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY} 1201 (1987) for a definition of tactical.
\textsuperscript{109} See supra Part III.A.2.
\textsuperscript{110} See supra text accompanying notes 78-81.
The idea that hybrid representation should be completely abrogated has support.\textsuperscript{111} In 1997, Maryland’s highest court firmly extinguished the potential of hybrid representation in Maryland with its decision in \textit{Parren v. State}.\textsuperscript{112} The court’s analysis is simple but quite compelling. The Maryland court recognized that there are only two types of representation which are constitutionally guaranteed.\textsuperscript{113} These are the right to “assistance of counsel” and to “self-representation,”\textsuperscript{114} and these rights are mutually exclusive—the right to counsel and the right to defend pro se cannot be asserted simultaneously.\textsuperscript{115} The court stated by analogy: “There can be but one captain of the ship, and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef.”\textsuperscript{116} The court recognized that hybrid representation causes too much confusion, as opposed to the clear lines that are established when the defendant chooses to be represented by counsel or to represent himself.\textsuperscript{117}

North Carolina also has an express prohibition of hybrid representation.\textsuperscript{118} In \textit{North Carolina v. Thomas} the court held that North Carolina only recognizes representation by counsel and self-representation; it further held that the judge erred when he allowed the defendant to proceed pro se while at the same time appointing counsel to represent the defendant.\textsuperscript{119}

In South Carolina abrogating hybrid representation would not be difficult. The potential constitutional hurdle to abrogation was crossed when the court in \textit{State v. Sanders} interpreted the “or by both” language of the South Carolina Constitution\textsuperscript{120} as not granting a constitutional right to hybrid representation.\textsuperscript{121} Therefore, hybrid representation could be abrogated without a constitutional amendment. Either the South Carolina Supreme Court\textsuperscript{122} or the General Assembly\textsuperscript{123} could prohibit the arrangement. While hybrid representation was

\textsuperscript{111} See Parren v. State, 523 A.2d 597 (Md. 1987); State v. Thomas, 484 S.E.2d 368 (N.C. 1997).

\textsuperscript{112} 523 A.2d at 602. The Court of Appeals viewed the relationship of the defendant/standby counsel as a form of hybrid representation. \textit{Id.} at 600-02.

\textsuperscript{113} \textit{Id.} at 599.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} State v. Thomas, 484 S.E.2d 368 (N.C. 1997).

\textsuperscript{119} \textit{Id.} at 370. Due to this “prohibition against hybrid representation, a court cannot allow defendant to proceed pro se while also appointing counsel to represent him, even for a limited purpose.” \textit{Id.}

\textsuperscript{120} S.C. CONST. art. I, § 14.


\textsuperscript{122} S.C. CONST. art. V, §§ 4, 4A. The Supreme Court of South Carolina has the power to make rules regulating legal practice and procedure, subject to approval by the General Assembly under § 4A. \textit{Id.} at § 4A.

\textsuperscript{123} Stokes v. Denmark Emergency Med. Servs., 315 S.C. 263, 266, 433 S.E.2d 850, 852 (1993) (holding that the power to regulate legal practice and procedure, while not spelled out in the South Carolina Constitution, is not limited to the South Carolina Supreme Court—the General Assembly can act independent of the court).
permitted by the trial judge in Sanders,124 a recent South Carolina Supreme Court case addressed the subject of hybrid representation and affirmed the trial court’s decision to deny the use of hybrid representation.125 Perhaps this is a welcome signal that the court is not inclined to advocate the use of hybrid representation, thereby making abrogation more likely.

Comparing the relatively modest benefits of hybrid representation to the large potential problems it can cause, the courts of South Carolina and the General Assembly of South Carolina should no longer recognize hybrid representation as means to deal with the problems of pro se representation.

B. Standby Counsel

1. Background and Benefits

The use of standby counsel is the United States judicial system’s other response to the problems associated with pro se representation.126 Unlike hybrid representation, standby counsel is not as complicated an arrangement. Standby counsel can be designated by judicial appointment after a defendant validly decides and is granted leave to proceed pro se.127 Standby counsel does not represent the pro se defendant.128 Instead, standby counsel is used by the court for two main reasons: (1) to provide advice to the defendant, such as advice on the procedural and evidentiary rules of the court and assists the defendant in developing his substantive case,129 and (2) to ensure judicial efficiency by carrying on with the trial the pro se defendant cannot continue in the defendant’s representative capacity.130 In summary, standby counsel enables the judge to perform the judge’s role without having to constantly instruct the pro se defendant on matters ordinarily thought of as mundane or obvious to the experienced attorney because the standby counsel can assist the pro se defendant.

