
Volume 28

Number 3 *Annual New York State Constitutional Law*
Issue

Article 32

March 2013

Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn - People v. Smith

Tiffany Frigenti
Touro Law Center

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Frigenti, Tiffany (2013) "Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn - People v. Smith," *Touro Law Review*: Vol. 28: No. 3, Article 32.

Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol28/iss3/32>

This Waiver of Sixth Amendment Rights is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn - People v. Smith

Cover Page Footnote

28-3

**FLYING SOLO WITHOUT A LICENSE: THE RIGHT OF
PRO SE DEFENDANTS TO CRASH AND BURN**

**SUPREME COURT OF NEW YORK
APPELLATE TERM, SECOND DEPARTMENT**

People v. Smith¹
(decided July 8, 2010)

I. INTRODUCTION

On January 26, 1995, court observers watched in suspense as Colin Ferguson, the mass murderer who gunned down six commuters and attempted to murder nineteen others aboard the Long Island Railroad, proceeded pro se in a Mineola, New York courthouse.² During his opening statement Ferguson stated, “There were 93 counts to that indictment, 93 counts only because it matches the year 1993. If it had been 1925, it would have been a 25-count indictment.”³ He continued to conduct his outlandish defense by questioning the victims he shot on the witness stand.⁴ Verdict: Ferguson was sentenced to 315 years and eight months to life in prison.⁵

Ferguson was not the first or the last high-profile defendant to elect to represent himself at trial. John Allen Muhammad, the Washington sniper who went on a shooting rampage killing ten people, al-

¹ 907 N.Y.S.2d 537 (App. Term 2d Dep’t 2010).

² Ronald W. Schneider, Jr., *A Measure of Our Justice System: A Look at Maine’s Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335, 336 (1996).

³ *Id.* (quoting David Van Biema, *A Fool for a Client*, TIME MAGAZINE, Feb. 6, 1995, at 66).

⁴ John T. McQuiston, *Ferguson’s Insanity Defense Angers Victims and His Lawyers*, N.Y. TIMES, Jan. 8, 1995, <http://www.nytimes.com/1995/01/08/nyregion/ferguson-s-insanity-defense-angers-victims-and-his-lawyers.html?pagewanted=all&src=pm>.

⁵ David Knowles, *Alleged ‘Underwear Bomber’ and the Art of the Pro Se Defense*, AOL NEWS (Sep. 13, 2010, 8:18 PM), <http://www.aolnews.com/2010/09/13/underwear-bomb-suspect-abdulmutallab-and-the-art-of-the-pro-se/>.

so represented himself at trial.⁶ His defense consisted of a “rambling opening statement,” and the badgering of witnesses.⁷ Verdict: Muhammad was convicted and sentenced to death.⁸ Dr. Jack Kevorkian, the medical pathologist who assisted in the suicide of terminally ill patients, similarly made the decision to go pro se, which he later admitted, “was an act of arrogance he regretted.”⁹ Verdict: Dr. Kevorkian was sentenced to twenty-five years in a maximum-security prison.¹⁰ Ted Bundy, the serial killer who confessed to the murder of thirty people, also took his hand at defending pro se.¹¹ Verdict: Bundy was sentenced to death in the electric chair.¹² More recently, Zacarias Moussaoui, a conspirator in the 9/11 bombings of the World Trade Center and the Pentagon, defended himself at trial.¹³ Verdict: Moussaoui was sentenced to life in prison without parole.¹⁴ While the crimes committed by these defendants vary in their brutality, they do share one commonality—each defendant has embarked on a reckless path of self-destruction, confirming that “one who is his own lawyer has a fool for a client.”¹⁵

This case note explores the ramifications of self-representation, supporting a substantial need for greater restriction on the right and standardization of procedure to provide guidance for courts and eradicate inconsistent treatment of pro se defendants. After examining how recent decisions have upheld the right to defend pro se, this case note discusses the constitutional basis and origins of the right of self-representation. It analyzes the various unresolved is-

⁶ *Id.*

⁷ *John Allen Muhammad's Opening Statement*, CNN.COM (Oct. 20, 2003, 10:21 PM), <http://www.cnn.com/2003/LAW/10/20/muhammad.statement/>.

⁸ Knowles, *supra* note 5.

⁹ *Doctor Who Helped End Lives*, N.Y. TIMES, Jun. 3, 2011, at A1, http://www.nytimes.com/2011/06/04/us/04kevorkian.html?pagewanted=3&_r=1.

¹⁰ *Kevorkian Gets 10 to 25 Years in Prison*, CNN.COM (Apr. 13, 1999), http://articles.cnn.com/1999-04-13/us/9904_13_kevorkian.03_1_suicide-charge-tom-youk-jack-kevorkian?_s=PM:US.

¹¹ Knowles, *supra* note 5.

¹² *Id.*

¹³ Dahlia Lithwick, *Moussaoui Hijacks the Legal System*, SLATE.COM (May 1, 2002, 6:41 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2002/05/moussaoui_hijacks_the_legal_system.html.

¹⁴ *Moussaoui Formally Sentenced, Still Defiant*, MSNBC.COM, http://www.msnbc.msn.com/id/12615601/ns/us_news-security/t/moussaoui-formally-sentenced-still-defiant/#.T0QOMJgydG4 (last updated May 4, 2006, 12:45 PM).

¹⁵ *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

sues that have arisen from the right of self-representation, leading to procedural obstacles for courts and adverse consequences for the accused.

II. FACTUAL BACKGROUND

In *People v. Smith*, the New York Supreme Court, Appellate Term, held that defendant's constitutional right to self-representation was violated when the trial court excluded him from two sidebar conferences after he expressly reserved the right to attend by choosing to proceed pro se.¹⁶ The court reasoned that this exclusion violated defendant's state constitutional right to self-representation under article I, § 6 of the New York State Constitution.¹⁷

Defendant was convicted of endangering the welfare of a child under New York Penal Law § 260.10,¹⁸ and he appealed his conviction.¹⁹ Before trial, defendant's application to proceed pro se was granted, permitting him to represent himself at trial with the assistance of standby counsel to raise objections during the people's cross-examination.²⁰ Nonetheless, at trial, defendant was "categorically precluded" from two sidebar conferences over his objection, on the ground that his attendance at the conferences would be "too disruptive," and would fail to impress upon the jury that he was in custody.²¹ However, on appeal, the Supreme Court, Appellate Term, held that the trial court's exclusion of defendant from sidebar conferences violated his right to self-representation, derived from both article 1, § 6 of the New York State Constitution and the Sixth

¹⁶ *Smith*, 907 N.Y.S.2d at 538-39 ("The minutes of the trial indicate that defendant expressly reserved the right to attend sidebar conferences and that the court unequivocally assured defendant that he would attend sidebar conferences.").

¹⁷ *Id.* at 539; N.Y. CONST. art I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.").

¹⁸ *Smith*, 907 N.Y.S.2d at 538; N.Y. PENAL LAW § 260.10 (McKinney 2011) ("A person is guilty of endangering the welfare of a child when: 1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health . . .").

¹⁹ *Smith*, 907 N.Y.S.2d at 538.

²⁰ *Id.*

²¹ *Id.* at 539.

Amendment of the United States Constitution.²²

In recognizing this fundamental right, the court referred to *People v. Rosen*.²³ There, the New York Court of Appeals granted defendant a new trial because the trial court violated defendant's constitutional right of self-representation by similarly excluding him from sidebar conferences.²⁴ Relying on the court's analysis in *Rosen*, the court in *Smith* acknowledged that "[a] defendant who has elected to appear pro se is both an accused and an attorney."²⁵ Moreover, the court in *Smith* construed the precedent set in *Rosen* as supporting a right to self-representation under both article I, § 6 of the New York State Constitution and the Sixth Amendment of the United States Constitution.²⁶ Based on this authority, the court in *Smith* established that a defendant who elects to proceed pro se "must be afforded the right to control the organization and content of his defense, make motions, argue points of law, participate in voir dire, question witnesses and address the court and jury during the trial."²⁷

The court in *Smith* also relied on *People v. McIntyre*,²⁸ in which the New York Court of Appeals stated that a criminal defendant's "right to self-representation embodies one of the most cherished ideals of our culture; the right of an individual to determine his own destiny."²⁹ The court in *Smith* reasoned that the trial court's exclusion of defendant from sidebar conferences and standby counsel's attendance at said conferences blatantly conflicted with this cherished ideal.³⁰

The court in *Smith* rejected the state's assertion that the denial

²² *Id.* (citing U.S. CONST. amend. VI; N.Y. CONST. art I, § 6).

²³ 613 N.E.2d 946 (N.Y. 1993).

²⁴ *Id.* at 950.

