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JD AND ME: EXPLORING HYBRID REPRESENTATION OF PRO SE DEFENDANTS IN CAPITAL MURDER CASES

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I. INTRODUCTION

In their decision in *Gideon v. Wainwright*,[1] the United States Supreme Court held that persons charged with a crime carrying jail time are entitled to have counsel appointed to represent them. Following a long history of defendant's having the right to represent themselves or appear *pro se*,[2] the United States Supreme Court in *Faretta v. California,*[3] held that a criminal defendant has a constitutional right to represent himself.

Before a defendant can waive their right to counsel, trial courts are required to determine if the defendant is competent to represent themselves and make sure the defendant is making this decision with "eyes open".[4] Further, it has been held that there is no constitutional right to "standby counsel", or attorneys who are present to assist the defendant in an advisory position with matters of procedure and the law or takeover the defense if the defendant changes their mind on proceeding without counsel.[5] Since the determination of *Faretta*, the Ohio Supreme Court has held that there is no right to "hybrid representation" or that a person electing to proceed *pro se* cannot also then have appointed counsel participate in trial as well,[6] thus limiting counsel to 'overcoming . . . [p]rocedural or evidentiary obstacles . . .' and 'help[ing] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.'"[7]

While not required constitutionally, most trial courts appoint standby counsel if a criminal defendant elects to proceed *pro se*.[8] This is especially true in cases involving serious offenses and where the death penalty is sought.[9]

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1 Gideon v. Wainright, 372 U.S. 335, 344–45 (1963).

2 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789); *see* United States v. Plattner, 330 F.2d 271, 273–74 (2d Cir. 1964); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Johnson v. Zerbst, 304 U.S. 458, 468–69 (1938).

3 Faretta v. California, 422 U.S. 806, 836 (1975).

4 *Id.* at 835.

5 *Id.* at 834 n.46.

6 State v. Martin, 103 Ohio St. 3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 32; State v. Thompson, 33 Ohio St. 3d 1, 13, 514 N.E.2d 407, 413 (1987).

7 State v. Hackett, 164 Ohio St. 3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 61 (Fischer, J., concurring) (citation omitted).

8 *See e.g.*, *Id.* at ¶ 4 (majority opinion); *see also* Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are they Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. CAL. REV. OF L. & SOC. JUST. 133, 148–49 (2015).

9 Goldschmidt, *supra* note 8, at 133; *see, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 170–71 (1984); Lenhard v. Wolff, 444 U.S. 807, 808–09 (1979); Duncan v. United States, No. 2:17-cv-00091-EJL, 2019 U.S. Dist. LEXIS 48470, at *1, *5 (D. Idaho Mar. 22, 2019).

The United States Supreme Court made it clear that death is different; for that reason more process is due, not less given the finality of the penalty if fulfilled.[10] "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause."[11] For this reason the process of a case where the death penalty is sought progresses differently with additional pretrial matters, safeguards and proceedings taking place.

The United States Constitution grants those facing the loss of life and liberty the right to due process and a fair trial under the law.[12] What can be done to ensure criminal defendants facing the death penalty feel as though their desired argument and defense will be presented while still having the appearance of a fair trial to the public at large? This Article will look at a comparison between a person the law says is qualified to waive counsel and represent themselves and a person qualified to be appointed to represent those facing the death penalty; what is required to waive counsel; the involvement of the trial court and the roles of standby counsel in *pro se* cases; the unique differences of a death penalty case, and ultimately demonstrate what a hybrid representation could look like when a defendant is *pro se* but wishes for standby counsel to be involved in the process. All while protecting the solemnity of the court process and maintaining a clear record.

I. TYPICAL *PRO SE* DEFENDANT VS. APPOINTED COUNSEL IN DEATH PENALTY CASES

So, who are we dealing with when we consider a defendant proceeding *pro se* in a death penalty case? Typically, a person elects to proceed *pro se* because they do not trust the system as a whole, or feel that their goals in representation are not being met by their court appointed counsel.[13] Some feel they can do it better, some feel because their attorney is appointed by the court that the attorney won't fight for them, and some want to argue a defense that attorneys cannot ethically advance due to the rules of professional conduct in place in that jurisdiction.[14] Many of these defendants waive counsel because it is the only way they feel that their case will be fully presented. Statistically, in death penalty cases, the defendant is male, likely white, 35-39 with an average age of 43 and median age of 41, with a 9th-11th grade education.[15] Additionally, defendants are likely to have some or all conditions, such as mental

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10 Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

11 Evitts v. Lucey, 469 U.S. 387, 401 (1985).

12 U.S. CONST. amends. V, XIV.

13 Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428–29 (2007); *see, e.g.*, United States v. Melillo, 631 F. App'x 761, 762 (11th Cir. 2015).

