

## Comments

# The Interplay of Pro Se Defendants, Standby Counsel, and Ineffective Assistance of Standby Counsel Claims: An Examination of Current Law and a Suggestion for Reform in Pennsylvania

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### ABSTRACT

Standby counsel is a term used to describe an attorney who has been appointed by a court to advise and assist a pro se defendant. While a criminal defendant has a constitutional right to self-representation, the defendant does not have a constitutional right to standby counsel. Instead, trial courts have the discretion to decide whether to appoint standby counsel to aid a pro se defendant. Moreover, trial courts have wide latitude in defining the precise role and responsibilities of an attorney appointed to act as standby counsel. Pennsylvania Rule of Criminal Procedure 121(D) and Pennsylvania courts' interpretations of this section primarily govern the appointment of standby counsel. As a

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result of the flexibility of Pennsylvania law concerning standby counsel, confusion abounds, and pro se defendants have frequently resorted to raising ineffective assistance of standby counsel claims.

This Comment seeks to analyze the current state of the law regarding pro se defendants, standby counsel, and ineffective assistance of counsel claims by focusing on Pennsylvania case law. First, this Comment discusses the relevant constitutional and statutory sources of both United States and Pennsylvania law regarding the right to self-representation, the role of standby counsel, and ineffective assistance of counsel claims. Thereafter, this Comment analyzes the inconsistencies and problems that exist in Pennsylvania as a result of the gaps in the current law. Finally, this Comment calls for specific reform of the Pennsylvania Rules of Criminal Procedure, which would address much of the confusion and inconsistency regarding the responsibilities of standby counsel.

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## I. INTRODUCTION

In courtroom *A*, a pro se defendant's trial for assault is about to begin. The pro se defendant sits at the defense table and, next to him, sits the attorney appointed to act as standby counsel. The standby counsel's presence reassures the pro se defendant. The trial judge informed the pro se defendant that his standby counsel may take an active role in the trial by raising objections, suggesting legal arguments to the pro se defendant, and, if the pro se defendant agrees, making arguments to the court on his behalf.

In courtroom *B*, a second pro se defendant's trial for assault is about to begin. Like the pro se defendant in courtroom *A*, this pro se defendant and the attorney appointed to act as his standby counsel sit at the defense table. However, the standby counsel's presence fails to calm this pro se defendant's nerves. The trial judge has instructed standby counsel that he may help the pro se defendant only with procedural matters and general trial strategy. Thus, this pro se defendant truly feels like he is on his own.

When looking at the two disparate situations described above, an observer might reasonably assume that courtroom *A* and courtroom *B* are located in different states or maybe even different countries. But that assumption would be incorrect. Under current U.S. law and Pennsylvania law, courtroom *A* and courtroom *B* can legally coexist in the same state, the same county, or even the same courthouse. The coexistence of the aforementioned disparate courtrooms is both problematic and unnerving.

Thus, this Comment analyzes the current state of the law regarding pro se defendants, standby counsel, and ineffective assistance of counsel claims by focusing on Pennsylvania case law. Part II of this Comment

discusses the relevant constitutional and statutory sources of both U.S. law and Pennsylvania law regarding the right to self-representation, the role of standby counsel, and ineffective assistance of counsel claims. Thereafter, Part III of this Comment analyzes the inconsistencies and problems that exist in Pennsylvania as a result of the gaps in the current law in this area and calls for specific reform of the Pennsylvania Rules of Criminal Procedure. Finally, Part IV briefly summarizes the issues discussed in this Comment.

## II. BACKGROUND

Criminal defendants' right to represent themselves and proceed pro se at trial is protected by both federal constitutional and statutory law.<sup>1</sup> However, the same cannot be said of the role of standby counsel because the U.S. Constitution does not grant a right to standby counsel.<sup>2</sup> Rather, the U.S. Supreme Court has ruled that the trial court has the power to appoint standby counsel to aid a pro se defendant and that the pro se defendant has the right not to have standby counsel impermissibly interfere with the defense the pro se defendant chooses to present to the jury.<sup>3</sup>

### A. *Federal Law Addressing the Right to Self-Representation and the Role of Standby Counsel*

#### 1. Constitutional and Statutory Sources of Authority

The Sixth Amendment to the U.S. Constitution<sup>4</sup> is the primary source of the right to self-representation.<sup>5</sup> In relevant part, the Sixth Amendment states, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”<sup>6</sup> The U.S. Supreme Court has interpreted the Assistance of Counsel Clause of the Sixth Amendment to protect not only a defendant's right to have an attorney

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1. See, e.g., U.S. CONST. amend. VI; 28 U.S.C. § 1654 (2012) (guaranteeing parties the right to represent themselves or be represented by counsel); *Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that counsel may not be forced upon a defendant who knowingly and voluntarily waives the right to assistance of counsel).

2. See *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984).

3. See *infra* Part II.A.2.b discussing *McKaskle*, 465 U.S. 168.

4. U.S. CONST. amend. VI.

5. *Id.*

6. *Id.*

represent the defendant in a criminal proceeding, but also a defendant's right to represent himself or herself in a criminal proceeding.<sup>7</sup>

Perhaps even more importantly, since the beginning of our nation, Congress has also protected the right to self-representation.<sup>8</sup> The First Congress codified this right in section 35 of the Judiciary Act of 1789.<sup>9</sup> The language used in the Judiciary Act of 1789 is very similar to the language currently used in 28 U.S.C. § 1654,<sup>10</sup> entitled "Appearance personally or by counsel," which codifies the right to self-representation.<sup>11</sup> Section 1654 states that "[i]n 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."<sup>12</sup> This statute clarifies that a person may represent himself or herself in federal court, which is implied by the language of the Sixth Amendment.<sup>13</sup>

## 2. U.S. Supreme Court Decisions

### a. *Faretta v. California*

In *Faretta v. California*,<sup>14</sup> the U.S. Supreme Court held that criminal defendants in state court have the constitutional right to represent themselves without counsel if they knowingly and voluntarily choose to do so.<sup>15</sup> Initially, the trial judge in *Faretta* appointed a public defender to represent the defendant on the charge of grand theft.<sup>16</sup> Before the date of trial, the defendant asked to represent himself because he thought the public defender's office was overworked.<sup>17</sup> The trial judge told the defendant that he would be held to the same standard as an attorney and preliminarily ruled that the defendant effectively waived his right to assistance of counsel.<sup>18</sup>

Thereafter, the trial judge held a second hearing to determine whether the defendant was actually capable of handling his own

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7. See *infra* Part II.A.2.a discussing *Faretta*, 422 U.S. 806.

8. 1 Stat. 73, 92 (1789).

9. 1 Stat. 73, 92 (1789).

10. 28 U.S.C. § 1654 (2012).

11. *Id.*

12. *Id.*

13. *Faretta v. California*, 422 U.S. 806, 819 (1975).

14. *Faretta v. California*, 422 U.S. 806 (1975).

15. *Id.* at 832–35.

16. *Id.* at 807.

17. See *id.* at 808 (noting that the defendant specifically asserted his belief that the public defender's office was "very loaded down with . . . a heavy case load").