²⁵ *Smith*, 907 N.Y.S.2d at 538 (quoting *Rosen*, 613 N.E.2d at 948).

²⁶ *Id.* at 539; see also N.Y. CRIM. PROC. LAW § 170.10 (6) (McKinney 2011) (stating, "If a defendant charged with a traffic infraction or infractions only desires to proceed without the aid of counsel, the court must permit him to do so. In all other cases, the court must permit the defendant to proceed without the aid of counsel if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until defendant is provided with counsel, either of his own choosing or by assignment."); see also *People v. McIntyre*, 324 N.E.2d 322, 326 (N.Y. 1974) (stating that "the New York State Constitution and criminal procedure statute clearly recognize" the right to self-representation).

²⁷ *Smith*, 907 N.Y.S.2d at 539 (citing *Rosen*, 613 N.E.2d at 949).

²⁸ 324 N.E.2d 322 (N.Y. 1974).

²⁹ *Id.* at 325.

³⁰ *Smith*, 907 N.Y.S.2d at 539.

of defendant's presence at sidebar conferences promoted a safe and orderly courtroom.³¹ Noting alternative measures that the trial court could have taken, the court referred to *People v. Briggs*,³² in which the Appellate Division suggested assigning court officers to accompany defendants at side bar conferences as an acceptable method of balancing defendant's right to self-representation with its duty to maintain an orderly and secure courtroom.³³ In addition, the court found no indication that defendant engaged in disorderly conduct to warrant forfeiture of his right to self-representation.³⁴

III. ESTABLISHMENT OF THE RIGHT TO SELF-REPRESENTATION

A. United States Constitution

In *Faretta v. California*,³⁵ the United States Supreme Court considered whether a defendant in a state criminal trial has a constitutional right to proceed without counsel "when he voluntarily and intelligently elects to do so."³⁶ The Court held that a defendant has a constitutional right to voluntarily and knowingly waive his right to the assistance of counsel and proceed pro se at trial.³⁷ The Court reasoned that embedded within the Sixth Amendment is the explicit right of a criminal defendant to the assistance of counsel and the implicit right of self-representation that emerges when a defendant chooses to waive the right to counsel.³⁸

Defendant, Anthony Faretta, was charged with grand theft and before trial requested to defend himself, rejecting his appointed pub-

³¹ *Id.* Further, the court rejected the trial court's argument that it would not permit defendant to approach the bench escorted by court officers because the jury would not be given the impression that defendant was in custody. *Id.*

³² 728 N.Y.S.2d 763 (App. Div. 2001).

³³ *Id.* at 765; see *People v. Vargas*, 668 N.E.2d 879, 885 (N.Y. 1996); *People v. Riley*, 738 N.Y.S.2d 793, 794 (App. Div. 2002); *People v. Walsh*, 698 N.Y.S.2d 502, 503 (App. Div. 1999).

³⁴ *Smith*, 907 N.Y.S.2d at 539 (acknowledging that a self-represented defendant "may forfeit the right to self-representation by engaging in disruptive or obstreperous conduct which is calculated to undermine, upset or unreasonably delay the progress of the trial" (citing *McIntyre*, 324 N.E.2d at 327-28)).

³⁵ 422 U.S. 806 (1975).

³⁶ *Id.* at 807.

³⁷ *Id.*

³⁸ *Id.* at 819-20.

lic defender.³⁹ In a preliminary ruling, the judge accepted defendant's waiver of counsel.⁴⁰ However, after a sua sponte hearing in which the court scrutinized defendant's ability to defend himself, the judge reversed his prior decision and re-appointed a public defender.⁴¹ At trial, only appointed counsel conducted the defense.⁴² Defendant's request to act as co-counsel and efforts to make motions on his own behalf were rejected.⁴³ Defendant was found guilty and on appeal, the California Supreme Court affirmed that defendant possessed neither a federal nor state constitutional right to self-representation.⁴⁴

However, the United States Supreme Court reversed the conviction finding that defendant had a constitutional right to self-representation.⁴⁵ The Court concluded, "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."⁴⁶ Moreover, the Court stated, "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."⁴⁷

³⁹ *Id.* at 807-08.

⁴⁰ *Faretta*, 422 U.S. at 807-13.

⁴¹ *Id.*

⁴² *Id.* at 810-11.

⁴³ *Id.*

⁴⁴ *Id.* at 811-12.

⁴⁵ *Faretta*, 422 U.S. at 814.

⁴⁶ *Id.* at 819.

⁴⁷ *Id.* at 819-20. Furthermore, the Court in *Faretta* recognized that the United States Courts of Appeals "have repeatedly held that the right of self-representation is protected by the Bill of Rights." *Id.* at 816. Emphasizing that the Sixth Amendment grants the accused the right to the assistance of counsel, multiple courts have interpreted this amendment to implicitly confer self-representation. *Id.* at 816-17. In *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964), the Second Circuit indicated that the Sixth Amendment right to the assistance of counsel was not intended to impair a defendant's absolute right to conduct his own defense, but was instead designed to supplement the other rights of a defendant. *Id.* at 274. The court in *Plattner* found support for its conclusion in the Judiciary Act of 1789, in statutes and rules governing criminal procedure, and in many state constitutions, which explicitly guarantee self-representation. *Id.*; see 28 U.S.C. § 1654 (2006) ("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."); FED. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right."). Thus, the implicit assertion in the Sixth Amendment's guarantee of a right to counsel and the Fifth Amendment's guarantee of due process of law together confer a right on the accused to self-representation

The Court articulated a history of recognition of the right of self-representation and found a “universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”⁴⁸ In *Adams v. United States ex rel. McCann*,⁴⁹ the Supreme Court first acknowledged an affirmative right of self-representation, noting that with the approval of the court the accused may freely and intelligently waive his Sixth Amendment right to assistance of counsel.⁵⁰ In addition, the Court in *Faretta* relied on *Snyder v. Commonwealth of Massachusetts*,⁵¹ in which the Court held that the Confrontation Clause of the Sixth Amendment provides a defendant with the right to take part in all events where fundamental fairness might be threatened without his presence.⁵² The Court in *Snyder* indicated that a pro se defendant should even be permitted to provide advice or supersede his counsel and conduct the trial himself.⁵³

The Court in *Faretta* also found evidence for the right of self-representation implicit in the language of the Sixth Amendment and acknowledged that self-representation has been engrained in the federal system since the establishment of the United States.⁵⁴ The Court concluded that “[t]he right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the [Sixth] Amendment.”⁵⁵ Thus, the Sixth Amendment provides a guarantee of assistance of counsel for a defendant who voluntarily

in a criminal case. *Faretta*, 422 U.S. at 816-17.

⁴⁸ *Faretta*, 422 U.S. at 817.

⁴⁹ 317 U.S. 269 (1942).

⁵⁰ *Id.* at 275. After defendant was convicted of federal mail fraud, he requested to conduct his own defense and waived his right to counsel. *Id.* at 282. Thereafter, defendant waived his right to trial by jury and was found guilty. *Id.* The decision was later reversed by the Second Circuit, which indicated that defendant could not waive his right to counsel before obtaining counsel. *Id.* at 270-71. However, the Supreme Court reversed, finding that because the Constitution does not force a lawyer upon a defendant, the right to counsel was validly waived by defendant. *Adams*, 317 U.S. at 279.

⁵¹ 291 U.S. 97 (1934), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁵² *Id.* at 105-06.

⁵³ *Id.* at 106; *see also* *Price v. Johnston*, 334 U.S. 266, 280 (1948), *abrogated by* *McCleskey v. Zant*, 499 U.S. 467, 482 (1991) (reaffirming defendant’s privilege to conduct his own defense at trial).

⁵⁴ *Faretta*, 422 U.S. at 816-17; *see also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have Assistance of Counsel for his defense.”).

⁵⁵ *Faretta*, 422 U.S. at 819.

accepts this assistance, and grants the accused the right to conduct the defense that ultimately determines his destiny.⁵⁶ However, imposing counsel upon the accused “violates the logic of the Amendment” transforming the intended role of an “assistant” into a “master,” a conversion that starkly juxtaposes the fundamental values of the American justice system.⁵⁷

Additionally, the Court found that the right of self-representation is further supported by English legal history.⁵⁸ Self-representation was a common practice in both England and colonial America, where numerous colonial charters, statutes, and state constitutions protected the right.⁵⁹ There is no evidence that the colonists or framers of the Constitution ever envisioned a system without self-representation or considered the right to defend pro se inferior to the right to counsel.⁶⁰ Thus, the Court concluded that the framers intentionally worded the Sixth Amendment to imply the right to self-representation.⁶¹

Ultimately, the Court overturned defendant’s conviction and permitted defendant to present his own defense.⁶² Although the right was upheld, the Court clarified that the right to self-representation is not absolute, indicating that trial courts may terminate the right in the event a defendant engages in misconduct.⁶³ Likewise, the decision authorized courts to terminate self-representation or appoint standby counsel for the accused when necessary.⁶⁴

While the majority of the Court in *Faretta* strongly affirmed the constitutionality of self-representation, three dissenting justices briskly contested, finding no independent constitutional basis for the

⁵⁶ *Id.* at 819-20.