14 MODEL CODE OF PRO. RESP. r. 1.2(d) (AM. BAR. ASS'N 1969); Hashimoto, *supra* note 13.

15 Tracy Snell, *Capital Punishment, 2020 Statistical Tables*, U.S. DEP'T OF JUST. (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf.

health, addiction, intellectual deficiencies, and chronic childhood trauma or abuses.[16] Oftentimes these are either undiagnosed or underreported, or both.[17]

In Ohio, for an attorney to be eligible to be court appointed to represent someone facing a possible death sentence the attorney must be certified by the Commission on Appointment of Counsel in Capital Cases.[18] The qualification for someone to be considered certified are set forth in Rule for Appointment of Counsel in Capital Cases 3.01(B).[19] These requirements include skill in the use of expert witnesses[20] and familiarity in forensics.[21] Further, it is required that the attorney have substantial knowledge of state, federal and international law regarding capital cases from a procedural and substantive standpoint,[22] it is further required in order to be "lead counsel" or the attorney in charge of the representation that further qualifications be met in Rule 3.02(B).[23] Out of 35,129 attorneys actively licensed in the State of Ohio

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16 Death Penalty Information Center, *The Death Penalty in 2022: Year End Report*, 1, 21–22 (Dec. 16, 2022), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf?dm=1683576592.

17 Robert J. Smith, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1244 (2014).

18 OHIO R. APPT. COUN. CAP. CASES 3.01(A) (2015).

19 "An applicant for certification under division (A) of this rule shall possess all of the following qualifications: (1) Admission to the practice of law in Ohio or admission to practice pro hac vice; (2) Demonstrated commitment to providing high quality legal representation in the defense of capital cases; (3) Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases; (4) Skill in the management and conduct of complex negotiations and litigation; (5) Skill in legal research, analysis, and the drafting of litigation documents; (6) Skill in oral advocacy; (7) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, arson, forensic pathology, and DNA evidence; (8) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status; (9) Skill in the investigation, preparation, and presentation of mitigating evidence; (10) Skill in the elements of trial advocacy, such as jury selection, cross examination of witnesses, and opening and closing statements." OHIO R. APPT. COUN. CAP. CASES 3.01(B) (2015).

20 OHIO R. APPT. COUN. CAP. CASES 3.01(B)(7) (2015)

21 *Id.*

22 OHIO R. APPT. COUN. CAP. CASES 3.01(B)(3) (2015).

23 Rule 3.02(B) stipulates that the attorney "(1) Possess at least five years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court; (2) Possess either of the following qualifications: (a) Experience as trial lead counsel in the trial of at least one capital case; (b) Experience as trial co-counsel in the trial of at least two capital cases. (3) Possess either of the following qualifications: (a) Experience as trial lead counsel in the jury trial of at least one murder or aggravated murder case in the ten years prior to making application; (b) Experience as trial lead counsel in three aggravated or first or second-degree felony jury trials in a court of common pleas in the five years prior to making application. (4) Comply with the general certification requirements of Appt. Coun. R. 3.01; (5) Comply with the training requirements of Appt. Coun. R. 4.01." OHIO R. APPT. COUN. CAP. CASES 3.02(B) (2015).

as of January 1, 2023,[24] 251 were certified by the Commission on Appointment of Counsel in Capital Cases with only 75 having been qualified to lead the defense and having met the requirements of the sections previously mentioned.[25] The American Bar Association compiled a list of requirements as to Lead and Co/Associate Counsel in May 2021 that seems to closely reflect Ohio's requirements with some variance in the experience necessary to represent defendants facing death.[26]

II. WAIVER OF THE RIGHT OF COUNSEL

The Supreme Court has held "the right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may at least occasionally be the accused's best possible defense".[27] The right to proceed *pro se* is not absolute however, and can be overcome by the State if the Defendant's mental state concerns the Court that he would be unable to properly represent himself[28] or if the assertion of the right is untimely.[29]