18. *Id.* at 808 n.2 (noting that the trial judge told the defendant that he would have to observe proper courtroom decorum and procedure even though the defendant might not know the rules).

defense.<sup>19</sup> The trial judge asked the defendant about specific aspects of trial procedure and state law.<sup>20</sup> Based on the defendant's answers, the trial judge concluded that the defendant could not represent himself because he had not knowingly and intelligently waived his right to assistance of counsel.<sup>21</sup> The judge also ruled that the defendant did not have a constitutional right to defend himself or act as co-counsel with his reappointed public defender.<sup>22</sup> At trial, the jury found the defendant guilty.<sup>23</sup> Following several unsuccessful appeals in state court, the U.S. Supreme Court granted certiorari.<sup>24</sup>

The U.S. Supreme Court held that the right of self-representation is firmly embedded in United States' history and that the right is implied by the language of the Sixth Amendment to the U.S. Constitution.<sup>25</sup> The Court noted that the Sixth Amendment grants rights to the defendant himself and not to the defendants' attorney.<sup>26</sup> Therefore, the Court held that the Sixth Amendment implicitly grants defendants the right to self-representation.<sup>27</sup> The Court placed particular emphasis on the word "assistance," noting that, even though counsel may have expertise, counsel is still only one of many tools that may be utilized by a defendant.<sup>28</sup> The Court further reasoned that counsel may not be forced upon a defendant because such a mandate would violate the logic of the Sixth Amendment.<sup>29</sup>

The Court also made clear that defendants who represents themselves, and thus proceed pro se, must do so "knowingly and intelligently" because a pro se defendant gives up the many benefits associated with representation by an attorney.<sup>30</sup> Moreover, the Court stated that judges should ensure that a defendant is aware of the risks associated with self-representation.<sup>31</sup> The Court further stated that defendants who proceed pro se may not argue on appeal that they were

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19. *Id.* at 808.

20. *See id.* at 808 n.3.

21. *Id.* at 809–10.

22. *Id.* at 810–11.

23. *Id.* at 811.

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

25. *Id.* at 812–14.

26. *Id.* at 819.

27. *Id.*

28. *Id.* at 820.

29. *Id.* (reasoning that the Sixth Amendment requires a defendant to specifically choose whether to hand his case over to a lawyer, and if the defendant does not agree to representation, then the defense presented by the lawyer is not really the defense the defendant wanted to present).

30. *Id.* at 835.

31. *Id.*

denied effective assistance of counsel because the quality of their pro se defense was inadequate.<sup>32</sup>

Regarding the notion of “standby counsel,” the Court noted that “a State may—even over objection by the accused—appoint ‘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.”<sup>33</sup> The Court implied that the appointment of standby counsel may be necessary to ensure that the defendant respects the court and complies with the requirements of both procedural and substantive law.<sup>34</sup> However, while the Court made clear that pro se defendants may not later claim that their own defense was ineffective, the Court remained silent on whether pro se defendants may later claim that standby counsel was ineffective.<sup>35</sup>

b. *McKaskle v. Wiggins*

Less than ten years after the Court decided *Faretta*, in *McKaskle v. Wiggins*,<sup>36</sup> the Court addressed what actions standby counsel may take during trial when a defendant has objected to the presence of the standby counsel.<sup>37</sup> The Court held that, when determining whether a defendant’s *Faretta* rights have been violated, a court should focus on whether the defendant was able to present the case in his or her way.<sup>38</sup> The Court laid out a lengthy framework for conducting this analysis.<sup>39</sup>

In *McKaskle*, the state charged the defendant with robbery.<sup>40</sup> At his first trial, the defendant filed a motion to proceed pro se.<sup>41</sup> The trial judge granted the defendant’s motion, but exercised judicial discretion by appointing two attorneys to jointly act as standby counsel.<sup>42</sup> The defendant initially objected to the participation of his standby counsel, but the defendant later accepted the attorneys’ presence and instructed them to raise objections directly to the court on his behalf.<sup>43</sup> Following

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32. *Id.* at 834 n.46.

33. *Id.* (citing *United States v. Dougherty*, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972)) (holding that the right to proceed pro se, pursuant to 28 U.S.C. § 1654, may not be denied on the basis of potential disruption alone, but noting that, if the defendant is deliberately disruptive and unruly, then the right to proceed pro se might be waived).

34. *See Faretta*, 422 U.S. at 834 n.46.

35. *Id.*

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

37. *Id.* at 170.

38. *Id.* at 177.

39. *See id.* at 176–84.

40. *Id.* at 170.

41. *Id.*

42. *Id.* at 170–71.

43. *Id.* at 171.

conviction by a jury, the judge granted a new trial because the original indictment was faulty.<sup>44</sup>

Initially, the defendant wanted to be represented at his second trial, but, just a few days before trial, the defendant told the court that he again wanted to proceed pro se.<sup>45</sup> The court acquiesced, but required that standby counsel remain in the courtroom for consultation.<sup>46</sup> Throughout the course of the second trial, the defendant consulted with standby counsel.<sup>47</sup> The second jury also found the defendant guilty.<sup>48</sup> The defendant subsequently appealed and argued that standby counsel had “unfairly interfered with his presentation of his defense.”<sup>49</sup> The U.S. Court of Appeals for the Fifth Circuit held that the defendant’s right to self-representation was violated by the participation of standby counsel and stated that “standby counsel is ‘to be seen, but not heard.’”<sup>50</sup> The Supreme Court granted certiorari and expressly rejected the “seen, but not heard” rule announced by the Fifth Circuit.<sup>51</sup>

In *McKaskle*, the Supreme Court began by noting that the *Faretta* Court not only recognized a constitutional right to self-representation, but also held that “a trial court may appoint ‘standby counsel’ to assist the pro se defendant in his defense.”<sup>52</sup> Thereafter, the *McKaskle* Court acknowledged the importance of allowing a pro se defendant to address the court and jury, control the order and substance of his own defense, make motions and legal arguments, and question witnesses.<sup>53</sup> However, the Court reasoned that *Faretta* does not mandate an “absolute bar on standby counsel’s unsolicited participation.”<sup>54</sup> Instead, the Court announced a broad standard that focuses “on whether the defendant had a fair chance to present his case in his own way.”<sup>55</sup> To help meet that standard, the Court placed two main limitations on standby counsel by stating that a pro se defendant is entitled to (1) actual control over the

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44. *Id.*

45. *Id.* at 171–72.

46. *McKaskle*, 465 U.S. at 172.

47. *Id.*

48. *Id.* at 173.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 170. The *McKaskle* Court’s announcement that the *Faretta* Court held that a trial court may appoint “standby counsel” is significant because this language did not appear in the text of the *Faretta* decision, but rather appeared in footnote 46. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

53. *McKaskle*, 465 U.S. at 174.

54. *Id.* at 176.