⁵⁷ *Id.* at 820.

⁵⁸ *Id.* at 821-32.

⁵⁹ *Id.* (“In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England.”).

⁶⁰ *Faretta*, 422 U.S. at 832.

⁶¹ *Id.*

⁶² *Id.* at 836.

⁶³ *Id.* at 834 n.46.

⁶⁴ *Id.* Furthermore, in *Martinez v. Court of Appeals of California, Fourth Appellate District*, 528 U.S. 152 (2000), the Supreme Court held that a criminal defendant has no federal constitutional right to self-representation on appeal. *Id.* at 163-64 (“[N]either the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction.”).

right to self-representation in a criminal trial.⁶⁵ As emphasized in Chief Justice Berger's dissenting opinion, the unequivocal provision for self-representation in the Federal Judiciary Act of 1789 and subsequent unequivocal omission of self-representation from the Sixth Amendment suggest the possibility that the founders of the Amendment intended no mandate of self-representation and desired to leave the issue to be resolved through legislative process.⁶⁶ The dissent also questioned the Court's historical findings, insisting that the framers purposefully excluded self-representation from the language of the Sixth Amendment.⁶⁷ Additionally, the dissenters expressed policy concerns that the right to proceed pro se would result in a procedural massacre.⁶⁸ The dissenters further warned that self-representation would compromise the integrity and public confidence in the justice system and declared that "[t]he system of criminal justice should not be available as an instrument of self-destruction."⁶⁹

The majority's interpretation in *Faretta* seems flawed when viewed in light of the intended role of the attorney, who in no way asserts his power over the client, but instead has an ethical obligation to provide his help and assistance to ensure his client makes informed decisions. Those decisions ultimately rest in the hands of the client. Accordingly, it seems nonsensical to conclude that a defendant, who

⁶⁵ *Faretta*, 422 U.S. at 836-38 (Burger, C.J., dissenting) (rejecting the majority's assertion that the right to self-representation "is tucked between the lines of the Sixth Amendment," and declaring that "the right to counsel is an integral part of the bundle making up the larger 'right to a defense as we know it'").

⁶⁶ *Id.* at 844-45 (Berger, C.J., dissenting).

⁶⁷ *Id.* at 850 (Blackmun, J., dissenting) ("[I]t is at least equally plausible to conclude that the Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language.").

⁶⁸ *Id.* at 852 (Blackmun, J., dissenting) (posing an extensive list of procedural questions left unanswered by the Court's opinion, which he warned would "haunt the trial of every defendant who elects to exercise his right to self-representation"); *id.* at 838-39 (Burger, C.J., dissenting) (stating: "'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.'" (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932))).

⁶⁹ *Faretta*, 422 U.S. at 840.

is required to have competent representation, assumes any subordinate role equivalent to that of a servant. To the contrary, a defendant maintains the ability to control his case and to find new representation if he so desires. Thus, this analogy is unfounded when viewed in light of the traditional role of a servant, who unlike a defendant, lacks authority to terminate his master and retain a new master to better suit his needs.

B. New York Constitution

Unlike the implied right to self-representation in the United States Constitution, the New York Constitution and New York Criminal Procedure Law expressly set forth the right to self-representation.⁷⁰ In *McIntyre*, the New York Court of Appeals emphasized that the right to defend pro se is explicitly supported by the New York Constitution and New York Criminal Procedure Law.⁷¹ The court concluded that even where the accused insists on conducting his own defense to his detriment, “respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice ‘with eyes open.’”⁷² After acknowledging multiple motivations for which a defendant might want to conduct his own defense, the court stressed that the right to defend pro se is not absolute, but subject to restrictions to promote

⁷⁰ *McIntyre*, 324 N.E.2d at 326. The court in *McIntyre* traced the origins of self-representation, declaring that the right is implicit in the Sixth Amendment right to counsel, protected under the Fifth and Fourteenth Amendment due process clauses, codified in the Judiciary Act of 1789, and contained in the United States Code. *Id.*; see also U.S. CONST. amend. VI; 28 U.S.C. § 1654 (2006).

⁷¹ *McIntyre*, 324 N.E.2d at 326; see also N.Y. CONST. art I, § 6 (“In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions”); N.Y. CRIM. PROC. LAW § 170.10(6) (McKinney 2011) (If a defendant . . . only desires to proceed without the aid of counsel, the court must permit him to do so.”). In *McIntyre*, after defendant was convicted of murder and robbery in the first degree, he elected to defend himself pro se; however, his request was denied based on defendant’s outburst and his assertion that assigned counsel was very competent. *McIntyre*, 324 N.E.2d at 324-25. Although the “Appellate Division affirmed, finding that the trial court was justified in denying the Pro se motion in light of the defendant’s inability to maintain self-control,” the Supreme Court reversed, indicating that disruptive behavior which is a direct reaction to denial of defendant’s motion to defend pro se, or which results from trial court’s conducting inquiry in an abusive manner “calculated to belittle a legitimate application,” “will not justify the forfeiture of the right of self-representation.” *Id.* at 325, 328.

⁷² *McIntyre*, 324 N.E.2d at 325 (quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)).

the orderly administration of justice and prevent ensuing attacks on verdicts due to lack of fundamental fairness.⁷³

In *McIntyre*, the court specified three requirements for a defendant to defend pro se. First, the request to defend pro se must be “unequivocal and timely asserted” in order to prevent obstruction in the courtroom.⁷⁴ Second, the defendant must make a “knowing and intelligent waiver of the right to counsel.”⁷⁵ Finally, the defendant must “not engage[] in conduct which would prevent the fair and orderly exposition of the issues.”⁷⁶ Hence, the right to self-representation is forfeited “[w]hen a defendant’s conduct is calculated to undermine, upset or unreasonably delay the progress of the trial.”⁷⁷

Further, in *People v. Rosen*,⁷⁸ the New York Court of Appeals stated, “Unlike the Federal right to self-representation, which is only implicit in the Sixth Amendment, the State constitutional right to self-representation is explicit and unambiguous.”⁷⁹ In *Rosen*, defendant requested to proceed pro se after he was indicted on charges of conspiracy, grand larceny, and other felonies.⁸⁰ The court allowed defendant to proceed pro se with standby counsel as his legal advisor, but imposed a restriction barring defendant from attending sidebar conferences.⁸¹ Defendant was convicted, but his conviction was later reversed by the New York Court of Appeals, which held that the trial court’s arbitrary exclusion of defendant from sidebar conferences violated his constitutional right to self-representation.⁸² The court rea-

⁷³ *Id.* at 326-27 (articulating multiple reasons why defendants wish to represent themselves, which include viewing counsel as an extension of the “oppressive judicial system,” desiring to save legal costs when defendant is of moderate resources and ineligible for assigned counsel, refusing counsel in order to lay the foundation for mistrial or a later attack of the conviction, and dissatisfaction with counsel’s defense strategies).

⁷⁴ *Id.* at 327.

⁷⁵ *Id.* The court noted that “mere ignorance of the law cannot vitiate an effective waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time it was made.” *Id.* Moreover, in determining competency of a defendant, the court may assess factors such as age, education, occupation, and prior exposure to legal procedures. *McIntyre*, 324 N.E.2d at 327.

⁷⁶ *Id.*

⁷⁷ *Id.* at 328.

⁷⁸ 613 N.E.2d 946.

⁷⁹ *Id.* at 948.

⁸⁰ *Id.*

⁸¹ *Id.* at 947.

⁸² *Id.*

soned that the quintessential values upheld by the right to defend pro se—“to affirm the dignity and autonomy of the accused”—“are threatened when a defendant who has assumed the risks inherent in self-representation is arbitrarily denied, despite specific request, the opportunity to attend sidebar discussions.”⁸³ However, the court in *Rosen* advised that “the right to attend sidebars is no broader than the right to self-representation itself, which may within an appropriate exercise of discretion be denied or divested.”⁸⁴

IV. DEFINING THE UNIVERSE OF SELF-REPRESENTATION

In the aftermath of *Faretta*, both federal and state courts have attempted to combat the stark implications of self-representation by instituting limitations on waiving the right to counsel and defending pro se. Left behind in the largely undefined universe created by *Faretta*, courts have independently defined boundaries in various areas relating to self representation, including: waiving the right to counsel, the role of standby counsel, hybrid representation, forfeiting the right to self-representation, and mental competency. These standards are intended to protect the interests of pro se defendants and preserve the integrity of the justice system.