While the benefits are relatively apparent, standby counsel is currently a tool that is within the judge’s discretion.131 A trial judge is not required to appoint standby counsel upon the request of the defendant. Moreover, a judge

126. See supra Part I.
127. Faretta v. California, 422 U.S. 806, 835 (1975). A defendant must “knowingly and intelligently” relinquish the “traditional benefits associated with the right to counsel.” Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). “Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation . . . .” Id.
128. Faretta, 422 U.S. at 834 n.46 (stating standby counsel may be available to represent the accused in the event the accused can no longer represent herself).
131. See McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985).
can order standby counsel appointed against the defendant’s wishes.\textsuperscript{132} However, appointing standby counsel is a practice that is encouraged and looked upon favorably.\textsuperscript{133}

The roots of standby counsel can be traced to a series of cases, but standby counsel first gained significant national exposure as a possible solution to the problems of pro se representation in \textit{Faretta v. California}.\textsuperscript{134} In \textit{Faretta} the trial court ruled that the defendant, who had previously represented himself, was not capable of waiving his rights knowingly and intelligently and that he had no constitutional right to pro se representation.\textsuperscript{135} The Supreme Court reversed the trial court and recognized that while all courts agree that a constitutional right to assistance of counsel exists under the Sixth Amendment, not all courts agree that, conversely, this includes the constitutional right to refuse counsel.\textsuperscript{136} In the opinion, the Court noted it was well aware of the problems associated with self-representation, but sufficient remedies existed, such as standby counsel.\textsuperscript{137}

In South Carolina, the use of standby counsel was first proposed in \textit{State v. Sanders}, a post-\textit{Faretta} case.\textsuperscript{138} The defendant Sanders was given the choice to proceed as co-counsel with his attorney or pro se with standby counsel.\textsuperscript{139} Sanders initially chose to proceed as co-counsel but later requested to change to pro se representation with standby counsel.\textsuperscript{140} The court allowed the use of standby counsel, and Sanders continued with his defense.\textsuperscript{141} Today, South Carolina judges appoint standby counsel at their discretion. Thus, standby counsel is currently not a pro se defendant’s absolute privilege.\textsuperscript{142}

\textit{2. Problems with the Current System of Standby Counsel}

While standby counsel is a beneficial option for pro se defendants, it has two significant problems in its current form. First, some believe there is great ambiguity surrounding the role of standby counsel.\textsuperscript{143} Second, in states permitting hybrid representation, the current perception of standby counsel leaves open the possibility of an implied hybrid representation arrangement,

\begin{itemize}
  \item \textsuperscript{132} \textit{See United States v. Dougherty}, 473 F.2d 1113, 1124-26 (D.C. Cir. 1972).
  \item \textsuperscript{133} \textit{See Mayberry v. Pennsylvania}, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring).
  \item \textsuperscript{134} 422 U.S. 806, 834-35 n.46 (1975).
  \item \textsuperscript{135} \textit{Id.} at 809-11.
  \item \textsuperscript{136} \textit{Id.} at 814. "[T]he Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'" \textit{Id.} (quoting Adams v. United States, 317 U.S. 269, 279 (1942)).
  \item \textsuperscript{137} \textit{Id.} at 834-35 n.46.
  \item \textsuperscript{138} 269 S.C. 215, 237 S.E.2d 53 (1977).
  \item \textsuperscript{139} \textit{Id.} at 217, 237 S.E.2d at 54.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{143} \textit{See, e.g., McKaskle v. Wiggins}, 465 U.S. 168 (1984) (illustrating the blurry lines between representation and non-representation).
\end{itemize}
which would ultimately subject the attorney/defendant relationship to the problems discussed under hybrid representation.\textsuperscript{144}