55. *Id.* at 177.

case presented to the jury and (2) perceived control of the case while in the presence of the jury.<sup>56</sup>

With respect to the “actual control” limitation, the Court noted specifically that standby counsel may not “substantially interfere with any significant tactical decisions,” control witness questioning, or speak instead of the defendant on critical issues.<sup>57</sup> Regarding the “perceived control” limitation, the Court noted that the jury must know that the defendant is representing himself.<sup>58</sup> To fulfill the “perceived control” requirement, the Court reasoned that disagreements between the pro se defendant and standby counsel should be decided in favor of the defendant if the issue is ordinarily one left to the discretion of counsel.<sup>59</sup>

The Court further reasoned that the actions of standby counsel are unlikely to be objectionable if the pro se defendant expressly approves of or acquiesces to the conduct.<sup>60</sup> Then, the Court clarified that, once a pro se defendant acquiesces to participation by standby counsel, the standby counsel’s participation in the case will be seen as unobjectionable unless the defendant expressly asks for standby counsel to cease active participation in the case.<sup>61</sup> The Court further determined that standby counsel is always permitted to aid the pro se defendant with ordinary procedural and evidentiary matters and specific tasks requested by the defendant.<sup>62</sup>

Although the *McKaskle* Court eventually concluded that many of the actions of the defendant’s standby counsel were “irreproachable,” the Court also noted that “standby counsel’s participation at [the defendant’s] trial should not serve as a model for future trials.”<sup>63</sup> The Court reached this conclusion based on an evaluation of the defendant’s participation at trial and standby counsel’s participation at trial.<sup>64</sup>

In particular, the *McKaskle* Court approved the pro se defendant’s direct participation in major aspects of the trial, including jury selection, opening and closing statements, direct and cross-examination of witnesses, and raising objections.<sup>65</sup> The Court, however, disapproved of the fact that standby counsel infrequently interrupted the defendant,

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56. *Id.* at 178.

57. *Id.*

58. *Id.* at 179.

59. *Id.*

60. *Id.* at 182.

61. *Id.* at 183.

62. *Id.* at 183–84.

63. *McKaskle*, 465 U.S. at 185–86 (implying that standby counsel was too involved when he or she relayed information about witnesses to the court, aided the defendant with evidentiary procedure, supplied the defendant with forms, questioned some witnesses, and instructed the defendant not to argue legal points while a witness was on the stand).

64. *Id.* at 184–87.

65. *Id.* at 184–86.

made unsolicited comments, and occasionally used profanity.<sup>66</sup> The Court also considered the agreement between standby counsel and the defendant, which permitted standby counsel to give a closing argument, and the fact that the trial court consistently ruled against standby counsel when the pro se defendant and standby counsel disagreed in the presence of the jury.<sup>67</sup> Thus, the Court concluded that, although standby counsel's actions were not praiseworthy, they did not infringe on the defendant's *Faretta* rights.<sup>68</sup>

In sum, the *McKaskle* Court determined that, although standby counsel need not remain silent, standby counsel must respect the defendant's constitutional rights to proceed pro se and present the defense in the defendant's own preferred way.<sup>69</sup>

*B. Pennsylvania Law Addressing the Right to Self-Representation and the Role of Standby Counsel*

While Pennsylvania obviously must comply with the U.S. Constitution and U.S. Supreme Court precedent regarding a criminal defendant's rights, federal law merely provides the minimum required protection.<sup>70</sup> States are free to expand upon those minimum guarantees.<sup>71</sup> In Pennsylvania, the Pennsylvania Constitution also protects a defendant's right to self-representation.<sup>72</sup> Additionally, the Supreme Court of Pennsylvania, with the guidance of the Criminal Procedural Rules Committee, has addressed the role of standby counsel in the Pennsylvania Rules of Criminal Procedure.<sup>73</sup> Aside from federal law, standby counsel's role in Pennsylvania is guided by the Pennsylvania Constitution, the language of Pennsylvania's standby counsel rule, and interpretations of the rule by state court judges.<sup>74</sup>

Article I, Section 9 of the Pennsylvania Constitution<sup>75</sup> is similar to the Sixth Amendment of the U.S. Constitution.<sup>76</sup> Among other rights,

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66. *Id.* at 185–86.

67. *Id.* at 186–87.

68. *Id.* at 186.

69. *Id.* at 187–88.

70. U.S. CONST. art. VI, cl. 2; *see also* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985) (discussing the notion that states are free to build upon the foundation of rights created by the federal constitution).

71. Pollock, *supra* note 70, at 980.

72. PA. CONST. art. I, § 9.

73. PA. R. CRIM. P. 121(D); *see also* *Criminal Procedural Rules Committee, UNIFIED JUDICIAL SYS. OF PA.*, <http://www.pacourts.us/courts/supreme-court/committees/rules-committees/criminal-procedural-rules-committee> (last visited Jan. 16, 2017) (describing the purpose of the Criminal Procedural Rules Committee).

74. PA. CONST. art. I, § 9; PA. R. CRIM. P. 121(D); PA. R. CRIM. P. 121 cmt.

75. PA. CONST. art. I, § 9.

Article I, Section 9 provides that a defendant in a criminal proceeding has “the right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to have compulsory process for obtaining witnesses in his favor.”<sup>77</sup> Thus, like the Sixth Amendment to the U.S. Constitution, Article I, Section 9 of the Pennsylvania Constitution guarantees a defendant’s right to representation by an attorney or self-representation.<sup>78</sup>

Moreover, the Supreme Court of Pennsylvania, with the guidance of the Criminal Procedural Rules Committee, has incorporated the U.S. Supreme Court’s decision in *McKaskle v. Wiggins* into the Pennsylvania Rules of Criminal Procedure.<sup>79</sup> However, in contrast to the Supreme Court’s lengthy and detailed decision in *McKaskle*, Pennsylvania’s rule concerning the role of standby counsel in criminal proceedings consists of two very short sentences.<sup>80</sup> Pennsylvania Rule of Criminal Procedure 121(D) (“Rule 121(D)”) states, “[w]hen the defendant’s waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.”<sup>81</sup>

The official comment to Rule 121(D) provides more guidance regarding when a trial judge should appoint standby counsel.<sup>82</sup> The comment specifically notes that appointment of standby counsel is prudent when the case may be long and complicated or involves multiple defendants or disruptive defendants who may lose the right to self-representation if their behavior becomes unruly.<sup>83</sup> Beyond this limited guidance, Pennsylvania trial judges must exercise discretion in order to explain the rights and duties of the pro se defendant and the attorney appointed as standby counsel. The exercise of discretion inevitably leads to varied instructions and confusion amongst all participants in the proceedings.

### C. *Federal Standard Regarding Ineffective Assistance of Counsel Claims*

Generally, defendants may raise a claim of ineffective assistance of counsel on appeal whenever their lawyer fails to provide effective legal

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76. Compare U.S. CONST. amend. VI, with PA. CONST. art. I, § 9.

77. PA. CONST. art. I, § 9.

78. *Id.*

79. See PA. R. CRIM. P. 121(D).

80. *Id.*

81. *Id.*

82. PA. R. CRIM. P. 121(D) cmt.

83. *Id.*

assistance to them.<sup>84</sup> However, defendants who choose to represent themselves may not later claim that the quality of their own defense was ineffective.<sup>85</sup>

In *Strickland v. Washington*,<sup>86</sup> the U.S. Supreme Court reiterated that “the [Sixth Amendment’s] right to counsel is the right to the effective assistance of counsel.”<sup>87</sup> The Court stated that the core of ineffectiveness is whether the attorney’s conduct was so egregious that the decision reached at the trial court is unreliable and unjust.<sup>88</sup> The Court then announced a two-part test for determining whether a claim of ineffective assistance of counsel is cognizable.<sup>89</sup> The Court held that, in order to prove a claim of ineffective assistance of counsel, the defendant must show that: (1) the defendant’s attorney’s performance during the trial was deficient and (2) the deficient performance prejudiced the defendant.<sup>90</sup>

Thereafter, the *Strickland* Court elaborated on the meaning of each prong of the test.<sup>91</sup> Regarding the performance prong, the Court reasoned that the standard for judging the attorney’s performance is objective and based on professional norms.<sup>92</sup> The question is whether the actions and decisions of the attorney fall within the range of actions and decisions that a reasonable attorney would take.<sup>93</sup> The attorney must remain loyal to the client and must utilize the attorney’s specialized skill and knowledge.<sup>94</sup> Additionally, the Court found that the reasonableness of the attorney’s decisions must be judged under the totality of the circumstances at the time the decisions were made.<sup>95</sup>

Regarding the prejudice prong, the *Strickland* Court noted that courts may presume prejudice in limited situations.<sup>96</sup> However, the Court held that, in most situations, the defendant must prove prejudice by showing that the errors committed by his or her attorney were so

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84. See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (discussing ineffective assistance of counsel claims).

85. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

86. *Strickland v. Washington*, 466 U.S. 668 (1984).

87. *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

88. *Id.*

89. *Id.* at 687.

90. *Id.*

91. *Id.* at 687–98.

92. *Id.* at 688.

93. *Id.*

94. *Id.*

95. *Id.* at 690.

96. *Strickland*, 466 U.S. at 692 (noting specifically that prejudice may be presumed where the defendant was actually or constructively denied assistance of counsel or where counsel has an actual conflict of interest).

grievous that the defendant was denied a fair trial.<sup>97</sup> In other words, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>98</sup> To determine whether the outcome would have been different, a court must consider all of the evidence presented during the original trial.<sup>99</sup> As justification for this standard, the Court noted that the purpose of an ineffective assistance of counsel claim is to attack the fundamental fairness of the defendant’s conviction.<sup>100</sup>

*D. Pennsylvania Standard Regarding Ineffective Assistance of Counsel Claims*

The Pennsylvania Supreme Court directly addressed the applicability of *Strickland* in *Commonwealth v. Pierce*.<sup>101</sup> In *Pierce*, the Pennsylvania Supreme Court compared its standard for judging ineffective assistance of counsel claims, which was announced in *Commonwealth ex rel. Washington v. Maroney*,<sup>102</sup> with the new standard set forth in *Strickland*.<sup>103</sup>

Initially, the Pennsylvania Supreme Court explained that its ineffective assistance of counsel cases have consistently required consideration of two elements when the defendant’s claim is of arguable merit: (1) whether counsel’s performance was unreasonable and (2) whether defendant was prejudiced by counsel’s deficient performance.<sup>104</sup> Thereafter, citing “obvious textual and policy considerations[,]” the Pennsylvania Supreme Court concluded that *Maroney* and *Strickland* “constitute the same rule.”<sup>105</sup> The Pennsylvania Supreme Court further explained that the *Maroney* standard provides equivalent protection to the federal *Strickland* standard.<sup>106</sup>

More recently, in *Commonwealth v. Lambert*,<sup>107</sup> the Pennsylvania Supreme Court articulated its ineffective assistance of counsel standard as having three distinct elements: (1) an underlying claim of arguable merit, (2) unreasonable performance by counsel, and (3) a reasonable probability that the outcome would have been different had counsel been

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97. *Id.* at 687.

98. *Id.* at 694.

99. *Id.* at 695.

100. *Id.* at 697.

101. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987).

102. *Commonwealth ex rel. Washington v. Maroney*, 235 A.2d 349 (Pa. 1967).

103. *Pierce*, 527 A.2d at 973.

104. *Id.* at 975.

105. *Id.* at 976.

106. *Id.*

107. *Commonwealth v. Lambert*, 797 A.2d 232 (Pa. 2001).

effective.<sup>108</sup> It is worth noting, however, that the three-pronged test in *Lambert* is simply a repackaging of the two-pronged test previously articulated in *Maroney*.

### III. ANALYSIS

#### A. *Disparity Among Pennsylvania Courts Regarding the Duties and Responsibilities of Standby Counsel*

The above-described framework is extremely flexible and allows judges to exercise practically unfettered discretion about whether to appoint standby counsel and what duties and responsibilities appointed standby counsel may perform.<sup>109</sup> In Pennsylvania, courts in different counties have reached disparate conclusions regarding how active standby counsel should be during a trial conducted by a pro se defendant. Judges in some counties instruct standby counsel to be very active,<sup>110</sup> while judges in other counties narrowly describe what actions standby counsel may undertake.<sup>111</sup>

##### 1. *Commonwealth v. Africa*

In *Commonwealth v. Africa*,<sup>112</sup> the Pennsylvania Supreme Court, in passing, addressed the role of standby counsel for the first time since the U.S. Supreme Court's decision in *Faretta*.<sup>113</sup> *Africa* originated in the Municipal Court of Philadelphia County,<sup>114</sup> where the trial judge granted the defendants' motion to proceed pro se.<sup>115</sup> However, the judge exercised his discretion and appointed a public defender to act as the

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108. *Id.* at 243 (citing *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999)). See also *Commonwealth v. Bryant*, 855 A.2d 726, 735–36 (Pa. 2004); *Commonwealth v. Bedell*, 954 A.2d 1209, 1211 (Pa. Super. Ct. 2008).

109. See, e.g., *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012); *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006); *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997); *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976).

110. See, e.g., *Brazil*, 701 A.2d 216 (originating in the Court of Common Pleas of Montgomery County); *Africa*, 353 A.2d 855 (originating in the Municipal Court of Philadelphia County).

111. See, e.g., *Spatz*, 47 A.3d 63 (originating in the Court of Common Pleas of York County); *Fletcher*, 896 A.2d 508 (originating in the Court of Common Pleas of Philadelphia County).

112. *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976).

113. *Id.* at 863–64.

114. *Id.* at 862 n.3. The Municipal Court of Philadelphia has limited jurisdiction and is responsible for trying criminal offenses punishable by five years incarceration or less, civil cases where the amount in controversy is less than \$12,000, landlord and tenant cases, and real estate and school tax cases under \$15,000. For more information on the Municipal Court of Philadelphia, see *Municipal Court*, PHILA. CTS., <http://courts.phila.gov/municipal/> (last visited Jan. 16, 2017).

115. *Africa*, 353 A.2d at 858.

defendants' "legal advisor."<sup>116</sup> Throughout the trial, the defendants repeatedly engaged in disruptive outbursts and the judge ordered them "bound and gagged" several times.<sup>117</sup> As a result of the repeated disruptions, the judge declared a mistrial, held the defendants in contempt of court and, thereafter, sentenced them to serve varying jail terms.<sup>118</sup>

Following the mistrial, the Pennsylvania Supreme Court assumed jurisdiction of the case by a per curiam grant of supersedeas.<sup>119</sup> While the Pennsylvania Supreme Court was primarily concerned with the defendants' sentences for contempt,<sup>120</sup> the court also addressed the role of standby counsel.<sup>121</sup> The court first noted that disruptions in the courtroom cannot be tolerated because they threaten the functionality of the court.<sup>122</sup> In spite of this proclamation, the court maintained that "[p]otentially disruptive defendants [. . .] have the right to represent themselves if counsel is validly waived."<sup>123</sup> However, the court also recognized that courts should appoint standby counsel in such situations.<sup>124</sup> The court noted that standby counsel should be available "to perform all the services a trained advocate would perform."<sup>125</sup>

*Africa* illustrates two of the different roles that standby counsel has occupied in Pennsylvania cases. First, the trial court appointed the public defender to act as "legal advisor" to the defendants,<sup>126</sup> a title that connotes a more technical role. Although the court did not expound upon the meaning of "legal advisor," an attorney occupying this role

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116. *Id.* Notably, courts, practitioners, and scholars have used many different terms to describe what is now commonly called "standby counsel." For a discussion of other commonly used terms, see Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. CAL. REV. L. & SOC. JUST. 133, 150–54 (2015).