A. Waiving the Right to Counsel

No federal requirement obligates trial courts to inform a criminal defendant of the right to self-representation when defendant has not asserted this right.⁸⁵ Hence, only when a defendant elects to

⁸³ *Rosen*, 613 N.E.2d at 949-50 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984)).

⁸⁴ *Id.* at 950 (citing *McIntyre*, 324 N.E.2d at 327).

⁸⁵ See *United States v. Martin*, 25 F.3d 293, 295 (6th Cir. 1994) (stating that the district court need not inform a defendant of his right to proceed pro se prior to the assertion of such a right); *Maldonado*, 348 F.2d at 16 (acknowledging the burdens of a notice requirement which if required would make “the task of administering the overriding constitutional policy in favor of granting a lawyer to every person accused of a serious crime . . . unduly treacherous”); see also *United States v. Martinez*, 883 F.2d 750, 759 (9th Cir. 1989), *vacated*, 928 F.2d 1470 (9th Cir. 1991) (finding that no requirement exists for trial courts to advise criminal defendants of the right to defend pro se); *People v. Slaughter*, 404 N.E.2d 1058, 1062 (Ill. App. Ct. 1980) (holding that failure to expressly inform defendant of the right to proceed pro se did not constitute error under *Faretta*); *State v. Garcia*, 600 P.2d 1010, 1014 (Wash. 1979) (concluding that no duty exists for a trial court to inform a defendant of his right to self-representation).

waive counsel and proceed pro se must a trial court inform defendant of his right to self-representation.⁸⁶ However, the United States Supreme Court maintains that there is a strong presumption against waiver of the right to counsel, observing that whether an intelligent waiver of right to counsel is made should be judged on a case by case basis after careful consideration of the particular facts and circumstances.⁸⁷ In *Carnley v. Cochran*,⁸⁸ the United States Supreme Court articulated the guidelines for a valid waiver. The Court stated, “Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”⁸⁹

Aside from the strong presumption against waiver of the right to counsel, the Court in *Faretta* stated that “[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.’”⁹⁰ However, the Court’s assertion ignited a circuit split concerning whether trial courts are required to, or merely should, admonish defendants of the dangers and disad-

⁸⁶ See *Munkus v. Furlong*, 170 F.3d 980, 982 (10th Cir. 1999) (holding that a criminal defendant does not have a constitutional right to be informed of the right to defend pro se); see also *Stano v. Dugger* 921 F.2d 1125, 1144 (11th Cir. 1991) (“Once the right of self-representation has been asserted clearly and unequivocally . . . then and only then is that court . . . required to conduct the requisite inquiry to determine whether the criminal defendant’s decision to represent himself is knowing, intelligent and voluntary.”).

⁸⁷ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁸⁸ 369 U.S. 506 (1962).

⁸⁹ *Id.* at 516. The Court further explained:

It has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’

. . . .

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Id. at 514-15 (quoting *Johnson*, 304 U.S. at 464-65).

⁹⁰ *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279).

vantages of self-representation.⁹¹ Although trial courts should conduct an inquiry into defendant's background by focusing on factors such as age, level of education, mental capacity, prior experience with legal proceedings, and understanding of proceedings, wide discretion rests with trial courts in deciding what constitutes a valid warning of the dangers of self-representation.⁹²

Defendant must assert his right to self-representation in a timely manner or else he waives this right.⁹³ In *United States v. Dunlap*,⁹⁴ the Court of Appeals for the Fourth Circuit held that once a trial begins, the decision to allow defendant to proceed pro se is left to the discretion of the trial court.⁹⁵ A request to proceed pro se is termed timely if it is made before meaningful trial proceedings have

⁹¹ Compare *United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) (finding that the trial judge must conduct a hearing to ensure that the accused understands the dangers of self-representation), *Piankhy v. Cuyler*, 703 F.2d 728, 730-32 (3d Cir. 1983) (stating that it is the trial court's responsibility to ensure that a defendant is made aware of the dangers of self-representation), *United States v. Welty*, 674 F.2d 185, 188-89 (3d Cir. 1982) (finding that the court has a responsibility to ensure the choice of self-representation is made knowingly and intelligently), and *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981) (interpreting *Faretta* to require trial courts to conduct a special hearing to ensure that the accused understands the dangers and disadvantages of proceeding pro se), with *United States v. Hafen*, 726 F.2d 21, 25 (1st Cir. 1984) (finding that a court is not required to provide a short statement of its reasons for finding a defendant's waiver of counsel to be knowing and intelligent), *Kimmel*, 672 F.2d at 721-22 (indicating that while there is a preference for trial courts to explain the risks of self-representation to the accused, no explanation is required), and *United States v. Tompkins*, 623 F.2d 824, 828-29 (2d Cir. 1980) (finding that no special hearing is required for a valid waiver of an accused's right to counsel); cf. *McDowell v. United States*, 484 U.S. 980, 981 (1987) (White, J., dissenting from denial of certiorari) ("Because a conflict among the lower courts has emerged concerning the proper application and interpretation of our decision in *Faretta*, I would grant certiorari and address the question presented by this petition.").

⁹² John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 516-17 (1996). The Supreme Court, in *Patterson v. Illinois*, 487 U.S. 285 (1988), was presented with an opportunity to answer the question of whether a hearing or inquiry should be required whenever a defendant requests to proceed pro se; however, it failed to resolve the issue. *Id.* at 298-300. While the Court stated that the waiver of counsel standard articulated in *Faretta* should be applied, it failed to address the proper application of that standard. *Id.*

⁹³ See *Parton v. Wyrick*, 704 F.2d 415, 417 (8th Cir. 1983) (affirming the trial court's refusal to allow defendant to proceed pro se when the request for self-representation was made on the morning of the trial).

⁹⁴ 577 F.2d 867 (4th Cir. 1978).

⁹⁵ *Id.* at 868 (stating that the timeliness requirement is justified by "the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury").

begun or before the jury has been impaneled, unless the request is a delay tactic.⁹⁶ Thus, in order for defendant to validly waive his right to counsel he must make a clear, voluntarily, and intelligent waiver of the right to counsel in a timely manner, after being informed of the dangers inherent in his decision.⁹⁷

Additionally, to effectually waive his right to counsel, the defendant must communicate his desire to proceed pro se to the court.⁹⁸ To effectively communicate a valid waiver of the right to counsel, the defendant must make a statement from which the trial judge can reasonably conclude that defendant desires to proceed pro se.⁹⁹ The defendant should express this statement in unequivocal terms.¹⁰⁰ However, when a defendant's desire to waive his right to counsel is less than clear, the validity of the waiver is left to the discretion of the court.¹⁰¹ In fact, some courts have allowed defendants to implicitly waive their right to counsel through conduct.¹⁰² For example, in *United States v. Auen*,¹⁰³ the Court of Appeals for the Second Circuit held that defendant implicitly waived the right to counsel at trial by continually refusing legal representation after repeated offers.¹⁰⁴

⁹⁶ *Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985).

⁹⁷ *Id.*

⁹⁸ *Faretta*, 422 U.S. at 835.

⁹⁹ *Leonard v. State*, 486 A.2d 163, 169 (Md. 1985).

¹⁰⁰ *See People v. Gillian*, 861 N.E.2d 92, 94 (N.Y. 2006) (holding that a defendant's request to represent himself was not clear and unequivocal where "defendant raised the argument for self-representation as a way of obtaining the dismissal of his first assigned counsel"). *Compare Fields v. Murray*, 49 F.3d 1024, 1033 (4th Cir. 1995) (holding that defendant did not "invoke his right to self-representation clearly and unequivocally"), with *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1064 (11th Cir. 1986) (finding that defendant unequivocally invoked his right to self-representation).

¹⁰¹ *See United States v. Orey*, 263 F.3d 669, 670-71 (7th Cir. 2001) ("The question of waiver is one of inference from the facts. As a matter both of logic and of common sense, . . . if a person is offered a [clear] choice between three things and says 'no' to the first and the second, he's chosen the third even if he stands mute when asked whether the third is indeed his choice.").

¹⁰² *See United States v. Irorere*, 228 F.3d 816, 826 (7th Cir. 2000) (finding that a defendant can "waive the right to counsel through his own contumacious conduct").

¹⁰³ 864 F.2d 4 (2d Cir. 1988).

