

A Criminal Defendant Has No Constitutional Right to Standby Counsel While Conducting a Pro Se Defense

Donna M. Hitscherich

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Hitscherich, Donna M. (1983) "A Criminal Defendant Has No Constitutional Right to Standby Counsel While Conducting a Pro Se Defense," *St. John's Law Review*: Vol. 57 : No. 3 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss3/10>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

tifiably has ignored the detriment suffered by children who are deprived of an adequate education.⁷⁰ As a consequence of the court's decision, neither a judicial nor an administrative remedy is available when a private school fails to provide the bargained-for education.⁷¹ It is hoped that the Court of Appeals soon will have the opportunity to rectify this most unfortunate result.

Diane M. Trippany

A criminal defendant has no constitutional right to standby counsel while conducting a pro se defense

The sixth amendment to the federal Constitution affords a criminal defendant the right to effective assistance of counsel⁷² and the right to appear pro se.⁷³ Although it appears that a defendant

⁷⁰ See, e.g., *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d at 39, 407 N.Y.S.2d at 882-85 (Suozzi, J., dissenting).

⁷¹ See *supra* notes 68-69.

⁷² The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. This amendment has been held to guarantee to criminal defendants the right to effective assistance of counsel. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The court will determine that there has been a denial of effective representation by counsel "only when the representation given is so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of it and correct it." *People v. Tomaselli*, 7 N.Y.2d 350, 356, 165 N.E.2d 551, 555, 197 N.Y.S.2d 697, 702 (1960).

Although the sixth amendment right to effective assistance of counsel has been held applicable to the states by virtue of the fourteenth amendment, *Powell v. Alabama*, 287 U.S. 45, 71 (1932), New York has afforded criminal defendants this protection independently of the fourteenth amendment, see *People v. Settles*, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 876 (1978); N.Y.CONST. art. I, § 6; CPL § 210.15(2) (1971). Specifically, the New York Constitution provides that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel." N.Y. CONST. art. I, § 6; see CPL § 210.15(2) (1971). For a discussion of the right to counsel guarantees that New York has granted to criminal defendants, see Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157, 178-92 (1979).

⁷³ See *Faretta v. California*, 422 U.S. 806, 819 (1975). The right to appear pro se has been recognized as implicit in the sixth amendment right to the effective assistance of counsel. *Id.* In *Faretta*, the Supreme Court stated:

[T]he right of an accused to conduct his own defense seems to cut against the grain of . . . decisions holding that . . . no accused can be convicted and imprisoned unless he had been accorded the right to the assistance of counsel.

. . . .

[However,] [i]t is one thing to hold that every defendant . . . has the right to the assistance of counsel, and quite another to say that a State may compel a defen-

simultaneously could exercise both rights consistently with the sixth amendment, a number of jurisdictions have considered these guarantees mutually exclusive.⁷⁴ Thus, a criminal defendant who elects to proceed pro se often is precluded from securing the assis-

dant to accept a lawyer he does not want.

Id. at 832-33 (citations omitted). Even prior to the Supreme Court's decision in *Faretta*, the constitutions of 36 states expressly conferred this pro se right, some declaring that the right was derived from the United States Constitution. *See id.* at 813-14 & nn.10-11; *see, e.g.*, ARIZ. CONST. art. II, § 24 (right to be heard, or to defend in person and by counsel); TEX. CONST. art. I, § 10 (right to defend either by himself, by counsel, or both); WASH. CONST. art. I, § 22 (right to defend in person or by counsel). Moreover, as early as 1933, the New York Court of Appeals recognized that "under both our Federal and State Constitutions, a defendant has the right to defend in person or by counsel of his own choosing." *People v. Price*, 262 N.Y. 410, 412, 187 N.E. 298, 299 (1933). New York has continued to acknowledge the defendant's right to conduct his own defense. *See, e.g.*, *People v. McIntyre*, 36 N.Y.2d 10, 14, 324 N.E.2d 322, 325, 364 N.Y.S.2d 837, 842 (1974); *People v. McLaughlin*, 291 N.Y. 480, 482, 53 N.E.2d 356, 357 (1944); *People v. Pippin*, 67 App. Div. 2d 413, 416-17, 415 N.Y.S.2d 654, 655 (1st Dep't 1979); *People v. Kelly*, 60 App. Div. 2d 220, 223, 400 N.Y.S.2d 82, 84 (1st Dep't 1977), *aff'd mem.*, 44 N.Y.2d 725, 376 N.E.2d 931, 405 N.Y.S.2d 458 (1978); *People v. Yates*, 45 App. Div. 2d 778, 778, 356 N.Y.S.2d 713, 715 (3d Dep't 1974).