117. *Africa*, 353 A.2d at 858–61 (explaining, among other things, that the defendants used profanity and abusive language, laid on the floor, shouted at spectators, and demanded that if one of them was to be bound and gagged, then they all should be bound and gagged).

118. *Id.* at 861 (describing the specific contemptuous acts of each defendant).

119. *Id.* at 862. A supersedeas is "[a] writ or bond that suspends a judgment creditor's power to levy execution, usu[ally] pending appeal." *Supersedeas*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also *Supersedeas*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Supersedeas> (last visited Feb. 14, 2017) (defining a supersedeas as "a process designed to stop enforcement of a trial court judgment brought up for review").

120. *Africa*, 353 A.2d at 858–62, 865–67.

121. *Id.* at 864.

122. *Id.* at 863.

123. *Id.* at 864.

124. *Id.*

125. *Id.* at 864 n.18 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring)).

126. *Id.* at 858.

would likely be tasked with advising the defendant about applicable law and legal procedures, but not with actively participating in the trial via making objections or examining witnesses. Second, the passing guidance of the Pennsylvania Supreme Court seems to indicate that an attorney appointed as standby counsel must utilize his formal training and actively participate in the trial whenever the defendant seriously misbehaves.<sup>127</sup> Moreover, the Pennsylvania Supreme Court issued this guidance without referencing the language of Rule 121(D) and did not explain the meaning of the Court's reference to the phrase "perform all the services a trained advocate would perform" because the role of standby counsel was only a tangential issue in *Africa*.<sup>128</sup>

## 2. *Commonwealth v. Brazil*

In *Commonwealth v. Brazil*,<sup>129</sup> the Pennsylvania Supreme Court specifically addressed several aspects of what is now Rule 121(D).<sup>130</sup> *Brazil* originated in the Court of Common Pleas of Montgomery County and involved an incident between inmates and guards at the State Correctional Institute at Graterford.<sup>131</sup> During the preliminary hearing, a public defender represented the defendant.<sup>132</sup> However, the defendant told the judge that he wanted to represent himself during his trial.<sup>133</sup> Without conducting a waiver of counsel colloquy,<sup>134</sup> the judge allowed

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127. *Id.* at 864 n.18 (quoting *Mayberry*, 400 U.S. at 468 (Burger, C.J., concurring)).

128. *Id.*

129. *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997).

130. *Id.* at 218–19. At the time this case was tried, the standby counsel provision was codified in the Pennsylvania Rules of Criminal Procedure, Rule 318. Rule 318 was renumbered Rule 121 on March 1, 2000. PA. R. CRIM. P. 121 note (effective Apr. 1, 2001).

131. *Brazil*, 701 A.2d at 217.

132. *Id.*

133. *Id.*

134. PA. R. CRIM. P. 121(A)(2) provides:

To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:

- (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
- (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
- (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

the defendant to represent himself and placed the public defender from the defendant's preliminary hearing on "standby" status.<sup>135</sup> At trial, the judge allowed the defendant's standby counsel to present a closing argument to the jury and discuss jury instructions with the court.<sup>136</sup> The defendant also consulted with standby counsel on three separate occasions during the cross-examination of several witnesses.<sup>137</sup>

On appeal, the Pennsylvania Supreme Court addressed both the waiver of counsel and the standby counsel issues.<sup>138</sup> The Court first quoted the criminal procedure rules regarding waiver of counsel and standby counsel, including the language now codified in Rule 121(D).<sup>139</sup> The core of the Court's opinion centered on the separate and distinct requirement that a trial judge must conduct a full waiver of counsel colloquy with a defendant every time a defendant seeks to represent himself, regardless of whether standby counsel is appointed.<sup>140</sup> Moreover, the court made clear that the appointment of standby counsel is not a substitute for a waiver of counsel colloquy.<sup>141</sup>

The Pennsylvania Supreme Court's conclusion in *Brazil* demonstrates that the role of standby counsel is not pervasive enough to adequately protect all of the defendant's rights.<sup>142</sup> The Court's reasoning implies that standby counsel is not fully engaged in every aspect of the proceedings and, thus, that standby counsel is not responsible for scrupulously protecting every right the defendant possesses.

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(d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;

(e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and

(f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

*Id.*

135. *Brazil*, 701 A.2d at 217.

136. *Id.* at 217 n.1.

137. *Id.*

138. *Id.* at 218.

139. *Id.*

140. *Id.* at 218–19.

141. *Id.* at 219.

142. *See id.* at 219 (explaining that the presence of standby counsel is not enough to negate the requirement that a trial court conduct a waiver of counsel colloquy when a defendant chooses to proceed pro se).

Moreover, the Montgomery County judge in *Brazil* allowed standby counsel to play a more active role at the pro se defendant's trial than the Philadelphia Municipal Court judge in *Africa* instructed standby counsel to play. Specifically, the Montgomery County judge in *Brazil* allowed standby counsel to speak directly to the jury and the court on behalf of the defendant.<sup>143</sup> These actions seemingly contradict the U.S. Supreme Court's holding in *McKaskle* that a pro se defendant must be able to retain actual and perceived control of his or her case.<sup>144</sup> Arguably, by hearing standby counsel give a closing argument, the jury in *Brazil* could have easily believed that the defendant was represented by or, at the very least, was acting as co-counsel with his standby counsel.

### 3. *Commonwealth v. Fletcher*

In *Commonwealth v. Fletcher*,<sup>145</sup> the Pennsylvania Supreme Court reviewed the award of a new trial to the defendant by a post-conviction court.<sup>146</sup> While the substance of this case is largely irrelevant,<sup>147</sup> the portions of this opinion detailing the appointment of standby counsel are germane to the discussion at hand. *Fletcher* originated in the Court of Common Pleas of Philadelphia County.<sup>148</sup> On appeal, the Pennsylvania Supreme Court noted, but did not comment on, the appointment of standby counsel by the trial judge.<sup>149</sup>

After the jury found the defendant guilty, the defendant filed a motion to dismiss his court-appointed attorney and proceed pro se for his post-verdict claims.<sup>150</sup> The trial court conducted a waiver of counsel colloquy, granted the defendant's motion, and appointed the defendant's former attorney as standby counsel.<sup>151</sup> Thereafter, the trial court specifically delineated the role of standby counsel and the responsibilities of the defendant.<sup>152</sup> The trial court stated that standby counsel may direct the pro se defendant "in every way he knows how concerning his claim, the pertinent legal principles and the pertinent

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143. *Id.* at 217 n.1.

144. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

145. *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006).

146. *Id.* at 509.

147. *Id.* The Commonwealth of Pennsylvania challenged a post-conviction court's grant of a new trial to the defendant, who had been convicted of first-degree murder. *Id.* The post-conviction court granted the new trial because the assistant medical examiner, who had performed the autopsy of the murder victim, did not testify at defendant's original trial. *Id.*

148. *Id.*

149. *Id.* at 512–13.