¹⁰⁴ *Id.* at 5; *see also United States v. Fazzini*, 871 F.2d 635, 642 (7th Cir. 1989) (concluding that defendant implicitly refused appointed counsel by dismissing four consecutive court appointed attorneys); *United States v. Arlen*, 252 F.2d 491, 494-95 (2d Cir. 1958) (explaining that "where a defendant able to retain counsel has been advised by the court that he must retain counsel by a certain reasonable time, and where there is no showing why he has not retained counsel within that time, the court may treat his failure to provide for his own defense as a waiver of his right to counsel and require such defendant to proceed to trial with-

Moreover, other courts have treated defendant's failure to retain counsel, after being advised by the court to do so within a reasonable amount of time, as a failure to provide for his own defense, and thereby, a waiver of the right to counsel.¹⁰⁵

Similarly, New York courts require that a defendant's request to waive his right to counsel be made unequivocally and timely.¹⁰⁶ A defendant's request to represent himself " 'must be clearly and unconditionally presented to the trial court' " in order "to ensure convicted defendants [do] not 'pervert the system by subsequently claiming a denial of their *pro se* right.' "¹⁰⁷ An application to defend *pro se* is timely when it is asserted before the trial commences because "the potential for obstruction and diversion is minimal."¹⁰⁸ At that juncture, the court can conduct a thorough inquiry without causing delay and confusion; however, once the trial begins the right is only granted under compelling circumstances.¹⁰⁹

Further, New York courts require that a defendant make a knowing, voluntary, and intelligent waiver of the right to counsel be-

out an attorney. Such a waiver is similar in its consequences to an election made by an indigent defendant.").

¹⁰⁵ *Spevak v. United States*, 158 F.2d 594, 596 (4th Cir. 1946); *United States v. Hartenfeld*, 113 F.2d 359, 362 (7th Cir. 1940). However, other circuits require misconduct on behalf of defendant to establish a waiver of counsel through conduct. *United States v. Goldberg*, 67 F.3d 1092, 1094 (3d Cir. 1995). The court in *Goldberg* drew a distinction between the concept of forfeiture and the concept of waiver, indicating that "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.* at 1100. Only the Eleventh Circuit has acknowledged this distinction, as indicated by its decision in *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995), in which it concluded that abuse by a defendant toward his attorney might result in *forfeiture* of defendant's right to counsel. *Id.* at 325. *But see* *United States v. Mitchell*, 777 F.2d 248, 258 (5th Cir. 1985) (finding that a defendant who knowingly retains an attorney with a scheduling conflict and fails to retain other counsel within a reasonable time *waives* his right to counsel); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) (concluding that "persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a knowing and voluntary waiver of counsel"). Other courts insist that a waiver by conduct may result only after a defendant has been warned that he will lose his attorney "if he engages in dilatory tactics," and continues to engage in misconduct. *Goldberg*, 67 F.3d at 1100; *see, e.g., United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (finding that defendant's failure to hire counsel constituted a waiver by conduct); *United States v. Allen*, 895 F.2d 1577, 1578 (10th Cir. 1990) (concluding that defendant's dilatory conduct resulted in a waiver by conduct).

¹⁰⁶ *McIntyre*, 324 N.E.2d at 327.

¹⁰⁷ *People v. LaValle*, 817 N.E.2d 341, 349 (N.Y. 2004) (quoting *McIntyre*, 324 N.E.2d at 327).

¹⁰⁸ *McIntyre*, 324 N.E.2d at 327.

¹⁰⁹ *Id.*

fore proceeding *pro se*.¹¹⁰ Determining whether a waiver is knowing, voluntary, and intelligent requires courts to undertake a “searching inquiry” to ensure defendant is fully informed of the dangers and disadvantages of defending *pro se*.¹¹¹ Thus, it is well established that a defendant can only waive his constitutional right to counsel if he is informed of the risks associated with doing so.¹¹²

In *People v. Ward*,¹¹³ defendant appealed his conviction for robbery and assault on the ground that the court failed to ensure he fully understood the inherent dangers of defending *pro se*.¹¹⁴ The Appellate Division reiterated the importance of conducting an exhaustive inquiry into defendant’s decision to waive his right to counsel, which ensures that the choice is made willingly, with full knowledge of the dangers involved.¹¹⁵ This inquiry requires appropriate record evidence demonstrating that the trial court has delved into defendant’s age, education, occupation, previous exposure to legal procedures, and other relevant factors bearing on a competent, intelligent, and voluntary waiver.¹¹⁶ However, the court need not evaluate all of these factors to find a valid waiver of counsel. In evaluating the validity of a waiver, New York courts have “eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry.”¹¹⁷

In *People v. Smith*,¹¹⁸ the New York Court of Appeals indicated that the trial court’s record exploration of the issue “must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding *pro se*, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication.”¹¹⁹ Based on these flexible criteria, courts have noted that a waiver of the right to counsel will not be deemed ineffective simply because the trial judge does not ask questions designed to elicit each

¹¹⁰ *Id.*

¹¹¹ *People v. Slaughter*, 583 N.E.2d 919, 923 (N.Y. 1991).

¹¹² *Id.*

¹¹³ 613 N.Y.S.2d 490 (App. Div. 1994).

¹¹⁴ *Id.* at 491.

¹¹⁵ *Id.*

¹¹⁶ *McIntyre*, 324 N.E.2d at 327.

¹¹⁷ *People v. Arroyo*, 772 N.E.2d 1154, 1156 (N.Y. 2002) (endorsing a non-formalistic flexible inquiry).

¹¹⁸ 705 N.E.2d 1205 (N.Y. 1998).

¹¹⁹ *Id.* at 1208.

of the specific items of information.¹²⁰ Still, there is no existing standardized procedure for admonishing defendants of the dangers of self-representation, leaving lower courts with “broad discretion in how they warn defendants.”¹²¹ Thus, the degree of protection afforded to defendants “largely depends upon the courtroom in which they are prosecuted.”¹²²

B. Defining the Role of Standby Counsel

In *Faretta*, the Court asserted that a trial court may—even over the objection of defendant—appoint standby counsel in self-representation cases to assist defendant if and when he seeks help, and to take over if self-representation must be terminated during trial.¹²³ In *McKaskle v. Wiggins*,¹²⁴ the United States Supreme Court addressed the role of standby counsel and upheld defendant’s conviction, despite standby counsel providing unsolicited and undesirable assistance.¹²⁵ In *Wiggins*, the court appointed two attorneys to serve as standby counsel to pro se defendant.¹²⁶ Throughout the trial, defendant altered his desire for assistance of standby counsel, fluctuating from requesting support to resisting assistance.¹²⁷ After defendant was convicted and sentenced to life in prison, he appealed his conviction on the ground that standby counsel had improperly interfered with his right to conduct his own defense, thereby depriving him of his right to self-representation.¹²⁸

Establishing a two-part test for determining when standby counsel violates a criminal defendant’s right to self-representation,

¹²⁰ *People v. Providence*, 813 N.E.2d 632, 635 (2004); *see also Arroyo*, 772 N.E.2d at 1156 (stating that when determining if a defendant effectively waived the right to counsel, all that is required is a reliable basis for appellate review).

¹²¹ *Decker*, *supra* note 92, at 516-17.

¹²² *Id.*

¹²³ *Faretta*, 422 U.S. at 834 n.46.

¹²⁴ 465 U.S. 168 (1984).

¹²⁵ *Id.* at 173.

¹²⁶ *Id.* at 170-71.

¹²⁷ *Id.* at 171-73.

¹²⁸ *Id.* at 170. The Fifth Circuit held that *Wiggins*’ Sixth Amendment right to self-representation was violated by the unwanted involvement of standby counsel. *Wiggins v. Estelle*, 681 F.2d 266, 275 (5th Cir. 1982), *rev’d sub nom. McKaskle v. Wiggins*, 465 U.S. 168 (1984). In doing so, it sought to establish a clear rule that “court-appointed standby counsel is ‘to be seen, but not heard.’ ” *Id.* at 273.

the Court held that standby counsel did not infringe upon defendant's right to self-representation.¹²⁹ According to the Court, the pro se defendant must first establish that he retained "actual control over the case."¹³⁰ A defendant does not maintain actual control if standby counsel substantially interferes with significant tactical decisions of defendant, assumes control of the questioning of witnesses, or speaks on matters of importance in defendant's place against his objection.¹³¹ Next, participation by standby counsel without the consent of defendant should not be allowed to destroy the jury's perception that defendant is representing himself.¹³² Ultimately, the Court found that defendant maintained actual control over the case and that participation of standby counsel did not destroy the jury's perception that defendant was representing himself.¹³³ Thus, despite the fact that standby counsel intervened without defendant's permission over fifty times during the three-day trial,¹³⁴ the Court found that defendant was afforded his right to self-representation.¹³⁵ Although the Court in *Wiggins* attempted to provide guidelines, the question of what constitutes acceptable participation of standby counsel without obstructing the right to self-representation remains unresolved.