It should be noted that the defendant's right to proceed pro se is a qualified one. *People v. McIntyre*, 36 N.Y.2d 10, 16-17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974). The Court of Appeals has articulated three preliminary requirements that must be fulfilled before a defendant may conduct a pro se defense: "(1) The request [must be] unequivocal and timely asserted, (2) there [must be] a knowing and intelligent waiver of the right to counsel, [and] (3) the defendant [must] not [have] engaged in conduct which would prevent the fair and orderly exposition of the issues." *Id.* at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844. As a corollary to the requirement of a "knowing and intelligent" waiver, the defendant must be apprised adequately of the dangers inherent in a pro se defense. *See People v. Carl*, 46 N.Y.2d 806, 808, 386 N.E.2d 828, 829, 413 N.Y.S.2d 916, 918 (1978). The failure to so advise the defendant will necessitate the granting of a new trial. *See, e.g.*, *People v. Harris*, 85 App. Div. 2d 742, 744, 445 N.Y.S.2d 801, 804 (2d Dep't 1981). Although *McIntyre* was a pre-*Faretta* decision, courts consistently have recognized the applicability of these requirements in post-*Faretta* cases. *See, e.g.*, *People v. Davis*, 49 N.Y.2d 114, 119, 400 N.E.2d 313, 316, 424 N.Y.S.2d 372, 375 (1979) (unequivocal request to proceed pro se); *People v. Reason*, 37 N.Y.2d 351, 356, 334 N.E.2d 572, 575, 372 N.Y.S.2d 614, 618 (1975) (knowing and intelligent waiver); *People v. Pippin*, 67 App. Div. 2d 413, 417, 415 N.Y.S.2d 654, 655 (1st Dep't 1979) (fair and orderly exposition of the issues).

⁷⁴ *See, e.g.*, *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145, 1148 (1978) (while appointment of advisory counsel is a generally fair and commendable practice, it is still discretionary), *cert. denied*, 439 U.S. 1076 (1979); *State v. Burgin*, 539 S.W.2d 652, 654 (Mo. Ct. App. 1976) ("a defendant who wishes to act pro se has no right to have counsel appointed . . . to serve as . . . procedural advisor"); *State v. Easton*, 35 Or. App. 603, 606, 582 P.2d 37, 39 (1978) (no constitutional right to co-counsel in a pro se defense). These courts, however, have not articulated precise grounds for refusing to recognize a legal right to counsel. Instead, they have generally asserted that the Supreme Court's decision in *Faretta* does not mandate the appointment of standby counsel in a pro se defense situation. *See, e.g.*, *United States v. Swinton*, 400 F. Supp. 805, 806 (S.D.N.Y. 1975); *see supra* note 73. For federal cases that have considered the rights to counsel and to appear pro se mutually exclusive, *see infra* note 75.

tance of counsel while conducting his defense.⁷⁵ Aligning New York with these jurisdictions, the Court of Appeals, in *People v. Mirenda*,⁷⁶ recently held that a criminal defendant has no constitutional right to standby counsel while conducting a pro se defense.⁷⁷