150. *Id.* at 512.

151. *Id.* at 513.

152. *Id.*

procedure relevant in this case . . . .”<sup>153</sup> However, the defendant was responsible for filing the post-verdict motions and presenting oral argument to the court.<sup>154</sup> The trial court also confirmed that the defendant understood that he was on his own and that if he “goofed,” he could not later claim ineffective assistance of counsel.<sup>155</sup>

The Court of Common Pleas of Philadelphia County in *Fletcher* delineated yet another variation of what the proper role of standby counsel can be. In contrast to the Court of Common Pleas of Montgomery County in *Brazil* and the Philadelphia Municipal Court in *Africa*, which did not specifically speak to the responsibilities of both standby counsel and the pro se defendant, the Court of Common Pleas of Philadelphia County in *Fletcher* spoke of the separate responsibilities of both standby counsel and the pro se defendant.<sup>156</sup> Implicitly, the *Fletcher* court addressed the separate responsibilities of standby counsel and the pro se defendant for the dual purposes of ensuring that: (1) the defendant truly understood the ramifications of his decision and (2) the attorney understood his role was limited.<sup>157</sup> Arguably, this approach creates a clear framework for the standby counsel-pro se defendant relationship.

#### 4. *Commonwealth v. Spotz*

In *Commonwealth v. Spotz*,<sup>158</sup> the defendant petitioned the Pennsylvania Supreme Court to review his petition for collateral relief under the Post Conviction Relief Act (PCRA)<sup>159</sup> following his first-degree murder conviction in York County.<sup>160</sup> The defendant raised many arguments in his petition, including that the trial court improperly restricted the two lawyers appointed to act as his standby counsel.<sup>161</sup> The defendant argued that the limitations were so severe as to render the appointment of standby counsel meaningless.<sup>162</sup> At trial, the judge stated that standby counsel could advise the defendant of legal matters that came up during the trial and help with exhibit procedure.<sup>163</sup> However,

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153. *Id.*

154. *Id.*

155. *Fletcher*, 896 A.2d at 512–13.

156. Compare *Commonwealth v. Brazil*, 701 A.2d 216, 218–19 (Pa. 1997), and *Commonwealth v. Africa*, 353 A.2d 855, 864 (Pa. 1976), with *Fletcher*, 896 A.2d at 512–13.

157. *Fletcher*, 896 A.2d at 512–13.

158. *Commonwealth v. Spotz*, 47 A.3d 63 (2012).

159. 42 PA. CONS. STAT. §§ 9541–9546 (2016).

160. *Spotz*, 47 A.3d at 73.

161. *Id.* at 76.

162. *Id.* at 81.

163. *Id.* at 81–82.

the judge further explained that standby counsel could not take notes, instigate communication with the defendant, offer arguments for the defendant, or make suggestions about what to do next or when to make an objection.<sup>164</sup> The judge also explained to the defendant that standby counsel could not “sit there and go over stuff with [the defendant] as if they are really counsel but [the defendant is] asking the questions.”<sup>165</sup>

The Pennsylvania Supreme Court affirmed the decision of the PCRA court, which held that the trial court properly instructed standby counsel and that even with the aforementioned restrictions in place, the defendant’s standby counsel offered aid when asked, provided the defendant with documents, and discussed general trial strategy.<sup>166</sup> In its affirmation of the PCRA court, the Pennsylvania Supreme Court stated that there was no merit to the defendant’s claim and that the trial judge impermissibly exercised his discretion in restricting the role of standby counsel.<sup>167</sup>

The highly restricted role of standby counsel delineated by the Court of Common Pleas of York County in *Spotz* is still another variation of what the role of standby counsel can be. In contrast to the Court of Common Pleas of Montgomery County in *Brazil*, which allowed standby counsel to play an active role in the defendant’s trial, the Court of Common Pleas of York County in *Spotz* narrowly defined the scope of standby counsel’s actions.<sup>168</sup> The main difference between these two approaches is that, in *Brazil*, standby counsel was permitted to speak directly to the jury on behalf of the defendant, while in *Spotz*, standby counsel was limited to a behind the scenes role.<sup>169</sup> Arguably, the approach taken in *Spotz* is truer to the description of standby counsel currently contained in Rule 121(D) because the standby counsel in *Spotz* played a supporting role, while the defendant took the lead.

*B. Nonrecognition of an “Ineffective Assistance of Standby Counsel” Claim in Pennsylvania*

In addition to giving standby counsel different responsibilities and restrictions, Pennsylvania courts and federal courts have also consistently refused to allow pro se defendants to raise ineffective assistance of

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164. *Id.*

165. *Id.* at 81.

166. *Id.* at 82.

167. *Id.*

168. Compare Commonwealth v. Brazil, 701 A.2d 216, 217 n.1 (Pa. 1997), with *Spotz*, 47 A.3d at 81–82.

169. Compare *Brazil*, 701 A.2d at 217 n.1, with *Spotz*, 47 A.3d at 81–82.

standby counsel claims.<sup>170</sup> Despite the myriad cases espousing that an ineffective assistance of standby counsel claim is without merit, pro se defendants continue to raise the claim.<sup>171</sup>

### 1. Early Decisions in Pennsylvania Refusing to Recognize Ineffectiveness of Standby Counsel

*Commonwealth v. Glessner*<sup>172</sup> was one of the first cases in Pennsylvania to stand for the proposition that a pro se defendant cannot claim ineffective assistance of standby counsel.<sup>173</sup> In a short paragraph, the Pennsylvania Superior Court reasoned that such a claim does not exist because a pro se defendant cannot shift the responsibility of his own ineffectiveness to the standby counsel who was acting in an advisory role.<sup>174</sup>

In the early 2000s, the Pennsylvania Supreme Court expanded on and ratified the holding of the Pennsylvania Superior Court in *Glessner*. In 2004, in *Commonwealth v. Bryant*,<sup>175</sup> the Pennsylvania Supreme Court stated that it would categorically refuse to consider “any ineffectiveness claims that arise from the period of self-representation.”<sup>176</sup> Two years later, in *Commonwealth v. Fletcher*,<sup>177</sup> the Pennsylvania Supreme Court applied and clarified *Bryant* by stating that ineffective assistance of trial counsel claims are precluded when the defendant chooses to represent himself.<sup>178</sup>

### 2. Federal Courts in Pennsylvania Agree with the Pennsylvania Supreme Court

Three years after *Fletcher*, in *United States v. Tilley*,<sup>179</sup> a case that originated from the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit held that there is no constitutional

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170. See, e.g., *United States v. Tilley*, 326 F. App'x 96 (3d Cir. 2009); *Blackman v. McGrady*, No. 12-5160, 2013 U.S. Dist. LEXIS 184934 (E.D. Pa. Nov. 26, 2013); *Miller v. Lamas*, No. 10-293, 2012 U.S. Dist. LEXIS 30486 (W.D. Pa. Feb. 15, 2012); *Commonwealth v. Blakeney*, 108 A.3d 739 (Pa. 2014); *Spotz*, 47 A.3d 63; *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006); *Commonwealth v. Bryant*, 855 A.2d 726 (Pa. 2004); *Commonwealth v. Glessner*, 486 A.2d 521 (Pa. Super. Ct. 1985).