During their representation by counsel, defendants have certain rights and decisions that they alone are permitted to make.[30] Some must be waived on the record.[31] Waiving counsel is an example of a waivable right with others being the right to a trial or if they wish to plead guilty, the right to testify, and the right to have a trial to a jury or the judge.[32] The *Faretta* court held that when an accused manages his own defense, he relinquishes as a factual matter, the benefits that traditionally come with having counsel.[33] As a result, in order to represent himself, the accused must knowingly and intelligently forgo those benefits.[34] A defendant doesn't need to have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, but he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish "he knows what he is doing and his choice is made with eyes open."[35]

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[24] E-mail from Tammy White, Att'y Serv. Manager, Sup. Ct. Ohio, to Michael Maloof, CLEV. ST. L. REV. (Aug. 22, 2023, 13:53 EST) (on file with author).

[25] *Id.*

[26] OHIO R. APPT. COUN. CAP. CASES 3.02, 3.03 (2015).

[27] McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984).

[28] Indiana v. Edwards, 554 U.S. 164, 171 (2008).

[29] State v. Cassano, 96 Ohio St. 3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 38.

[30] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

[31] Boykin v. Alabama, 395 U.S. 238, 242–43 (1969).

[32] *Id.* at 243.

[33] Faretta v. California, 422 U.S. 806, 835 (1975).

[34] *Id.*

[35] *Id.*

The Supreme Court considered what makes someone competent to waive counsel in *Godinez v Moran*.[36] The Court held that the competency standard for waiving the right to counsel at trial is no higher than the general competency standard for standing trial, because "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights."[37] According to the Supreme Court the general competency standard, according to the Supreme Court, is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."[38] This has been curbed slightly by the United States Supreme Court in *Indiana v. Edwards*,[39] which held that states can insist on that criminal defendants proceed with counsel.

III. COURT INVOLVEMENT, APPOINTMENT AND INVOLVEMENT OF "STANDBY COUNSEL", IN CASES WHERE THE DEFENDANT PROCEEDS *PRO SE*

A. Court Involvement

When addressing a *pro se* defendant, trial courts must consider whether to give advisements of other rights of the defendant that would ordinarily be explained by the appointed attorney, such as the right to exercise peremptory challenges, advisements of the rules of evidence, the right to appear at trial in civilian clothing, the right of access to legal materials, and the right to pretrial discovery.[40] Along with these considerations, Professor Myron Moskovitz proposes additional rights, such as excusing jurors for cause, the right to object on prosecution evidence; and the right to present an opening statement/closing argument.[41] Typically trial counsel would explain these rights and in most cases take responsibility for exercising them.[42] The *pro se* defendant, having knowledge of these rights, seems even more prudent where death is a possible sentence, due in no small part to the defendant's decision to exercise or waive these rights being matters of life and death.

B. Standby Counsel: Optional or Required

The Supreme Court has held that standby counsel can be appointed over self-represented defendant objection.[43] Although the Ohio Supreme Court and federal courts have held that there is no obligation under state nor the federal law to even

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[36] Godinez v. Moran, 509 U.S. 389, 395–96 (1993).

[37] *Id*. at 399.

[38] Dusky v. United States, 362 U.S. 402 (1960).

[39] Indiana v. Edwards, 554 U.S. 164, 178 (2008).

[40] Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 341–42 (2004).

[41] *Id*.

[42] McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984).

[43] *Id*. at 184.

inform a defendant who seeks to waive counsel about the possibility of appointing standby counsel,[44] there appears to be some debate between current members of the Ohio Supreme Court on this issue.[45] Justice Pat Fischer has written about his belief such a right exists.[46] Justice Melody Stewart adds that there should be some guidelines to prevent arbitrariness in when courts appoint standby counsel and on what the role of that standby counsel should be.[47] Justice Stewart proposes, without knowing if standby counsel is being appointed, a defendant cannot make a knowing and informed decision about whether to waive counsel or not.[48] Citing *Faretta*, an argument is then made using holdings from other jurisdictions and excerpts from American Bar Association Standards 3rd Edition that in capital cases and cases of potentially severe sentencing or complex nature demand standby counsel be appointed.[49]