In *Mirenda*, the defendant, charged with grand larceny, criminal mischief, and various counts of criminal possession of stolen property,⁷⁸ was permitted by the trial court to conduct a pro se defense pursuant to his postarrest request to do so.⁷⁹ The court, however, refused to appoint standby counsel to aid the defendant in his defense.⁸⁰ Prior to the trial, the defendant requested the assistance of counsel two more times.⁸¹ After conducting a lengthy inquiry to ascertain whether the defendant was aware of the dangers of self-representation,⁸² the lower court determined that the defendant fully appreciated the risks involved in proceeding pro se and made a knowing and intelligent decision to defend in that fashion.⁸³ The court accordingly denied each of the defen-

⁷⁵ See, e.g., *United States v. Klee*, 494 F.2d 394, 396 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974); *United States v. Condor*, 423 F.2d 904, 907-08 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); see also *United States v. Wolfish*, 525 F.2d 457, 463 (2d Cir. 1975) (as long as the defendant retained experienced counsel, he could not appear pro se), *cert. denied*, 423 U.S. 1059 (1976); *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964) (choice between defense by a lawyer and defense pro se); *United States v. Mitchell*, 137 F.2d 1006, 1010 (2d Cir.) (rights to assistance of counsel and to appear pro se "cannot both be exercised at the same time"), *aff'd on rehearing*, 138 F.2d 831 (2d Cir.), *cert. denied*, 321 U.S. 794 (1943); *United States v. Swinton*, 400 F. Supp. 805, 806 (S.D.N.Y. 1975) ("defendant's appearance as co-counsel lies within the discretion of the trial court").

⁷⁶ 57 N.Y.2d 261, 442 N.E.2d 49, 455 N.Y.S.2d 752 (1982).

⁷⁷ *Id.* at 264, 442 N.E.2d at 50, 455 N.Y.S.2d at 753.

⁷⁸ *Id.* The charges resulted from a police raid on a Yonkers garage in which a car-dismantling operation was being conducted. *Id.* at 264-65, 442 N.E.2d at 50, 455 N.Y.S.2d at 753. The defendant Mirenda was apprehended as he was driving his car behind a truck laden with auto parts that had just left the garage. *Id.* at 265, 442 N.E.2d at 50, 455 N.Y.S.2d at 753. In addition to the defendant, the truck driver and two other men inside the garage were arrested. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The defendant requested that the court appoint counsel to will "act only as an advisor." *Id.* This request, in essence, is for the appointment of standby counsel. See Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U.L. Rev. 570, 570 (1977).

⁸¹ 57 N.Y.2d at 265, 442 N.E.2d at 50, 455 N.Y.S.2d at 753. Mirenda sought standby counsel when he initially sought to appear pro se, as well as during the trial court's inquiry into whether the defendant understood the pitfalls of self-representation. *Id.*

⁸² *Id.*

⁸³ See *id.* Although no actual colloquy between the lower court and the defendant with respect to the latter's capability to proceed pro se is reported in the *Mirenda* opinion, the majority did refer to the defendant's "familiarity with legal principles and courtroom procedures." *Id.* at 266, 442 N.E.2d at 51, 455 N.Y.S.2d at 754.

dant's requests for standby counsel.⁸⁴ The defendant thereafter was convicted,⁸⁵ and the Appellate Division, Second Department, affirmed without opinion.⁸⁶

On appeal, the Court of Appeals affirmed.⁸⁷ Chief Judge Cooke, writing for the majority,⁸⁸ observed that while a criminal defendant is guaranteed the right to counsel and the right to appear pro se by both the federal and state constitutions,⁸⁹ a defendant who chooses to conduct his own defense enjoys no concomitant right to representation.⁹⁰ Though recognizing that the discretionary appointment of standby counsel had received judicial approval,⁹¹ the Court nevertheless declined to elevate this form of

⁸⁴ *Id.* at 265, 442 N.E.2d at 50, 455 N.Y.S.2d at 753.