171. See, e.g., *Fletcher*, 896 A.2d 508; *Bryant*, 855 A.2d 726; *Glessner*, 486 A.2d 521.

172. *Commonwealth v. Glessner*, 486 A.2d 521 (Pa. Super. Ct. 1985).

173. *Id.* at 524–25.

174. *Id.*

175. *Commonwealth v. Bryant*, 855 A.2d 726 (Pa. 2004).

176. *Id.* at 737.

177. *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006).

178. *Id.* at 522.

179. *United States v. Tilley*, 326 F. App'x 96 (3d Cir. 2009).

right to have standby counsel raise objections on behalf of the defendant.<sup>180</sup> The *Tilley* court reasoned that, even if standby counsel could give ineffective assistance, standby counsel would not be obligated to object to testimony solicited by the defendant because that would violate the defendant's right to control his own defense under *McKaskle*.<sup>181</sup> The *Tilley* court further stated that a pro se defendant cannot claim that his self-representation amounted to ineffective assistance of counsel.<sup>182</sup> This statement about ineffectiveness claims slightly narrowed the categorical approach taken in *Bryant*.<sup>183</sup> However, *Tilley* signaled, for the first time, that the federal courts in Pennsylvania were willing to embrace the reasoning articulated by the Pennsylvania Supreme Court.

A few years later, in *Miller v. Lamas (Miller I)*,<sup>184</sup> a magistrate judge for the United States District Court for the Western District of Pennsylvania recommended that the defendant's writ of habeas corpus petition be denied as meritless because a pro se defendant cannot claim that his standby counsel was ineffective.<sup>185</sup> The magistrate judge cited the language of Rule 121(D) and reasoned that a pro se defendant cannot "bootstrap his own failure to raise [a] claim by blaming [standby] counsel for failing to remedy his own mistake."<sup>186</sup> The district judge adopted the magistrate judge's report and recommendation in *Miller v. Lamas (Miller II)*<sup>187</sup>, signifying approval of the magistrate judge's reasoning.<sup>188</sup>

Most recently, in the 2013 decision in *Blackman v. McGrady*,<sup>189</sup> the United States District Court for the Eastern District of Pennsylvania reiterated that a defendant who chooses self-representation cannot later claim ineffective assistance of counsel.<sup>190</sup> The *McGrady* court reasoned that "the right to counsel and the right to self-representation are mutually

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180. *Id.* at 96.

181. *Id.*

182. *Id.*

183. *Commonwealth v. Bryant*, 855 A.2d 726, 737 (Pa. 2004) (stating that the Pennsylvania Supreme Court would categorically refuse to consider "any ineffectiveness claims that arise from the period of self-representation").

184. *Miller v. Lamas*, No. 10-293, 2012 U.S. Dist. LEXIS 30486 (W.D. Pa. Feb. 15, 2012).

185. *Id.* at \*23, \*20 n.7.

186. *Id.* at \*20 n.7 (quoting *Bryant*, 855 A.2d at 740).

187. *Miller v. Lamas*, No. 10-293, 2012 U.S. Dist. LEXIS 30361 (W.D. Pa. Mar. 7, 2012).

188. *Id.* at \*2.

189. *Blackman v. McGrady*, No. 12-5160, 2013 U.S. Dist. LEXIS 184934 (E.D. Pa. Nov. 26, 2013).

190. *Id.* at \*32 (citing *Commonwealth v. Sims*, 549 A.2d 1280 (Pa. Super. Ct. 1988) and *Bryant*, 855 A.2d at 737).

exclusive.”<sup>191</sup> To bolster this proposition, the *McGrady* court heavily relied on the *Bryant* court’s proposition that claims of ineffective standby counsel are precluded when defendants choose to represent themselves.<sup>192</sup>

The *McGrady* court noted that, logically, a defendant “cannot waive his right to counsel, and [then] later complain that the counsel he received was ineffective.”<sup>193</sup> The *McGrady* court reasoned that ineffective assistance of standby counsel claims fail because such claims exist only if a right is violated, and, under *McKaskle*, no constitutional right to standby counsel exists.<sup>194</sup> Moreover, the *McGrady* court reasoned that a pro se defendant simply cannot have it both ways because no constitutional right to “hybrid representation” exists.<sup>195</sup> Additionally, the *McGrady* court reasoned that the main concern envisioned by *McKaskle* is that standby counsel does too much, so as to take control away from the pro se defendant.<sup>196</sup> Thus, the *McGrady* court reasoned that it was rational for the Pennsylvania state courts to reject the defendant’s claim because the defendant argued that standby counsel did too little.<sup>197</sup>

### 3. Recent Decisions in Pennsylvania Refusing to Recognize Ineffectiveness of Standby Counsel

Contemporaneous with the *McGrady* decision in the United States District Court for the Eastern District of Pennsylvania were two Pennsylvania Supreme Court decisions that expounded upon the refusal to recognize ineffective assistance of standby counsel claims brought by pro se defendants.<sup>198</sup> These two cases clearly show that Pennsylvania courts have not shied away from this line of reasoning, but rather have embraced such rationale.

In 2012, the Pennsylvania Supreme Court thoroughly discussed the topic of standby counsel in *Commonwealth v. Spatz*.<sup>199</sup> The first part of

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191. *Id.* at \*33.

192. *Id.* at \*34.

193. *Id.*

194. *Id.*

195. *Id.* at \*34–35 (citing *Commonwealth v. Williams*, 410 A.2d 880, 883 (Pa. Super. Ct. 1979) for the proposition that neither the U.S. Constitution nor the Pennsylvania Constitution recognize a right to hybrid representation). Hybrid representation occurs where a lawyer acts as co-counsel with a defendant. *See Hybrid Representation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

196. *McGrady*, 2013 U.S. Dist. LEXIS 184934 at \*36.

197. *Id.* at \*43.

198. *See Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012); *Commonwealth v. Blakeney*, 108 A.3d 739 (Pa. 2014).

199. *See Spatz*, 47 A.3d at 81–83.

the *Spotz* decision discussed the role of standby counsel.<sup>200</sup> However, the second part of the *Spotz* decision held that there was no merit to the defendant's claim that standby counsel was ineffective for failing to object to the limitations that the trial judge imposed on standby counsel.<sup>201</sup> The *Spotz* court stated that the defendant's claim was meritless because the trial court judge acted within the confines of his discretionary power.<sup>202</sup>

In part, the *Spotz* court based its decision on the fact that, when a defendant chooses self-representation, the defendant alone is the counsel of record for the case.<sup>203</sup> Moreover, the *Spotz* court reasoned that allowing a pro se defendant to raise ineffectiveness claims would "mak[e] a mockery of the judicial system."<sup>204</sup> Finally, the *Spotz* court stated that the court would not hear an ineffective assistance of standby counsel claim based on lack of action by standby counsel during a trial in which the defendant chose self-representation.<sup>205</sup>

Two years later, in *Commonwealth v. Blakeney*,<sup>206</sup> the Pennsylvania Supreme Court succinctly summarized all of the prior holdings concerning what claims may be raised by a pro se defendant.<sup>207</sup> The *Blakeney* court held that a pro se defendant cannot claim that he was ineffective or that his standby counsel was ineffective.<sup>208</sup> Moreover, the *Blakeney* court reiterated that a defendant cannot claim standby counsel did too little because the role of standby counsel must be limited in order to safeguard the defendant's *Faretta* rights.<sup>209</sup> Finally, the *Blakeney* court held that no right to "hybrid" representation or "co-counsel" status exists because, per Rule 121(D), the sole purpose of standby counsel is to be available to the defendant for consultation and advice.<sup>210</sup> Thus, the *Blakeney* court proclaimed that standby counsel cannot be subject to ineffective assistance of counsel claims because of the limited role envisioned by Rule 121(D).<sup>211</sup>

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200. See *supra* Part III.A.4 discussing *Commonwealth v. Spotz*, 47 A.3d 63 (Pa. 2012).