The Ohio Supreme Court has held that "standby counsel can be of great aid to criminal defendants who choose to represent themselves and can help to ensure that defendants who overestimate their ability to handle their own defense are not left totally adrift."[50]

C. Standby Counsel Involvement

The Supreme Court then put limits on the uninvited involvement of standby counsel indicating that the *pro se* defendant must retain control over the case he chooses to present to the jury and there must remain an illusion to the jury that the Defendant is representing himself.[51] The *McKaskie* court indicated that it is anticipated that there may be times outside the presence of the jury that the trial court

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[44] State v. Obermiller, 147 Ohio St. 3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 50; *see also* United States v. Cohen, 888 F.3d 667, 680 (4th Cir. 2018) ("It is settled that [the defendant] had no right to the appointment of a standby counsel after he chose to proceed pro se, let alone the right to a standby counsel of his choosing."); United States v. Mikolajczyk, 137 F.3d 237, 246 (5th Cir. 1998) ("[T]he defendant was constitutionally guaranteed the right to represent himself if he so chose, or to receive competent representation from an attorney, but the availability of standby counsel to provide a combination of the two was not constitutionally required."); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998).

[45] State v. Hackett, 164 Ohio St. 3d 74, 2020-Ohio-6699, 172 N.E.3d 75 (consisting of a majority opinion, 2 concurring opinions, and a dissenting opinion).

[46] *Id.* at ¶ 29 (Fischer, J., concurring) ("In *Martin*, this court held that '[i]n Ohio, a criminal defendant has the right to representation by counsel or *to proceed pro se with the assistance of standby counsel*.' This language appears to acknowledge the existence of a right to standby counsel in Ohio.") (emphasis added) (quoting *State v. Martin*, 103 Ohio St. 3d 385, 2004-Ohio-5471, 816 N.E.2d 227).

[47] *Id.* at ¶ 48 (Stewart, J., concurring).

[48] *Id*. at ¶ 49, 63.

[49] *Id.* at ¶ ¶ 52–55.

[50] *Id*. at ¶ 20 (majority opinion).

[51] *McKaskle v. Wiggins*, 465 U.S. 168, 178-79 (1984).

will need to reconcile disagreements between standby counsel and the *pro se* litigant. The court felt that *Faretta* rights are adequately protected if the proceedings take place outside the presence of the jury. The *pro se* defendant is permitted to speak freely on his behalf and, if disagreements between standby counsel and the *pro se* defendant are resolved in the defendant's favor, whenever said issue is one that would be left to the discretion of the trial counsel.[52] The *McKaskie* court went further to indicate that the goals of *Faretta* are met in instances where the standby counsel assists with overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, provided that the defendant has indicated a desire to complete that task.[53] Standby counsel does not violate the *pro se* defendant's rights if they assist in ensuring that the basic rules of the courtroom and its procedures are complied with.[54] And as the court expressed earlier in its opinion, it noted that these actions do not make the defendant appear to lack control over his defense.[55] The court in *McKaskie* felt that these actions were beneficial because "a defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by a trained counsel as a matter of course."[56]

D. Hybrid Counsel: A Possible Hidden Right under the Ohio Constitution or a Hinderance to the Record?

In 2022 the Ohio Supreme Court ruled on an appeal of right in *State of Ohio v McAlpin*.[57] The defendant in that matter argued on appeal both that the self-representation rights under *Faretta* did not extend to aspects of the capital trial process,[58] and that standby counsel in the case impermissibly was involved or hindered McAlpin's representation of himself when the standby counsel prevented a report that was likely unfavorable to the defendant to be created by an expert.[59]

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52 *Id*. at 179, 199 n.10 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE Standard 6-3.7. (2d ed. 1980) which discusses how standby counsel may "call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion . . ." and UNIF. R. CRIM. P. r. 711 (1974) and Mayberry v. Pennsylvania, 400 U.S. 455, 467–68 (1971) (Burger, C.J., concurring)).

53 *Id*. at 183.

54 *Id*.

55 *Id*.

56 *Id*. at 183–84.

57 State v. McAlpin, 169 Ohio St. 3d 279, 2022-Ohio-1567, 204 N.E.3d 459.

58 *Id*. at ¶ 44. Specifically, the death qualification portion of voir dire and the penalty portion of proceedings where the jurors weigh aggravating factors against mitigating factors in determining if death is the sentence that should be imposed.

59 *Id*. at ¶ 62.