\textit{a. Ambiguity}

As to the ambiguity that surrounds standby counsel, consider the following: A defendant accused of robbery elects to represent himself pro se. The court chooses to permit the pro se representation but appoints standby counsel over the defendant's initial objections. The defendant, in an attempt to define the standby counsel role, firmly requests that the standby counsel not be allowed to assist or interrupt. However, when the defendant later examines witnesses, the defendant interrupts his examination many times to consult with his standby counsel and allows the standby counsel to assume some courtroom duties. The defendant is subsequently convicted and then complains about the intrusion of standby counsel in the presence of the jury and in the presence of the judge without the jury. The defendant particularly complains that standby counsel expressed her view to the judge and made unsolicited remarks in front of the jury. This scenario is a simplistic version of the facts of McKaskle v. Wiggins.\textsuperscript{145} In McKaskle the Supreme Court dealt with whether the intrusion of standby counsel violated the defendant's Sixth Amendment rights to counsel under Faretta.\textsuperscript{146} If the Court had concluded that those rights were violated by the intrusion of standby counsel, then the Court would have had to reverse the conviction and order a new trial.\textsuperscript{147} This reversal would be the result of an ill-defined role of standby counsel.

This analysis is significantly different from the Sixth Amendment analysis under hybrid representation.\textsuperscript{148} While hybrid representation and standby counsel both subject a conviction to the possibility of reversal under the Sixth Amendment, the theories behind the possible Sixth Amendment violations are quite different. As discussed earlier, under hybrid representation an attorney

\footnotesize

\textsuperscript{144} Poulin, supra note 64, at 693-96; see also Part III.A.2.
\textsuperscript{146} Id. at 178-79. The court in McKaskle stated:

The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy. In related contexts the courts have recognized that a defendant has a right to be present at all important stages of trial, that he may not normally be forced to appear in court in shackles or prison garb, and that he has a right to present testimony in his own behalf. Appearing before the jury in the status of one who is defending himself may be equally important to the pro se defendant.

\textit{Id. (citations omitted).}

\textsuperscript{147} United States v. Haese, 162 F.3d 359, 364 (1998) (stating "a valid claim for ineffective assistance of counsel... justifies... reversal of... conviction" if the prongs of \textit{Strickland} are met).
\textsuperscript{148} See supra Part III.A.1.
still represents the defendant. Therefore, the question is whether the attorney rendered effective assistance of counsel. With standby counsel, the defendant represents himself alone, effectively waiving his right to complain of "ineffective assistance of counsel," while the attorney sits in a position to aid the defendant when needed. Therefore, when standby counsel assumes too much control, the Sixth Amendment analysis is whether the defendant was afforded his Sixth Amendment right to "assistance of counsel."

The Court in McKaskle ultimately decided against the defendant, reversing the Fifth Circuit; the majority stated that it did not see a need to go so far as to patently disallow standby counsel a participatory role in trial. However, the Court left the door wide open for appeals and excessive litigation in this area by leaving the role of standby counsel so unclear and by making Sixth Amendment analysis of standby counsel conduct a subjective standard. In the sixteen years since McKaskle was decided, the Supreme Court has not clarified the appropriate role of standby counsel.

In South Carolina the doctrine of standby counsel has not been clearly defined. The Supreme Court of South Carolina confronted the doctrine for the first time in State v. Sanders. In the twenty-three years since Sanders, the South Carolina courts have confronted the doctrine of standby counsel in relatively few cases. Therefore, the case of State v. Reed is highly important to this area of law. Reed discussed whether the defendant had the right to have standby counsel appointed after the guilt phase of the trial but during the sentencing phase. The court held that this right did not exist because the request was untimely.

149. See supra Part III.A.1.
150. See supra Part III.A.1.
151. See McKaskle, 465 U.S. at 177 n.8 (stating a pro se defendant waives his right to complain of ineffective assistance of counsel).
152. Id. at 188 ("[C]ounsel need not be excluded altogether."); id. at 182 ("[A] categorical bar on participation by standby counsel . . . is unnecessary.").
153. Id. at 181 ("[E]xcessive involvement by counsel will destroy the appearance that the defendant is acting pro se.").
154. This case has been followed numerous times in the last sixteen years. Bribiesca v. Galaza, 215 F.3d 1015, 1019 (9th Cir. 2000); McGurk v. Stenberg, 163 F.3d 470, 475 (8th Cir. 1998); Myers v. Johnson, 76 F.3d 1330, 1334 (5th Cir. 1996); Cain v. Peters, 972 F.2d 748, 749 (7th Cir. 1992); United States v. Betancourt-Arretuche, 933 F.2d 89, 92 (1st Cir. 1991); United States v. Heine, 920 F.2d 552, 554 (8th Cir. 1990); United States v. Mills, 895 F.2d 897, 902 (2d Cir. 1990); United States v. Torres, 793 F.2d 436, 441-42 (1st Cir. 1986); United States v. Lorick, 753 F.2d 1295, 1298-99 (4th Cir. 1985); United States v. Walsh, 742 F.2d 1006, 1007 (6th Cir. 1984).
155. See infra text accompanying notes 161-64.
158. Reed, 332 S.C. at 35, 503 S.E.2d at 747.
159. Id. at 44, 503 S.E.2d at 751.
160. Id.
Reed is particularly significant because the South Carolina Supreme Court defined standby counsel for the first time.161 The court defined standby counsel as an aid to the defendant to the extent desired.162 Because this definition is so vague and ambiguous, the attorneys who are thrust into the role of standby counsel are left with very little guidance.163 While ambiguity is not always harmful, ambiguity in the role of standby counsel can be particularly harmful.164 When neither the standby counsel nor the defendant can clearly define the role of standby counsel, each may hold different assumptions, and this may be a source of contention. The contention may be so serious that the judge is forced to become involved. In short, the ambiguity could cause unnecessary expenditures of time and energy. It could also lead a defendant to feel shortchanged, or, alternatively, to believe that standby counsel is forcibly interfering with his case.