Likewise, New York courts allow for the appointment of standby counsel for pro se defendants, even over objections.¹³⁶ However, the appointment of standby counsel is not a constitutional right, but a matter of trial judge management, which is left to the discretion of the judge.¹³⁷ In *People v. Mirenda*,¹³⁸ the New York Court of Appeals found that the trial judge did not abuse his discretion by deny-

¹²⁹ *McKaskle*, 465 U.S. at 177-79, 188.

¹³⁰ *Id.* at 178.

¹³¹ *Id.*

¹³² *Id.* at 178-79.

¹³³ *Id.* at 185.

¹³⁴ *See McKaskle*, 465 U.S. at 191 (White, J., dissenting).

¹³⁵ *Id.* at 185 (majority opinion). *But see id.* at 195 (White, J., dissenting) (expressing concerns about allowing standby counsel to impede on the rights of pro se defendants).

¹³⁶ *People v. Sawyer*, 438 N.E.2d 1133, 1139 (N.Y. 1982); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-3.7 (American Bar Association, 3d ed. 2000), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudge.html#6-3.7 (stating that it is advisable to appoint standby counsel to protect defendants and to facilitate the trial, not only in serious cases, but in cases expected to be long or complicated or where there are multiple defendants).

¹³⁷ *People v. Mirenda*, 442 N.E.2d 49, 51 (N.Y. 1982).

¹³⁸ *Id.*

ing defendant's request for standby counsel, because defendant was fully aware of the potential pitfalls of self-representation.¹³⁹ Moreover, because there is no constitutional right to effective assistance of standby counsel, defendants are not entitled to relief for the ineffectiveness of standby counsel, unless standby counsel "held that title in name only . . . [but in reality,] acted as the defendant's lawyer throughout the proceedings."¹⁴⁰

Moreover, New York courts have set parameters for the amount of intervention standby counsel may have without violating defendant's right to present his own case. In *People v. Hilts*,¹⁴¹ the Appellate Division instructed standby counsel only to assist defendant upon his request, forewarning counsel not to provide unsolicited advice during trial.¹⁴² Relatedly, in *People v. Nevitt*,¹⁴³ the Appellate Division concluded that standby counsel did not unduly interfere with defendant's right to try his case because counsel conferred with defendant, obtained consent before challenging any of the jurors, and defendant failed to object to any of counsel's representation during the trial.¹⁴⁴

One thing that is clear: standby counsel can serve as a worthy tool for pro se defendants, who lack access to many legal materials available to lawyers.¹⁴⁵ Also, standby counsel can assist by stepping in if defendant chooses to be absent from the trial. Thus, judges may appoint standby counsel at their discretion in an effort to promote justice and grant impartial trials.¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997).

¹⁴¹ 846 N.Y.S.2d 750 (App. Div. 2007).

¹⁴² *Id.* at 752 (finding that while a defendant has a right to proceed pro se, he has no right to hybrid representation, and thus the county court was well within its authority to impose restrictions on assigned counsel's continued assistance).

¹⁴³ 619 N.Y.S.2d 6 (App. Div. 1994).

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *See United States ex rel. George v. Lane*, 718 F.2d 226, 227 (7th Cir. 1983) (holding "that when a defendant (pretrial detainee) is offered the assistance of appointed counsel and refuses the same, no constitutional right exists mandating that the prisoner in the alternative be provided access to a law library should he choose to refuse the services of court-appointed counsel").

¹⁴⁶ Decker, *supra* note 92, at 537.

C. Hybrid Representation

Courts uniformly hold that defendant is not entitled to hybrid representation, wherein defendant serves as co-counsel at his own trial.¹⁴⁷ *Faretta* does not guarantee a constitutional right to hybrid representation, as a defendant has the right to either conduct his own defense or have an attorney conduct his defense—but not both.¹⁴⁸ However, while the right to “hybrid representation is not constitutionally guaranteed, it is constitutionally permissible,” as demonstrated by some courts allowing the accused to assume various lawyering functions,¹⁴⁹ but only as a “matter of grace.”¹⁵⁰

Despite lack of agreement among jurisdictions as to whether hybrid representation is permissible, there are several “well-adhered-to rules” regarding the complex issue:¹⁵¹ First, by retaining counsel, a criminal defendant relinquishes “the right to conduct part of his own defense.”¹⁵² Second, where hybrid representation is permitted, the court is still required to “obtain a valid waiver of counsel from the defendant.”¹⁵³ Third, once a defendant elects “to proceed pro se, the defendant cannot conduct part of the trial and then ask counsel to conduct other portions.”¹⁵⁴ Finally, after a pro se defendant welcomes “participation by counsel, any subsequent participation by counsel is presumed to occur with the defendant’s approval, unless the defendant expressly and unambiguously renews the request to proceed without counsel.”¹⁵⁵

In *People v. Rodriguez*,¹⁵⁶ the New York Court of Appeals stated, “While the Sixth Amendment and the State Constitution af-

¹⁴⁷ See *Wilson v. Hurt*, 39 Fed. App’x 324, 327 (6th Cir. 2002) (finding no constitutional right to hybrid representation).

¹⁴⁸ *McKaskle*, 465 U.S. at 183.

¹⁴⁹ *Decker*, *supra* note 92, at 537-39.

¹⁵⁰ *State v. Melson*, 638 S.W.2d 342, 359 (Tenn. 1982).

¹⁵¹ *Decker*, *supra* note 92, at 539-40.

¹⁵² *Id.* (citing *United States v. Treff*, 924 F.2d 975, 979 (10th Cir. 1991) (finding that any decision to allow or disallow hybrid representation rests in the discretion of the trial court)).

¹⁵³ *Id.* (citing *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982) (holding that “[t]he district court has the authority to allow, if the accused desires, a hybrid form of representation in which the accused assumes some of the lawyer’s functions”)).

¹⁵⁴ *Id.* (citing *People v. Partee*, 511 N.E.2d 1165, 1177 (Ill. App. Ct. 1987)).

¹⁵⁵ *Id.* (citing *McKaskle*, 465 U.S. at 183).

¹⁵⁶ 741 N.E.2d 882, 884 (N.Y. 2000) (indicating that a criminal defendant has no constitutional right to hybrid representation).

ford a defendant the right to counsel or to self-representation, they do not guarantee a right to both. These are ‘separate rights depicted on the opposite sides of the same [constitutional] coin. To choose one obviously means to forego the other.’¹⁵⁷ Based on this assertion, the court emphasized that the decision to allow hybrid representation lies within the sound discretion of the trial court and acknowledged that many courts have refused to recognize a right of defendants represented by counsel to simultaneously act in their own defense.¹⁵⁸ In fact, some courts prohibit hybrid representation altogether.¹⁵⁹

D. Forfeiting the Right to Self-representation

A defendant’s right to self-representation may be terminated when defendant engages in seriously obstructive behavior, based on the court’s responsibility to maintain order, safety, and prevent disruption and delay in the courtroom. In *Faretta*, the Court stated, “The right to self-representation is not a license to abuse the dignity of the courtroom” nor the right to engage in “serious and obstructionist misconduct.”¹⁶⁰ In other words, the right to self-representation is not “to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process.”¹⁶¹

Although courts have attempted to provide guidelines in determining when disruptive conduct should result in forfeiture of the right to self-representation, drawing the line “between a manipulative effort to present arguments and a sincere desire to dispense with the benefits of counsel” has presented challenges.¹⁶² In *United States v. Vernier*,¹⁶³ the Court of Appeals for the Fifth Circuit held that defendant was not unconstitutionally denied his right to self-representation

¹⁵⁷ *Id.* at 884 (quoting *United States v. Purnett*, 910 F.2d 51, 54 (2d Cir. 1990)) (alteration in original).

¹⁵⁸ *Id.* at 885.

¹⁵⁹ See *Parren v. State*, 523 A.2d 597, 599 (Md. 1987) (“[T]here are only two types of representation constitutionally guaranteed—representation by counsel and representation *pro se*—and they are mutually exclusive.”). The Court of Appeals of Maryland refused to allow hybrid representation, mandating that Maryland courts strictly ensure that defendants proceed with or without effective assistance of counsel. *Id.*

¹⁶⁰ *Faretta*, 422 U.S. at 834 n.46.

¹⁶¹ *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000).