The *McAlpin* court upheld McAlpin's conviction and death sentence.[60] While Justice Fischer concurred with the majority's decision, he wrote a concurring opinion to stress "the need to reevaluate Ohio's jurisprudence related to standby and hybrid representation."[61] Justice Fischer correctly indicates that the *Martin* and *Thompson* courts did not consider the language of the Ohio Constitution but relied on cases decided using laws with different language.[62] In the Ohio Constitution a defendant's right is, "in any trial, in any court, the party accused shall be allowed to appear and defend in person *and* with counsel"[63] Justice Fischer argues that the conjunctive of "and" and absence of a disjunctive such as "or" provides in basic grammar an argument for a constitutional right to hybrid representation.[64]

IV. UNIQUE PROCESSES OF A DEATH PENALTY TRIAL

A. Pretrial

Unbeknownst to most lay persons, a criminal case can be won or lost at trial before the first word is uttered at that trial. This is especially true in cases where the death penalty is possible.[65] Because these cases involve at least one death, there will be specialized evidence that is sought to be introduced regarding the cause of the death both in manner and who was involved. The motion practice is also necessarily the most intense that many attorneys will ever engage in. While the right to speedy trial in Ohio guarantees a trial within 270 days from the point of arrest,[66] cases involving a possible death sentence will commonly last for years of pretrial activity before the matter proceeds to trial due to the number of pretrial motions being filed and needing to be argued and ruled upon before trial.[67]

The Ohio Public Defender has a motions manual on its website with one hundred different motions ranging in topics from funding the defense, discovery motions, trial procedure motions, motions to suppress, jury selection, and motions *in limine* for the first and second phases of trial.[68] While not all of these motions will be applicable to every death penalty case, those that are must be filed to preserve for appeal any denial

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60 *Id*. at ¶ 301.

61 *Id*. at ¶ 303 (Fischer, J., concurring).

62 *Id*. at ¶ 312 (Fischer, J., concurring).

63 OHIO CONST. art. I, § 10 (emphasis added).

64 *See McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, 204 N.E.3d 459, at ¶ 314 (Fischer, J., concurring).

65 *See infra* Sections V.A, V.B.

66 OHIO REV. CODE § 2945.71(C)(2) (2023) ("(2) Except as provided in division (C) of section 2945.73 of the Revised Code, shall be brought to trial within two hundred seventy days after the person's arrest.").

67 *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row (last visited Aug. 23, 2023).

68 *Motions Manual*, OHIO PUB. DEF. (June 02, 2020), https://opd.ohio.gov/law-library/death-penalty/motions-manual.

of relief that is sought by the motions.[69] The reason that the motion manual exists is to help legal professionals to file motions they, even with the qualifications and experience they hold to represent clients in these cases, may not have realized or thought to pursue. Access to internet resources by inmates is understandably limited and unless an inmate has been told about the Ohio Public Defender website having these motions, they may not look at the website since it is their desire to represent themselves.

A. Jury Selection

From the start, the selection of a jury in a case where the death penalty is sought is different from any other criminal matter. In all cases, whether the death penalty is sought or not, there are two ways that a perspective juror can be removed from the perspective panel- for cause and peremptorily.[70] For cause removal is due to the juror stating some mindset, reservation, or bias that would not permit them from applying the law as it is given to them or consider the evidence in a fair way.[71] Examples of this include someone who is of a religious belief that they cannot sit in judgment of others because that is only their spiritual entity's right, or someone who holds the view that if a minority person is charged with a crime, they must have been up to something. If parties cannot remove a juror for cause, they have a certain number of peremptory removals that can be used. The parties do not have to give a reason for these removals, but they are not permitted to remove jurors on the basis of race,[72] or gender,[73] or in at least one federal jurisdiction, sexual orientation.[74] The number of peremptory challenges afforded each side is increased in death penalty cases,[75] but they are not infinite and likely will result in a defendant having to choose between 2 or more less than favorable jurors that they otherwise would want to remove from the jury.

Juries in all other cases, including murders where the death penalty is not being sought, are told as a matter of course that they aren't to consider punishment in their deliberations[76]. The perspective jurors are told that punishment is a matter only for

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69 *See Preserving Issues for Appeal: What it Means and Why it Matters*, GUSDORFF L. P.C. (Jan. 21, 2022), https://www.gusdorfflaw.com/preserving-issues-for-appeal/.