⁸⁵ *Id.* Mirenda's codefendant, the truck driver, was represented by counsel and was acquitted of all charges. *Id.* On appeal, Mirenda challenged the introduction at trial of materials seized from an attaché case in his car, as well as the exclusive nature of the sixth amendment right to counsel. *Id.* at 267, 442 N.E.2d at 51, 445 N.Y.S.2d at 754. During his pro se representation at the suppression hearing, the court determined that Mirenda had consented to a search of his car, but not of certain "legal papers" that he contended were in the automobile. *Id.* At the time of Mirenda's apprehension, the arresting officers consented not to examine these papers, but they then found an attaché case in the trunk of the car. *Id.* The police opened the case in the defendant's presence and found "identification tags" from various vehicles as well as other incriminating items. *Id.* The lower court determined that the defendant's limited consent to the search of his car did encompass permission to open the attaché case. The Court of Appeals determined that this conclusion did not constitute legal error. *Id.*

⁸⁶ *People v. Mirenda*, 81 App. Div. 2d 1046, 439 N.Y.S.2d 786 (2d Dep't 1981) (mem.).

⁸⁷ *People v. Mirenda*, 57 N.Y.2d 261, 442 N.E.2d 49, 455 N.Y.S.2d 752 (1982).

⁸⁸ Chief Judge Cooke was joined in the majority opinion by Judges Jasen, Jones, Wachler and Fuchsberg. Judge Meyer filed a dissenting opinion, and Judge Gabrielli took no part in the consideration of the case.

⁸⁹ *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; *see supra* notes 72-73.

⁹⁰ 57 N.Y.2d at 264, 442 N.E.2d at 50, 455 N.Y.S.2d at 753. The *Mirenda* Court interpreted the language of the state constitution, which declares that a "party accused shall be allowed to appear and defend in person and with counsel," to guarantee that a defendant who chooses to defend by counsel does not lose his right to appear personally in the courtroom. *Id.* at 265 n.*, 442 N.E.2d at 50 n.*, 455 N.Y.S.2d at 753 n.*. The Court further noted that although recognition of a federal constitutional right to standby counsel has been urged by several commentators, *see infra* note 105, "[t]he fact remains that a Sixth Amendment right to such a form of representation has not been adopted," 57 N.Y.2d at 266 n.*, 442 N.E.2d at 51 n.*, 455 N.Y.S.2d at 754 n.*; *see* *United States v. Klee*, 494 F.2d 394, 396 (9th Cir.) (constitution does not guarantee defendant discretion to select a particular form of representation), *cert. denied*, 419 U.S. 835 (1974); *United States v. Condor*, 423 F.2d 904, 907-08 (6th Cir.) (waiver of right to counsel constitutes "correlative assertion" of a pro se defense), *cert. denied*, 400 U.S. 958 (1970).

⁹¹ 57 N.Y.2d at 265-66 n.*, 442 N.E.2d at 50-51 n.*, 455 N.Y.S.2d at 753-54 n.*; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, THE TRIAL JUDGE'S FUNCTION 6-3.7 (2d ed. 1980) [hereinafter cited as ABA STANDARDS]. The ABA Standards state:

When a defendant has been permitted to proceed without the assistance of coun-

representation to the level of a constitutional right.⁹² Rather, Chief Judge Cooke noted, the assignment of standby counsel is simply a matter of trial management that lies solely within the discretion of the trial judge.⁹³ Upon finding that the record revealed no abuse of discretion,⁹⁴ the Court concluded that the defendant's requests for standby counsel properly were denied.⁹⁵

Judge Meyer, in a vigorous dissent, noted that the sixth amendment's "assistance of counsel" language and the state constitution's "in person and with counsel" terminology gave an accused protective rights.⁹⁶ The dissent further observed that nothing in the case law⁹⁷ or the constitutional history⁹⁸ compelled the conclusion that the right to counsel and the right to appear pro se were mutually exclusive.⁹⁹ Rather, the dissent emphasized the right to counsel exists to "aid" criminal defendants, and to serve "as an 'assistance' for the accused."¹⁰⁰ Accordingly, after finding that the appointment of standby counsel would neither unduly burden the court nor disrupt the course of a criminal trial,¹⁰¹ Judge

sel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judges should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

ABA STANDARDS, *supra*, at 6.37.