¹⁶² *Id.*

¹⁶³ 381 Fed. App’x 325, 325 (5th Cir. 2010).

in his prosecution for carjacking when he “posed a risk of violence and escape, . . . was defiant and troublesome, . . . boasted that he wanted to go out in a bloody confrontation, to disrupt his trial, and to make news,” and attempted a violent escape from jail in the forty-eight hours preceding trial.¹⁶⁴ The court reasoned that the limitation of defendant’s right to defend pro se was warranted because his behavior was intended to cause delay or some tactical advantage.¹⁶⁵ Additionally, *Faretta* suggested that if a pro se defendant is removed from the court proceedings due to disruptive behavior, standby counsel is permitted to step in to conduct his defense.¹⁶⁶

The New York Court of Appeals also limited the right to self-representation by mandating that a defendant may not engage in conduct which would prevent the “fair and orderly exposition of the issues.”¹⁶⁷ The court in *McIntyre* declared, “When a defendant’s conduct is calculated to undermine, upset or unreasonably delay the progress of the trial he forfeits his right to self-representation.”¹⁶⁸ However, despite articulating this principle, the court concluded that defendant’s misconduct was a provoked outburst that did not justify the forfeiture of defendant’s right to self-representation.¹⁶⁹ In *People v. Cooks*,¹⁷⁰ the Appellate Division authorized limiting self-representation based on misconduct when it upheld the trial court’s revocation of the right to self-representation, when “[d]efendant was disruptive, feigned mental illness, feigned physical ailments and re-

¹⁶⁴ *Id.* at 329.

¹⁶⁵ *Id.* at 328; see also *United States v. Smith*, 413 F.3d 1253, 1280-81 (10th Cir. 2005) (holding that defendant’s behavior demonstrated that he was playing “cat and mouse” with the court by requesting to represent himself); *Buhl v. Cooksey*, 233 F.3d 783, 797 (3d Cir. 2000) (stating that determining whether a pro se defendant intends only disruption and delay is the kind of determination district courts must make routinely, but holding that the court did not make a sufficient inquiry).

¹⁶⁶ *Faretta*, 422 U.S. at 834 n.46; see also *United States v. Trapnell*, 638 F.2d 1016, 1027 (7th Cir. 1980) (permitting standby counsel to take over for an absent pro se defendant to prevent undue delay or mistrial).

¹⁶⁷ *McIntyre*, 324 N.E.2d at 327.

¹⁶⁸ *Id.* at 328.

¹⁶⁹ *Id.* (“Just as the court may not rely on a posturing outburst to validate an erroneous denial, the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner calculated to belittle a legitimate application.”). *But see id.* at 329 (Gabrielli, J., dissenting) (disagreeing that defendant’s behavior resulted from the trial judge’s provocation and concluding that defendant waived his right to defend pro se by his disruptive conduct).

¹⁷⁰ 812 N.Y.S.2d 529 (App. Div. 2006).

peatedly asked to leave the courtroom and claimed illness when summoned back.”¹⁷¹ In sum, the governmental interest in ensuring the integrity and efficiency of the judicial process will at times outweigh a defendant’s interest in acting as his own lawyer.

E. Mental Competency

The United States Supreme Court, by delineating the requisite degree of mental competency for defendants, has further limited the right to self-representation. In *Godinez v. Moran*,¹⁷² the Supreme Court ruled that the competency standard used to determine a defendant’s ability to waive the right to counsel is no higher than that used to determine a defendant’s ability to stand trial.¹⁷³ Hence, if a defendant is competent to stand trial, no further examination by the court is necessary. The Court reasoned that “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.”¹⁷⁴ Essentially, the Court insisted that the decision to waive counsel should not require any higher level of mental capacity than what is required to waive other constitutional rights.¹⁷⁵ Thus, while waiving the right to counsel requires that courts conduct an extensive inquiry into defendant’s decision, defendant need not maintain any heightened level of competence to enter into such a decision in the first place—all that is required is a knowing and voluntary waiver.¹⁷⁶

The Supreme Court first articulated a standard of mental competence for criminal defendants on trial in *Dusky v. United States*.¹⁷⁷ The Court held that in order for a defendant to be considered competent for a criminal proceeding he must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . [must have] a rational as well as fac-

¹⁷¹ *Id.* at 530; *see also* *People v. Thomas*, 900 N.Y.S.2d 773, 775-76 (App. Div. 2010) (holding that the trial court properly denied defendant his right to self-representation because a fair and orderly trial “would not have been feasible” in light of defendant’s position that, among other things, he was entitled to absolute immunity because he was “Almighty God” and “King of the United States,” and that he was born on a day the earth spun backwards).

¹⁷² 509 U.S. 389 (1993).

¹⁷³ *Id.* at 399.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 400.

¹⁷⁷ 362 U.S. 402 (1960).

tual understanding of the proceedings against him.”¹⁷⁸ Thus, all that is required is that “the accused must be sufficiently competent to follow the proceedings, evaluate the evidence, and understand the significance of what is transpiring in the courtroom.”¹⁷⁹ This standard has been widely criticized by those who cannot see why “[a]n infinitely more comprehensive and intricate command of the law is required of a competent attorney, yet the application of the Dusky test allows the layperson who wishes to proceed pro se to do so despite a lack of technical legal knowledge, at best, and regardless of mental illness, at worst.”¹⁸⁰ Although the right to competent counsel is undoubtedly an essential right of any defendant, a defendant forfeits this right in choosing to proceed pro se. Hence, the guidelines articulated in *Godinez* and *Dusky* raise countervailing concerns. On the one hand, there are those who wish to firmly uphold the autonomy of self-representation without heightening any requirement of competence. However, others fear lower standards of competency fail to appropriately assess a defendant’s ability to conduct his own defense.¹⁸¹

In *Indiana v. Edwards*,¹⁸² the Supreme Court addressed the concerns of *Dusky* critics by considering whether a state may bar the accused from defending himself when defendant is “a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct the trial himself.”¹⁸³ The Court stated:

[T]he Constitution permits judges to take realistic account of the particular defendant’s mental capacities . . . [and] permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from

¹⁷⁸ *Id.*

¹⁷⁹ Decker, *supra* note 92, at 519.

¹⁸⁰ *Id.*; see also *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting) (“A person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin.”).

¹⁸¹ See *Godinez*, 509 U.S. at 417 (Blackmun, J., dissenting) (“To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system.”).

¹⁸² 554 U.S.164 (2008).

¹⁸³ *Id.* at 167. In its analysis, the Court revisited the *Faretta* holding, and made clear that *Faretta* did not answer the issue regarding mental competency, noting that both the decision itself and later cases have affirmed that the right to self-representation is not absolute. *Id.* at 171.

severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.¹⁸⁴

The decision in *Edwards* demonstrates an effort on behalf of the Court to protect societal interests and to maintain judicial efficiency by permitting courts to inquire “whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.”¹⁸⁵ However, despite *Edwards*’ allowance for states to differentiate between a defendant’s competency to stand trial and a defendant’s competency to defend pro se, courts continue to adhere to low standards in making this determination.¹⁸⁶ In fact, some courts have blatantly rejected any suggestion of a higher standard of competence for waiver of counsel.¹⁸⁷

In *People v. Reason*,¹⁸⁸ the New York Court of Appeals rejected the contention that there are two separate and distinct levels of mental capacity—one standard to stand trial, and another standard to waive the right to counsel.¹⁸⁹ The court noted that the requirement of mental competency to stand trial arose at a time before defendant was entitled to have counsel assigned, and therefore was intended to ensure he had sufficient mental capacity to understand the proceedings and make his own defense.¹⁹⁰ Based on this history, the court maintained that it would be nonsensical to conclude that a standard designed to determine whether a defendant was capable of defending himself is inadequate when he chooses to conduct his own defense.¹⁹¹ Moreover, the court observed the pragmatic difficulties involved in formulating a workable, heightened standard to assess competency

¹⁸⁴ *Id.* at 177-78.

¹⁸⁵ *Id.*

¹⁸⁶ Decker, *supra* note 92, at 522-23 (noting the case of Colin Ferguson, who was convicted of six counts of murder for his “shooting rampage on a commuter train in Long Island, New York, [which] illustrates the potentially devastating injustice caused by allowing an incompetent defendant to proceed pro se”).

¹⁸⁷ See *People v. Anderson*, No. C058629, 2009 WL 3809633, at *5 (Cal. Ct. App. Nov. 16, 2009) (stating that under California law, “a defendant competent to stand trial is also competent to waive his right to counsel, and therefore a court *cannot* require a higher standard of competence to accept the waiver.”).

¹⁸⁸ 334 N.E.2d 572 (N.Y. 1975).