70 *How Courts Work*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/ (last visited Jul. 21, 2023).

71 *Challenge for cause*, THE PEOPLE'S LAW DICTIONARY (1st ed. 2002).

72 Batson v. Kentucky, 476 U.S. 79, 84 (1986).

73 Taylor v. Louisiana, 419 U.S. 522, 537–38 (1975); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994).

74 Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014).

75 FED. R. CRIM. P. 24(b).

76 HON. PRENTICE H. MARSHALL, HON. THOMAS A. FLANNERY & HON. PATRICK E. HIGGINBOTHAM, PATTERN OF CRIMINAL JURY INSTRUCTIONS 9 (Fed. Jud. Ctr. 1982).

the court to decide.[77] With death penalty juries, the subject of punishment is present in their minds from start to finish because it is possibly the ultimate decision they will decide upon. As a result they are heavily questioned on their feelings towards the death penalty.[78] Questions like their overall view of the death penalty, when they might feel the death penalty should be imposed, what religious or political beliefs regarding the death penalty they hold will be asked of them individually and at length.[79] Often, the subject of punishment is understandably a significant, if not a majority, of the questions they are asked.[80]

This is because a jury in cases where the death penalty is sought must be "death qualified".[81] But what makes someone "death qualified"? The Supreme Court first examined this topic in *Witherspoon v. Illinois* and held prospective jurors could not be disqualified from jury service simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against it.[82] However, a state may exclude those jurors who would automatically vote against the death penalty or those whose attitudes about the death penalty would affect their decision regarding the defendant's guilt or innocence.[83] This exclusion was expanded in 1985 when the Court developed the *Witt* standard which gave more discretion to the judge in death qualification.[84] The judge decides whether the jurors' attitudes toward the death penalty would "prevent or substantially impair" their ability to decide on the sentence fairly.[85] This holding arguably expanded the range of people who could be excluded by death qualification. The trial judge is deemed to be in the best position to observe potential jurors' demeanor resulting in decisions to exclude jurors for cause being given great deference by appellate courts.[86]

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[77] *Id.*

[78] Witherspoon v. Illinois, 391 U.S. 510, 513–15 (1968).

[79] *Id*.

[80] *Death Qualification*, CAP. PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org/resources/deathqualification (last visited Aug. 23, 2023).

[81] *See* Witherspoon, 391 U.S. at 516–17.

[82] *Id*. at 521–23.

[83] *Id*. at 542 n.21.

[84] Wainwright v. Witt, 469 U.S. 412, 429–30 (1985).

[85] *Id*. at 416.

[86] Uttecht v. Brown, 551 U.S. 1 (2007) (upholding, in a 5-4 decision, a trial judge's excluding of a juror who expressed hesitation about imposing the death penalty but was not totally against it. The juror had on six occasions indicated that he could follow the law when asked in voir dire but was then excluded by the trial judge when other answers were deemed to be equivocal).

Given the sensationalism that is attached to capital punishment,[87] there were social scientific studies undertaken as to the effect of this qualifying of death penalty juries.[88] The results of these studies became the focus of The Supreme Court holding in *Lockhart v. McCree* which held that there is no unconstitutional bias of juries toward a guilty verdict by subjecting them to qualification and that general empirical research could not decide the issue with a bright line, but rather each defendant would be required to show their specific jury was biased.[89]

B. Two Phased Trial

Compared to a murder trial without death penalty implications, the major difference once the presentation of evidence begins is that there are potentially two phases of the trial. The evidentiary or "guilty/not guilty" phase, and the penalty phase. The first phase is what is traditionally seen on television representations of trials. During this phase prosecutors are required to prove beyond a reasonable doubt that the defendant committed the murder and that the facts surrounding the murder qualify the case for the death penalty.[90] The penalty phase often sees evidence re-introduced because during the penalty phase the jury considers whether the facts that qualify the murder for the death penalty outweigh facts in mitigation, or that lessen the seriousness of the defendant's actions.[91]

Often it is strategically suggested that one attorney conducts the first phase while the other counsel conducts the mitigation phase so that the voice which has been arguing for weeks that the defendant is not guilty is not then the voice that is saying "so he is guilty but here is why you shouldn't find that death is legally required". A defendant appearing *pro se* is not just the same voice arguing in both phases. The defendant is someone the jury has found guilty of killing at least one person. The jury has also found that the circumstances of the defendant's actions were such that the law in that jurisdiction qualifies the defendant for the death penalty and horrific enough that the prosecutor thinks a jury will decide death. It is undeniable that at the very least some of the defendant's arguments will lose effect.