⁹² 57 N.Y.2d at 266, 442 N.E.2d at 51, 455 N.Y.S.2d at 754.

⁹³ *Id.*

⁹⁴ *Id.* In reviewing the trial court's treatment of the defendant's request to proceed pro se, the *Mirenda* Court implicitly noted the preliminary requirements that must be satisfied before a criminal defendant may conduct such a defense. *Id.*; see *People v. McIntyre*, 35 N.Y.2d 10, 16-17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974); *supra* note 73. The Court observed that the trial judge had conducted a lengthy colloquy with the defendant, and, throughout the inquiry, the defendant expressed his appreciation of the dangers attendant to a pro se defense as well as his familiarity with courtroom procedures. See 57 N.Y.2d at 266, 442 N.E.2d at 51, 455 N.Y.S.2d at 754.

⁹⁵ See 57 N.Y.2d at 266-67, 442 N.E.2d at 51, 455 N.Y.S.2d at 754.

⁹⁶ *Id.* at 267-68, 442 N.E.2d at 52, 455 N.Y.S.2d at 755 (Meyer, J., dissenting).

⁹⁷ *Id.* at 268, 442 N.E.2d at 52, 455 N.Y.S.2d at 755 (Meyer, J., dissenting).

⁹⁸ *Id.* (Meyer, J., dissenting). The dissent buttressed the argument that the Constitution does not prohibit the concurrent exercise of the right to counsel and the right to proceed pro se by tracing the history of representation in criminal trials from the early English common law to several modern commentators' views that the sixth amendment rights need not be mutually exclusive. *Id.* (Meyer, J., dissenting).

⁹⁹ *Id.* (Meyer, J., dissenting).

¹⁰⁰ *Id.* (Meyer, J., dissenting) (quoting *Faretta v. California*, 422 U.S. 806, 820, 832 (1975)).

¹⁰¹ *Id.* at 269, 442 N.E.2d at 52, 455 N.Y.S.2d at 755 (Meyer, J., dissenting). Judge Meyer observed that the appointment of standby counsel in pro se defense cases would not impose any greater burden upon the state in terms of time or money than is caused by the

Meyer concluded that a pro se defendant has a constitutional right to the assistance of standby counsel.¹⁰²

It is submitted that the *Mirenda* Court properly refused recognition of a constitutional right to standby counsel since a pro se defendant is already accorded sufficient constitutional protection.¹⁰³ As long as judicial precaution is taken to ensure that a defendant's waiver of counsel had been knowingly and intelligently made,¹⁰⁴ the forfeiture of the right to counsel poses no constitu-

provision of such counsel for a defendant who does not wish to appear pro se. *Id.* (Meyer, J., dissenting). This is especially convincing, Judge Meyer asserted, since the Court has recognized a trial judge's ability to impose standby counsel "even over the objection of the accused." *Id.* (Meyer, J., dissenting). Furthermore, the dissent stated that "a Trial Judge [need not] permit the provision of standby counsel to a defendant to be used as an instrument of disruption." *Id.* at 269, 442 N.E.2d at 52, 455 N.Y.S.2d at 756. (Meyer, J., dissenting) (citations omitted).

¹⁰² *Id.* (Meyer, J., dissenting).

¹⁰³ At the outset it should be noted that the right to counsel exists to balance the inequality of position between the accused and the state. The Supreme Court itself has recognized that "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978). Indeed, the fact that lawyers are hired both to prosecute and to defend alleged criminals supports the "widespread belief that lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). It should be mentioned, however, that notwithstanding the apparent lack of wisdom involved in an accused's decision to proceed pro se, see, e.g., *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971); *People v. Kelly*, 60 App. Div. 2d 220, 223, 400 N.Y.S.2d 82, 84 (1st Dep't 1977), *aff'd mem.*, 44 N.Y.2d 725, 376 N.E.2d 931, 405 N.Y.S.2d 458 (1978), pro se representation effectuates the fundamental principle that "the right to defend is personal," since the defendant, and not the state, will bear the consequences of conviction, *Faretta v. California*, 422 U.S. 806, 834 (1975).