b. Implied Hybrid Representation

The second problem surrounding the current view of standby counsel is the possibility that a hybrid representation arrangement will be implied into the standby counsel/pro se defendant relationship.165 The prevailing view is that in order to create a hybrid representation arrangement, the defendant must request permission from the judge.166 This is because a request of hybrid representation is equal to a request of partial pro se representation, and in order for a defendant to be able to represent himself pro se, he must be granted permission by a judge. A judge must deny pro se representation if the defendant is deemed incompetent.167 In addition, if a defendant who is currently representing himself pro se wishes to relinquish that right, courts will grant his request if the proceeding will not be disrupted.168 This is a very low standard, much lower than the standard for receiving permission to proceed pro se. The relative ease with which a party may surrender self-representation is what opens the door to implied hybrid representation.169

Implied hybrid representation involves a defendant’s moving from full pro se representation (with the attorney acting as standby counsel) to partial pro se representation (with the attorney acting as co-counsel with the defendant). This situation can occur when an overzealous standby counsel intervenes in a pro se defendant’s case either with or without permission. In actuality, when standby

161. See id. at 43-44, 503 S.E.2d at 751.
162. See id. The court “allowed counsel to sit beside appellant as standby counsel and aid appellant to the extent he desired.” Id. at 43, 503 S.E.2d at 751.
163. See id. We must assume standby counsels may participate no further than the limits of McKaskle. However, what limits does McKaskle set out?
164. See supra text accompanying notes 143-45.
165. Poulin, supra note 64, at 693-96.
166. See DeFoor & Mitchell, supra note 60, at 223.
168. See Menefield v. Borg, 881 F.2d 696, 698 (9th Cir. 1989).
169. See Poulin, supra note 64, at 693-96.
counsel intervenes, she is either taking, or the defendant is voluntarily relinquishing, the defendant’s right to pro se representation; therefore, the defendant does not necessarily need the permission of the court for implied hybrid representation.170 Thus, it appears that a defendant and standby counsel can inadvertently slip into an implied hybrid representation arrangement which exposes the proceeding to all of the problems associated with hybrid representation. In practice, a defendant’s conviction would be subject not only to a challenge on Faretta grounds, but also to a challenge on Sixth Amendment ineffective assistance of counsel grounds. On appeal, the defendant could argue that a standby counsel/pro se defendant arrangement existed and that the standby counsel was overzealous in her assistance, or the defendant could argue that the overzealous actions of the standby counsel created an implied hybrid representation, and therefore, the standby counsel was in reality a co-counsel and owed all duties of a co-counsel, including effective representation. Thus, the potential for implied hybrid representation creates additional considerations for the court when permitting the pro se defendant to retain standby counsel.