V. A PROCESS FOR USING HYBRID REPRESENTATION TO MAINTAIN THE APPEARANCE OF A FAIR TRIAL, PROTECT THE DEFENDANT'S ABILITY TO CONTROL HIS DEFENSE, AND PRESERVE A USABLE RECORD FOR ANY NECESSARY APPEALS

The Supreme Court has made clear that when a criminal defendant proceeds *pro se* that there is no right to abuse the dignity of the courtroom[92] or to avoid compliance

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87 Lockhart v. McCree, 476 U.S. 162, 167–70 (1986).

88 *Id*. at 168–69.

89 *Id*. at 170–71.

90 *Id*. at 195–96 (Marshall, J., dissenting).

91 18 U.S.C. § 3592; *see also Mitigation in Capital Cases*, CAP. PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org (last visited Aug. 23, 2023).

92 Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (Brennan, J., concurring).

with relevant rules of procedural or substantive law,[93] nor is there a right to engage in serious and obstructionist misconduct.[94] The Supreme Court also recognizes as "the most basic of the Constitution's criminal law objectives" being providing for a fair trial,[95] and that "even at the trial level…the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[96] The Supreme Court felt that proceedings must not only be fair, they must "appear fair to all who observe them."[97]

There has been concerns expressed by the courts that permitting more than an advisory role for standby counsel will lead to confusion of the record, or violation of the self-represented defendant's right to represent himself.[98]

It has been held that constitutional rights must prevail, even when they protect undesirable actions or outcomes.[99] Justice Fischer in his concurring opinion in *Hackett* states "If the mere fact that procedures necessary to protect a person's constitutional rights are burdensome were sufficient to overcome the need to protect those rights, then freedoms like our right to free speech, peacefully assemble, or bear arms could be quickly vanquished."[100]

In the author's experiences with multiple counsel trials,[101] the courts the author has appeared in front of, have handled maintaining the record clarity in a multitude of efficient ways that could be implemented in a case where a self-represented person wished to both participate and have the assistance of standby counsel. Some courts mandate that a single attorney handles any duties regarding each witness such as questioning and raising any objections that arise during their testimony.[102] This could be accomplished either organically during the flow of the trial, or by designation each day by the court, on the record before the jury is brought in inquiring of the State who they anticipate calling for that particular day, then asking the self-represented defendant who they anticipate raising objections or cross examining each witness. Other courts invite all counsel to the bench for the purpose of arguing objections which

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93 *Id*.

94 *Id*. *See also* Illinois v Allen, 478 US 364 (1986).

95 Indiana v. Edwards, 554 U.S. 164, 176–77 (2008).

96 Martinez v. Court App. of Ca., 528 U.S. 152, 162 (4th Dist. 2000).

97 Wheat v. United States, 486 U.S. 153, 160 (1988).

98 State v. Hackett, 164 Ohio St. 3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 10.

99 *Id*. at ¶ 39 (Fischer, J., concurring) (citing Texas v. Johnson, 491 U.S. 397 (1989) and State v. Lessin, 67 Ohio St. 3d 487, 1993-Ohio-52, 620 N.E.2d 72).

100 *Id*. at ¶ 39.

101 The author participated in three co-counsel trials with his father when new to legal practice including a sexual battery, and a case alleging the defendant engaged in a pattern of corrupt activity. As a prosecutor, the author was part of a three-person trial team for an aggravated murder case. The author has also sat as "of counsel" for a *pro se* defendant trial.

102 *Id*. at ¶ 40.

allows for input from counsel and the self-represented defendant further ensuring that the defendant's rights are protected while also maintaining the appearance of a fair trial.[103] While courts are understandably hesitant to allow a defendant to move freely about the courtroom, any processes used for a purely *pro se* representation could be implemented for a hybrid situation.[104]

Indeed, during the discovery process the defendant may desire to question specific witnesses while feeling that standby counsel is better suited to question other witnesses that may require a more refined approach or technique. Some defendants may wish to simply present the open or close of their case so they have the chance to tell their story or make their preferred arguments to the jury. Some may also recognize the gravity of the situation if a guilty verdict is returned and want to permit the attorney to be the majority participant in the sentencing phase while retaining a certain feeling of control, as well.