¹⁰⁴ See *supra* note 73. An appropriate "colloquy on the record between the judge and defendant" serves to test the defendant's appreciation of his waiver of counsel and also provides an objective basis for review. *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982). The colloquy between the judge and the defendant should reveal the defendant's age, see, e.g., *United States v. Dujanovic*, 486 F.2d 182, 187 (9th Cir. 1973), educational background, *id.*, and prior familiarity with courtroom procedures and legal principles, see, e.g., *People v. Mirenda*, 57 N.Y.2d at 266, 442 N.E.2d at 51, 455 N.Y.S.2d at 754. The trial judge, however, should not be required to place in the record all of the information about the accused that conceivably might impact upon the defendant's decision to represent himself. *Martin v. State*, 630 S.W.3d 952, 954 n.5 (Tex. Crim. App. 1982) (en banc). Instead, the "approach is to provide awareness of problems in the undertaking so that the decision [to appear pro se] is not lightly made." *Id.* In *People v. Sawyer*, 57 N.Y.2d 12, 438 N.E.2d 1133, 453 N.Y.S.2d 418 (1982), *cert. denied*, 103 S. Ct. 830 (1983), the Court of Appeals determined that the trial court's statements that the defendant was "facing a very serious charge" and that "your own best interests are probably served by having a lawyer represent you" did not satisfy its responsibility to engage in a "searching inquiry." *Id.* at 21, 438 N.E.2d at 1138, 453 N.Y.S.2d at 423. The Court of Appeals thus requires that the record reveal a "searching inquiry" of the defendant to ascertain whether the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on [him]." *Id.*; see also *People v. Kelly*, 60 App. Div. 2d 220, 223, 400 N.Y.S.2d 82, 84 (1st Dep't 1977), *aff'd*

tional difficulty.¹⁰⁵ Moreover, even if after such precaution the defendant chooses not to be represented by an attorney, the trial judge in his discretion may appoint standby counsel.¹⁰⁶ Indeed, appellate courts, including the Court of Appeals, have consistently endorsed the discretionary appointment of standby lawyer assistance when necessary to protect the rights of a criminal defendant.¹⁰⁷

Elevating standby counsel to the status of a constitutional right, it is suggested, would afford a pro se defendant too great a benefit. A number of tactical advantages accrue to a pro se defendant that do not inure to a defendant who is represented by an attorney, including the right to elicit sympathy from the jury because of his counsel-less defense and the opportunity to cast his

mem., 44 N.Y.2d 725, 376 N.E.2d 931, 405 N.Y.S.2d 458 (1978).

¹⁰⁵ Compare *United States v. Wolfish*, 525 F.2d 457, 463 n.2 (2d Cir. 1975) ("nothing in *Faretta* or in any statute . . . suggests that a defendant may both have an attorney and represent himself") (emphasis in original), *cert. denied*, 423 U.S. 1059 (1976) and *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964) (rights to counsel and to defend pro se are "two faces of the same coin;" choice between the two is sometimes termed waiver or election) with *Garcia, Defense Pro Se*, 23 U. MIAMI L. REV. 551, 563-64 (1969) (automatic denial of advisory counsel to pro se defendant is "unsound and is inconsistent with both the meaning and the spirit of the right involved") and Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 940 (1972) (neither language of sixth amendment nor needs of pro se defendant justify an either/or interpretation of right to assistance of counsel).

¹⁰⁶ See *supra* note 91 and accompanying text.