¹⁸⁹ *Id.* at 574.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

without infringing on a defendant's constitutional right to self-representation.¹⁹² According to the court, however, mental capacity remains relevant in the waiver of counsel because the determination that it is intelligent and voluntary "may well turn, even in major part, on the mental capability of the defendant at the time in the circumstances."¹⁹³

In *People v. Tafari*,¹⁹⁴ the Appellate Division held that defendant was improperly denied his constitutional right to self-representation when his request to represent himself at trial was denied due to mental illness and concerns that his medication would affect his ability to understand the proceedings.¹⁹⁵ The court reasoned that because defendant was examined and found competent after responding to the court's apprehensions about the risks of proceeding pro se, he should have been afforded his right to self-representation.¹⁹⁶ Moreover, in *People v. Reilly*,¹⁹⁷ the Appellate Division held that the trial court was not required to order a competency examination of defendant before it granted defendant's application to defend pro se.¹⁹⁸ In that case, defendant, who was arrested and charged with burglary and larceny, was hospitalized for approximately three weeks and diagnosed as suffering from manic-depressive disorder.¹⁹⁹ Defendant elected to proceed pro se at trial and his request was granted.²⁰⁰ Defendant's right to proceed pro se was later revoked when he attempted to have a witness identify him as Jesus Christ; however, he was ultimately found competent to stand trial and convicted on all counts.²⁰¹ On appeal, observing that appropriate warnings and careful consideration were provided, the court found that the trial court validly honored defendant's request to proceed pro se.²⁰²

¹⁹² *Id.*

¹⁹³ *Reason*, 334 N.E.2d at 574.

¹⁹⁴ 891 N.Y.S.2d 711 (App. Div. 2009).

¹⁹⁵ *Id.* at 713.

¹⁹⁶ *Id.*

¹⁹⁷ 631 N.Y.S.2d 203 (App. Div. 1995).

¹⁹⁸ *Id.* at 203-04.

¹⁹⁹ *Id.* at 203.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Reilly*, 631 N.Y.S.2d at 203-04.

V. CONCLUSION

While the Sixth Amendment is intended to provide protection to defendants in the criminal trial process, the Supreme Court's decision in *Faretta* has largely undermined this purpose. Moreover, the explicit grant of the right to self-representation provided in the New York State Constitution has only further eroded "jurisprudential integrity."²⁰³ In constitutionalizing the right to self-representation, courts were left to cope with the onerous task of defining the extent of this right, which has resulted in a plethora of inconsistent decisions among jurisdictions.²⁰⁴ While the Court's decision in *Faretta* was justifiably intended to promote the autonomy and uphold the rights of criminal defendants, it has resulted in injurious implications for those accused, who ignorantly forfeit competent legal representation to their own detriment.

Not only does the decision continue to present harmful consequences for defendants who choose to exercise this right, but it has also damaged the integrity and efficiency of the courts by wasting judicial resources. Regardless of whether a judge grants a defendant's request to proceed pro se, the decision will likely be appealed.²⁰⁵ If the judge allows defendant to represent himself at trial, which likely will result in a conviction, defendant will argue on appeal that his waiver was not knowing and intelligent.²⁰⁶ Conversely, if the judge refuses to allow defendant to proceed pro se, defendant will likely appeal on the ground that his constitutional right to self-representation was violated.²⁰⁷

Requirements imposed on trial courts seek to limit the harmful effects of the decision, such as providing warnings to defendants of the harmful repercussions of defending pro se, mandating that all waivers be knowing, voluntary and intelligent, and appointing stand-by counsel. Further limiting the right to self-representation, courts recognize forfeiture in the event of obstreperous behavior and require that the exercise of all requests in a timely manner. However, while

²⁰³ Decker, *supra* note 92, at 598.

²⁰⁴ *Id.* at 488-89.

²⁰⁵ Brian H. Wright, *The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro Se with a Defendant's Right to Assistance of Counsel*, 76 MARQ. L. REV. 785, 785-86 (1993).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

attempting to limit the burden which pro se representation places on ensuring the fair and orderly administration of justice, these limitations have in effect caused further inconsistencies among the courts.

Since *Faretta's* recognition of the right of self-representation, courts have struggled to grapple with the multiplicity of difficult legal issues that have arisen. First, courts remain burdened by the task of deciphering exactly what constitutes a waiver of the right to counsel. While some courts have demanded relinquishment of the right to counsel be unambiguous and unequivocal, others have interpreted repeated refusals to cooperate with counsel as an implicit election to defend pro se. Second, while courts conclusively agree that defendants should be admonished of the dangers of self-representation, there is no clear standard governing the communications a trial judge may impart without infringing on the right to self-representation. Moreover, while agreeing that requests to defend pro se must be timely, no definite standard for what constitutes a timely waiver of the right to counsel exists.

Third, courts remain constrained in their power to judge a defendant's incompetency by the assertion that pro se defendants are not required to possess any legal abilities whatsoever. Although the Supreme Court attempted to distinguish mental capacity to stand trial from mental capacity to represent oneself, courts continue to rely on the same standard, thereby endorsing ill-fated inept defendants to embark on a path of self-destruction. Fourth, courts struggle to define a fitting role for standby counsel, who may be imposed upon a pro se defendant against his wishes, but who avoids *Faretta's* characterization of becoming a "master." It is difficult to reconcile a right derived from the Sixth Amendment, which recognizes that competent counsel may impair a defendant's right to self-representation, with the subsequent imposition of standby counsel on a defendant who believes he has the boundless authority to represent himself. Nevertheless, courts are still faced with the challenge of defining the scope of authority maintained by standby counsel, making it difficult to determine when involvement crosses the line.

If these procedural questions were the only issues left to resolve, there might be hope for one day establishing uniformity of procedure for pro se defendants. However, any optimism is shattered when one evaluates the additional difficulties posed by pro se defendants, who tend to be a thorn in the side of any trial court that en-

counters them. Defendants wish to proceed pro se for a variety of reasons. Most of the time defendants want to demonstrate their disrespect for authority, exhibit their rebelliousness and hostility, manipulate the justice system, or promote a radical political scheme.²⁰⁸ Even if these defendants have no hidden agenda, they are often so outlandish and irrational that they believe they can succeed.²⁰⁹ However, regardless of whether pro se defendants are “political extremist[s], . . . misfit[s], or . . . incorrigible career criminal[s] with nothing to lose,” they all have one undeniable thing in common—they are rarely acting in their best interest.²¹⁰ It is illogical to believe that a defendant facing criminal charges with no legal background whatsoever can effectively construct and articulate a defense, a skill that takes any competent attorney years of schooling and experience to master. Thus, to afford defendants the detrimental right to defend pro se in no way promotes the Sixth Amendment’s policy of safeguarding the interests of a criminal defendant. Furthermore, pro se defendants have fittingly earned a reputation of being disruptive and troublesome to the judicial process. Therefore, while defendants should never be afforded the right to self-annihilation, it certainly should not come at the expense of safely administering justice in the courtroom.

In *People v. Smith*, the New York Supreme Court, Appellate Term, upheld the right of a criminal defendant to proceed pro se.²¹¹ This decision signifies an effort to preserve the right to self-representation by ensuring pro se defendants an opportunity to participate in sidebar conferences. The decision demonstrates an additional attempt by the court to define the scope of self-representation, an area that was left largely undefined by the *Faretta* decision and remains unresolved. Setting these boundaries poses an infinite task that has only resulted in limitations of the right followed by subsequent expansions with little standardization among jurisdictions. Thus, the pro se defendant’s scanty chance of success also largely depends on the courtroom in which he sits. Courts will continue to struggle to uphold the right of self-representation while simultaneously battling the stark implications that accompany this right. Despite the interest of autonomy that underlies its conception, the right to self-

²⁰⁸ Decker, *supra* note 92, at 485-87.

²⁰⁹ *Id.* at 487.

²¹⁰ *Id.* at 597-98.

²¹¹ *Smith*, 907 N.Y.S.2d at 539.

2012] *FLYING SOLO WITHOUT A LICENSE* 1049

representation continues to engulf the very purpose for which it was designed—to protect the trial interests of the accused.

*Tiffany Frigenti**

* J.D. Candidate 2013, Touro College Jacob D. Fuchsberg School of Law; B.S. 2009, Boston University. Special Thanks: To Andrew Koster, Rena Sepowitz, and the members of the *Touro Law Review* for their time, effort, and assistance with this case note. To Ara Ayvazian, for his guidance and assistance in preparing me for the challenges that lie ahead. To each of my brothers for their undivided encouragement throughout my law school career. To Peter Devita for his love and support during the last two years, and for giving me the strength and courage to pursue my dreams, encouraging me all along that I was capable of what I have now achieved. And to the best parents I could ever ask for, for dedicating a lifetime of support, for teaching me that with dedication and perseverance anything is possible, and for always believing in me.