While the defendant in *McKaskie* ultimately argued he was interfered with,[105] it appears that there was a form of hybrid representation that occurred and from which a record was readily available and clear enough that the appellate courts were able to review the record to determine who did what and if there was an intrusion into the defendant's rights under *Faretta*.[106] The author believes that between the protections of the *McKaskie* rule regarding standby counsel not being permitted to overrun the *pro se* defendant's control of the defense, if a trial court advised the hypothetical *pro se* defendant of the potential issues that may be involved in a hybrid representation that the holding in *State v. Bey* regarding invited error[107] would protect against an overwhelming onslaught of appeals on those issues.

Much like the required admonitions when a defendant elects to proceed *pro se,* the court can keep the record clean by advising the defendant he is viewed as lead of the defense, a position taken by Justice Fischer in *Hackett*.[108] It would then be presumed that any part of the case the defendant assigns or permits standby counsel to perform is done with the express permission and consent of the defendant. Additionally, the defendant understands that it is presumed standby counsel's actions are in line with the defendant's strategic wishes waiving the defendant's right to claim ineffective assistance of counsel as well as that defendant's right to control the defense were infringed. If the defendant feels that a conflict exists between defendant and standby

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103 McKaskle v. Wiggins, 465 U.S. 168, 178–80 (1984).

104 To be sure there will be some counsel who are unwilling to participate in such a dynamic, but there are likely to be some who will be willing to do so and may appreciate the unique opportunities that are presented by being involved in a limited capacity that may end up playing to the strengths of the professional counsel.

105 465 U.S. at 173.

106 *Id*. at 187–88.

107 State v. Bey, 85 Ohio St. 3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484 (1999) (holding [a] party will not be permitted to take advantage of an error which he himself invited or induced).

108 State v. Hackett, 164 Ohio St. 3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 40 (Fischer, J., concurring).

counsel it is the defendant's responsibility to ask to address the court and the court will resolve all disputes in the defendant's favor.[109]

The court could further advise the jury, with the defendant's wishes, that the defendant is electing to represent himself but has chosen to have an attorney help the defendant to present his case. The jury is not to put any weight or consideration into the defendant representing himself, his having assistance of counsel but to follow the law and consider all presentation of the case and evidence whether it was presented by an attorney or the defendant. This would also be something that the parties could include in their *voir dire* questions of the jurors; asking questions about the jurors feelings would serve to not only identify anyone who would be unable to follow the law or be biased against a side when the defendant is in control of the defense, but it would also lessen the saturation of *voir dire* with talk of sentencing/punishment that tends to in some fashion imply there is something that will need to be sentenced on.

VI. CONCLUSION

It is both ironic and in some fashion appropriate that in *Gideon v Wainwright* that the defendant was *pro se* in the fight to make sure all criminal defendants facing jail time could be appointed counsel to represent them while *Faretta* saw a represented defendant arguing to be permitted to do it himself.[110] We now examine a middle of the road proposition of allowing defendants to both enjoy the benefits and risks of having a blended representation. Justice Fischer in the *Hackett* case seems to indicate a desire for another case to come before the Ohio Supreme Court for the purpose of analyzing the Ohio Constitution and its plain language.[111] With the advances in technology the ability to discern who said what for record purposes is easier than ever. An advent of computer access to inmates results in fewer reasons to not permit defendants who want to be in control of their defense from doing so while also allowing them to involve appointed counsel if they feel necessary. At the end of the day, the defendant is the one who must live with, and potentially die from, the consequences. Utilizing the holdings discussed in this Article, certainly courts could properly warn of the possible pitfalls and define the roles of the parties for the defendants such that they can approach their decisions with their eyes open and minds knowing. The administration of American criminal justice has been evolving since the days of our founding, perhaps hybrid representation is the next big step.

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109 *See* Wiggins, 465 U.S. at 194 (White, J., dissenting).

110 Gideon v. Wainwright, 372 U.S. 335, 336–38 (1963); Faretta v. California, 422 U.S. 806, 808 (1975).

111 *Hackett* at ¶ 63 (Fischer, J., concurring).