¹⁰⁷ See, e.g., *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971); *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145, 1148, *cert. denied*, 439 U.S. 1076 (1978); *Wake v. Barker*, 514 S.W.2d 692, 696-97 (Ky. Ct. App. 1974); *People v. Sawyer*, 57 N.Y.2d 12, 22, 438 N.E.2d 1133, 1139, 453 N.Y.S.2d 418, 424 (1982) (dictum), *cert. denied*, 103 S. Ct. 830 (1983). The Court of Appeals recently commented upon the discretionary ability of a trial judge to allow a pro se defendant to have the assistance of counsel. See *People v. Sawyer*, 57 N.Y.2d 12, 22, 438 N.E.2d 1133, 1139, 453 N.Y.S.2d 418, 424 (1982), *cert. denied*, 51 U.S.L.W. 3553 (U.S. Jan. 24, 1983). In *Sawyer*, the Court stated:

[W]here a defendant decides on self-representation, a Judge "may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." It may be advisable to do so to protect the defendant and to facilitate the trial . . .

Id. at 22, 438 N.E.2d at 1139, 453 N.Y.S.2d at 424 (quoting *Faretta v. California*, 22 U.S. 806, 835 n.46 (1975)) (citation omitted). In *Sawyer*, the trial court rejected the defendant's request to substitute counsel on the basis of a conflict of interest. 57 N.Y.2d at 15, 438 N.E.2d at 1135, 453 N.Y.S.2d at 420. The defendant thereafter presented his counsel-less defense. *Id.* at 18, 438 N.E.2d at 1136, 453 N.Y.S.2d at 421. Upon review of the record, the Court of Appeals determined that the trial court had not adequately ascertained whether the defendant was aware of the risks inherent in self-representation, and therefore ordered a new trial. *Id.* at 21-22, 438 N.E.2d at 1138, 453 N.Y.S.2d at 423-24. It thus appears that the Court's statement, though dictum, represents its willingness to permit discretionary appointment of standby counsel.

defense in moral rather than legal terms.¹⁰⁸ Perhaps the greatest of these advantages is the opportunity to have the jury view his demeanor, and, to some extent, examine his character without the concomitant risk of impeachment by the prosecution.¹⁰⁹ While a defendant who is represented solely by counsel is virtually precluded from these tactical possibilities, a pro se defendant who receives standby counsel ostensibly obtains these advantages as well as those of representation. Thus, it is submitted, such a defendant is afforded an unparalleled advantage in the presentation of his case. This is especially true when standby counsel is of the co-counsel variety, which permits the attorney to direct the technical aspects of the trial while the defendant himself sets its emotional tone.¹¹⁰ It appears, therefore, that as long as trial courts exercise

¹⁰⁸ See Garcia, *supra* note 105, at 551-52; Note, *supra* note 105, at 932; Comment, *Self Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1499 (1971). In addition to advantages of a moral or emotional nature, a defendant who proceeds in a pro se fashion benefits from potential delay and confusion caused by such a defense, as well as the ability to lay the groundwork for a mistrial or subsequent challenge to a conviction. See *People v. McIntyre*, 36 N.Y.2d 10, 16, 324 N.E.2d 322, 326, 364 N.Y.S.2d 837, 843-44 (1974).

¹⁰⁹ See *People v. McIntyre*, 36 N.Y.2d 10, 16, 324 N.E.2d 322, 326-27, 364 N.Y.S.2d 837, 843-44 (1974). The Supreme Court has described the waiver of the privilege against self-incrimination in the following manner:

[The accused] has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on matters he has himself put in dispute.

Brown v. United States, 356 U.S. 148, 155-56 (1958). When a defendant testifies in his own behalf, his credibility may be attacked by the same methods that are available to impeach an ordinary witness. See generally W. RICHARDSON, RICHARDSON ON EVIDENCE § 525, at 515 (J. Prince 10th ed. 1973). It would appear, however, that a criminal pro se defendant will be able, in effect, to appear in his own behalf without waiving his privilege against self-incrimination.