3. Standby Counsel v. Hybrid Representation

Despite its problems, standby counsel as an arrangement between an attorney and a pro se defendant is superior to hybrid representation for several reasons. First, the form of standby counsel representation is restricted to what is constitutionally permitted—representation by counsel or pro se representation.171 Second, the interpersonal dynamics of the relationship are not confused by the attorney and client having to collaborate as co-counsel.172 Third, the judge can better protect the verdict when the arrangement is standby counsel. While both arrangements subject a verdict to possible reversal under the Sixth Amendment, the trial judge has a greater possibility of preventing a Sixth Amendment challenge under the standby counsel arrangement because the judge can proactively restrain standby counsel from becoming the overzealous assistant complained of by pro se defendants on appeal. However, under the hybrid representation arrangement, the judge can do little to prevent the attorney from endangering the verdict because the problems the pro se defendant complains of on appeal are interpersonal and are not readily apparent to the court during trial. Finally, as stated earlier, standby counsel can provide the pro se defendant with all of the benefits hybrid representation is thought to provide, including: (1) allowing the defendant with special knowledge to

170. See, e.g., McKaskle, 465 U.S. at 182-83 (recognizing the trial court allowed hybrid representation without the defendant requesting permission from the judge); see also Poulin, supra note 64, at 693-96 (supporting the idea that a pro se defendant/standby counsel relationship can "drift" to hybrid representation).

171. See supra text accompanying notes 76-81 (discussing the ambiguity in the South Carolina Constitution regarding the constitutionality of hybrid representation).

172. See supra Part III.B.1.
present the case, but also providing legal expertise when the defendant lacks substantive and procedural legal knowledge; (2) allowing the defendant to be seen and heard without having to take the stand; and (3) accounting for a defendant’s mistrust of the legal system by allowing the defendant to represent himself. 173

IV. A PROPOSED SOLUTION

Despite its problems, standby counsel serves the courts in substantially beneficial ways and should be used often, though standby counsel should continue to be used only at the trial judge’s discretion. Unlike hybrid representation, the problems associated with standby counsel are easily remedied. To address the problem of ambiguity, guidelines should be created to define the role of standby counsel for both the attorney serving in the role and the pro se defendant receiving the benefits. For the potential problem of implied hybrid representation, the abrogation of hybrid representation should prevent the actions of an overzealous standby counsel from causing the relationship with the pro se defendant to be re-characterized as hybrid representation. Thus, abrogation of hybrid representation can eliminate the problems that implied hybrid representation poses. If abrogation is not the desired path, then the creation of clear guidelines for standby counsel should lessen the possibility of implied hybrid representation. If standby counsel stays within her defined role, then her role should remain as standby counsel and not drift into the realm of hybrid representation.

Questions arise as to what type of guidelines the South Carolina Supreme Court or the General Assembly should create to regulate standby counsel. Essentially, the nature of the guidelines depends on what the proper role of standby counsel should be. There are two major judicial schools of thought. 174 These opposing views are manifested in the majority and the dissenting opinions of McKaskle v. Wiggins. 175

The first position is Justice O’Connor’s majority opinion, which advocates allowing standby counsel a certain amount of responsibility, provided it is with the pro se defendant’s permission or does not offend the pro se defendant’s rights under Faretta. 176 Justice O’Connor’s position allows the defendant latitude in his defense and standby counsel latitude in her assistance by allowing standby counsel to substantially participate in the trial with permission and to participate minimally when comments are infrequent or innocuous. 177

173. See supra Part III.A.3.
175. Id.
176. See id. at 181-88. The Court is concerned about the standby counsel’s participation in front of the jury. The court notes that, practically speaking, a pro se defendant’s Faretta rights cannot be undermined outside of the jury’s presence unless the participation is entirely overbearing. See id. at 181-82.
177. Id. at 185-87.
Upon review, the court isolates each intrusion by standby counsel and judges the intrusion against the pro se defendant’s Faretta rights. Justice O’Connor’s standard serves to set very permissive upper limits on standby counsel’s involvement in a criminal proceeding.

The second judicial position appears in Justice White’s dissenting opinion. The opinion advocates that standby counsel’s involvement should be only to be “seen-but-not-heard,” but the occasional innocuous comment from standby counsel should be permitted. Justice White supports the notion that standby counsel’s involvement cannot be judged in compartmentalized groupings. A court must view the trial as a whole because that is the way a pro se defendant assesses standby counsel’s involvement, and the defendant’s Sixth Amendment rights are the ones being violated by the intrusions of standby counsel. This standard, if followed, would make it much more difficult to overturn a conviction and, at the same time, would allow the pro se defendant the freedom he desires.

Currently it appears that South Carolina advocates standby counsel involvement up to the limits of McKaskle. However, this implies little because McKaskle says little; therefore, abuse of the role of standby counsel is possible. The South Carolina Supreme Court or the General Assembly needs to speak on the issue because eventually an appointed standby counsel will either over-assist the defendant and cause a potential reversal of the conviction or will under-assist the pro se defendant and deprive him of the assistance to which he is entitled.