¹¹⁰ The simultaneous exercise of the sixth amendment rights to counsel and to appear pro se has been characterized as hybrid representation. See, e.g., Note, *supra* note 80, at 570. This hybrid representation has manifested itself in two forms. The advisory counsel variety allows the attorney to serve as a coach to the defendant, and to assume active counsel duties should the pro se defense be terminated. See, e.g., *Wiggins v. Estell*, 681 F.2d 266, 273 (5th Cir. 1982). The co-counsel form of representation permits both the attorney and the defendant to actively present the case. See Case Note, *Hybrid Representation—An Accused Has No Constitutional Right in Texas to Representation Partially Pro Se and Partially by Counsel*, 9 TEX. TECH L. REV. 323, 326 n.22 (1977-1978). Although the *Miranda* dissent did not define the precise role of standby counsel, it appears that Judge Meyer envisaged the use of standby counsel in an advisory capacity. 57 N.Y.2d at 269, 442 N.E.2d at 53, 455 N.Y.S.2d at 755 (Meyer, J., dissenting). Indeed, Judge Meyer relied upon *Wiggins v. Estell*, 681 F.2d 266 (5th Cir. 1982) in which the Fifth Circuit adopted the position that

the utmost scrutiny in ensuring that a defendant's decision to proceed pro se is an informed one, the *Mirenda* holding is fair to both the pro se defendant and the criminal justice system.¹¹¹

Donna M. Hitscherich

An employee who is hired for no specific duration but who has received assurances that he would not be terminated without just cause may maintain a breach of contract action for wrongful termination

Pursuant to the employment-at-will doctrine,¹¹² unless the duration of employment is specified, the employment relationship

standby counsel is "to be seen, but not heard." *Id.* at 273. The *Wiggins* Court further amplified this position by stating that "[standby counsel] is not to compete with the defendant or supersede his defense, [but] [r]ather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." *Id.* (footnotes omitted).

¹¹¹ A pro se defendant essentially is held to the same standards of courtroom procedure as is a criminal defendant who is represented by counsel. *See, e.g.,* *United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973). Pragmatically, however, trial judges sometimes attempt to aid the pro se defendant. *See, e.g.,* *Grubbs v. State*, 255 Ind. 411, 416, 265 N.E.2d 40, 43-44 (1970). Furthermore, a judge who presides over a criminal trial being conducted by a pro se defendant "must be especially acute and vigilant in governing the conduct of counsel and witnesses. . . ." *Id.*, 265 N.E.2d at 44. The defendant, moreover, may not use his constitutional right to appear pro se in order to disrupt the court proceedings. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Thus, in the interests of an orderly trial procedure, a trial judge may be prompted to appoint standby counsel for a pro se defendant. *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971).

¹¹² The employment-at-will doctrine was derived from the common-law principles of master and servant which existed until the middle of the 19th century. *See generally* *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967); *Committee on Labor and Employment Law, At-Will Employment and the Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170, 170-71 (1981) [hereinafter cited as *Committee on Labor Law*]; *DeGiuseppe, The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 3-4 (1981-1982); *Feerick, Employment At Will*, N.Y.L.J., Oct. 5, 1979, at 1, col. 1; *Feinman, The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-20, 122-23 (1976); *Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980) [hereinafter cited as *HARVARD Note*]. English common law regarded the employment relationship as founded upon contract principles. When an employee was hired for an indefinite period, the term of employment was presumed to be 1 year. *See* *Committee on Labor Law, supra*, at 171; *DeGiuseppe, supra*, at 4; *Feinman, supra*, at 120. The English rule was accepted generally in the United States until the end of the 19th century. *See* *Committee on Labor Law, supra*, at 171; *DeGiuseppe, supra*, at 5-6; *Feinman, supra*, at 122; *see also* *Adams v. Fitzpatrick*, 125 N.Y. 127, 129, 26 N.E. 143, 145 (1891). At that time, the laissez-faire political and economic theory that developed from American industrial growth significantly