Therefore, to address the pro se issue proactively, this Comment proposes several changes to the current system. First, the name “standby counsel” should be changed to “advisory counsel.” A pro se defendant must understand that the decision he has made is important and must not be taken lightly. The words “standby counsel” paint the picture of the backup quarterback waiting on the sideline for the starting quarterback to get hurt so that he can get his chance. The pro se defendant must not think that as soon as his self-representation gets out of hand he can just say, “I quit,” and then send in a backup, because while

178. Id. at 197 (White, J., dissenting).
179. There is a commentator who advocates this permissive role. Ann Bowen Poulin, a Villanova University law professor, advocates that the role of standby counsel “should be strengthened” and “judges should . . . expand the role.” Poulin, supra note 64, at 678. Standby counsel should “be an active and supportive force in the pro se defendant’s trial.” Id. Poulin states that she advocates standby counsel to the limits permitted by McKaskle, but she seems to advocate an extension of standby counsel beyond the role contemplated by Justice O’Connor in the McKaskle opinion. See id. at 706.
181. Id. at 190-92.
182. Id. at 192.
183. Id. at 197.
184. See id.

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the courts readily permit a pro se defendant to surrender self-representation, the courts do not advocate an immediate grant of counsel.\textsuperscript{186}

Second, South Carolina should generally adopt Justice White's dissent. The advisory counsel should be "seen-and-not-heard" in almost every instance. Her role should be to assist the pro se defendant in substantive preparation by gathering the necessary materials needed to construct a capable defense. She should assist the pro se defendant procedurally by issuing subpoenas, filing motions, and addressing general procedural issues relevant to the pro se defendant's case. She should advise the defendant on all evidentiary matters including objecting at trial. In general, advisory counsel should be a coach, meaning she should explain courtroom protocol and instruct the pro se defendant on the proper way to handle himself in front of the jury and the judge. If the pro se defendant objects to all of the above assistance, then advisory counsel may do as little as needed to ensure judicial economy and an orderly courtroom. Advisory counsel should not address the court or the jury except in the following circumstances: (1) she may object directly to evidentiary or procedural matters on behalf of the pro se defendant, (2) she may be required to cross-examine the victim\textsuperscript{187} so that the victim will not have to face the accused directly, and (3) she may be required to directly examine the pro se defendant. Finally, the jury should be informed of this arrangement prior to trial so they are not confused by the advisory counsel's role.

V. CONCLUSION

Throughout United States legal history, pro se representation has been an integral part of the justice system. This history and general acceptance of the doctrine culminated in the declaration of a constitutional right. This declaration ensured that pro se representation, however good or bad, is and will continue to be a mainstay of the criminal justice system.

Pro se representation has historically created many problems for the courts, including: (1) the pro se defendant's lack of substantive legal knowledge to construct a defense; (2) the pro se defendant's inability to protect himself adequately from the prosecution because of his lack of knowledge about procedural and evidentiary law; (3) the potential for courtroom disruption; and (4) an increased need for judges to choose between enforcing the rules of evidence and procedure while maintaining impartiality.

In theory, hybrid representation is an attractive solution. However, in practice it creates many problems for the court, the attorney, and the defendant. It creates a relationship that often results in combative between attorney and defendant, needlessly introduces another means by which a guilty verdict

\textsuperscript{186} Id. at 44, 503 S.E.2d at 751. There is a strong presumption that a defendant should be able to waive his right to self-representation. However, this decision is within the discretion of the court, and if a waiver would poorly serve the justice system or cause delay then it will often not be permitted. \textit{Id.}

\textsuperscript{187} The term "victim" refers only to the person directly injured by the crime, not a relative or friend who has been indirectly affected.
may be overturned, and is ambiguous in light of the alternative solution presented by standby counsel. Therefore, the use of hybrid representation should be foreclosed.

Standby counsel is also an attractive solution in theory, but, as currently practiced, it has caused many problems for the courts. However, unlike hybrid representation, these problems can be remedied and are subject to greater judicial control because they are based on ambiguities in the role of standby counsel. Clarification of the role would better serve the attorneys thrust into the role and the defendants who are hoping to benefit from the presence of standby counsel.

With action from either the judiciary or the legislature, South Carolina should clean up and clarify this area of law. Such clarification would be useful for the judges of this state who, unfortunately, must deal with the problems a pro se defendant introduces to the court.

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