201. *Spotz*, 47 A.3d at 82.

202. *Id.*

203. *Id.* at 83.

204. *Id.* at 96 n.25. (citing *Commonwealth v. Bryant*, 855 A.2d 726, 736–37 (Pa. 2004)).

205. *Id.* at 95–96.

206. *Commonwealth v. Blakeney*, 108 A.3d 739 (Pa. 2014).

207. *Id.* at 748–49.

208. *Id.* at 749.

209. *Id.* at 756.

210. *Id.* at 762.

211. *Id.* (citing *Commonwealth v. Spotz*, 47 A.3d 63, 82–83 (Pa. 2012)).

C. *Problems with the Current State of Pennsylvania Law Regarding Pro Se Defendants, Standby Counsel, and Ineffective Assistance of Counsel Claims*

Against the aforementioned backdrop, the intersection of the right to self-representation, the role of standby counsel, and ineffective assistance of counsel claims is clearly complicated and problematic. In Pennsylvania, Rule 121(D), more than any other source of law, is at the crux of this intersection. Rule 121(D) largely contributes to some of the main problems that currently exist regarding the responsibilities and role of standby counsel.

1. Vague Language of Rule 121(D)

The main problem created by the current formulation of Rule 121(D) is an interpretative one. Rule 121(D) is very short,<sup>212</sup> but the confusion created by the rule's words is great. The second sentence of Rule 121(D) provides that “[s]tandby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.”<sup>213</sup> At issue in this sentence are the words “consultation” and “advice,” which under the current iteration of Rule 121(D) is the only guidance provided to standby counsel regarding what actions the standby counsel may and may not take.

According to *Black's Law Dictionary*,<sup>214</sup> there are two definitions of “consultation” that are relevant to the discussion at bar: (1) “[t]he act of asking the advice or opinion of someone (such as a lawyer)” and (2) “[a] meeting in which parties consult or confer.”<sup>215</sup> Both of these definitions are rather cursory and do little to further an attorney's understanding of what standby counsel is actually permitted to do. The only helpful aspect of these two definitions is that the structure of the first definition places the burden on the pro se defendant to actively ask the attorney appointed as standby counsel for assistance with a particular matter. Interestingly, the word “consultation” is defined in terms of the word

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212. Including the section heading, Rule 121(D) is only thirty-five words. See PA. R. CRIM. P. 121(D).

213. *Id.*

214. According to the Statutory Construction Act, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]” 1 PA. CONS. STAT. § 1903 (2016). Moreover, the Supreme Court of Pennsylvania has stated that “a word's usage [generally] accords with its dictionary definition.” *Commonwealth v. Giulian*, 141 A.3d 1262, 1268 (2016).

215. *Consultation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

“advice,” which is the second vague word used in Rule 121(D) to define the role of standby counsel.

“Advice,” as defined by *Black’s Law Dictionary*, refers to “[g]uidance offered by one person, esp. a lawyer, to another; professional counsel.”<sup>216</sup> This definition, much like the definitions of “consultation,” is perfunctory and lacks the specificity needed to truly inform an attorney of how to fulfill the role of standby counsel. Within this definition of “advice,” the word “guidance” must be further defined. “Guidance” has several definitions including “direction, advice or counseling, and supervised care or assistance.”<sup>217</sup> These definitions do nothing to clarify the realm in which standby counsel must operate.

Altogether, in the context of Rule 121(D), these definitions, at most, provide that standby counsel must be available to meet with a pro se defendant, offer his professional opinion when asked, and guide the pro se defendant through the technicalities of his trial.

## 2. Confusion and Meritless Claims

The aforementioned vague language of Rule 121(D) provides little guidance to courts, attorneys appointed to act as standby counsel, and pro se defendants. The language of Rule 121(D) allows judges the flexibility to decide what “consultation” and “advice” mean in practice.<sup>218</sup> Some Pennsylvania judges have taken a narrow view of standby counsel and specifically prescribe what actions may and may not be taken by standby counsel.<sup>219</sup> However, other Pennsylvania judges have taken a broad view of standby counsel and allow standby counsel to undertake virtually any task.<sup>220</sup>

As a result of the contradictory descriptions of the responsibilities of standby counsel presently found in Pennsylvania case law, the role that standby counsel plays at a pro se defendant’s trial depends on where the trial takes place, what judge presides over the trial, and the disposition of that judge on that particular day.<sup>221</sup> Even with the best of research, pro se defendants in future Pennsylvania cases have no way of

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216. *Advice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

217. *Guidance*, DICTIONARY.COM, <http://dictionary.reference.com/browse/guidance?st> (last visited Feb. 14, 2017).

218. See PA. R. CRIM. P. 121(D) (lacking specific descriptions of “consultation” and “advice”).

219. See *supra* Part III.A.4 discussing *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012) and Part III.A.3 discussing *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006).

220. See *supra* Part III.A.1 discussing *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976) and Part III.A.2 discussing *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997).

221. See, e.g., *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012); *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006); *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997); *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976).

knowing what can be expected of standby counsel. This disparity creates a general state of uncertainty amongst pro se defendants in Pennsylvania.

As evidenced by the myriad cases discussed above, even after a trial judge explains his view of standby counsel to a pro se defendant, those pro se defendants remain confused about whether or not their standby counsel has effectively discharged his or her duties.<sup>222</sup> As a result, pro se defendants consistently ask appellate courts to review their cases on the grounds of ineffective assistance of standby counsel.<sup>223</sup> Although Pennsylvania courts have consistently held that ineffective assistance of standby counsel claims are meritless, pro se defendants continue to bring these claims, suggesting that pro se defendants do not fully understand the role of standby counsel or what it means to proceed pro se.<sup>224</sup> The continued filing of these claims means that appellate courts must needlessly address a claim that has been ruled meritless in Pennsylvania for many decades, thereby decreasing the efficiency of Pennsylvania appellate courts.

### 3. Ethical Issues for Attorneys Appointed to Act as Standby Counsel

While the above problems primarily revolve around the legal implications for pro se defendants and the courts, the uncertain role of standby counsel also raises ethical concerns for the attorneys appointed to act as standby counsel.<sup>225</sup> In much the same way that pro se defendants will not be able to predict what role standby counsel may take at trial, the same can be said of the attorneys appointed to act as standby counsel. The current formulation of the law surrounding the role of standby counsel prevents the attorneys appointed to act as standby counsel from carefully examining the potential ethical concerns posed by such an undertaking. Although a thorough analysis of the ethical concerns surrounding standby counsel is beyond the scope of this

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222. See *supra* Part III.A.1 discussing *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976), Part III.A.2 discussing *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997), Part III.A.3 discussing *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006), and Part III.A.4 discussing *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012).

223. See *supra* Part III.A.1 discussing *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976), Part III.A.2 discussing *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997), Part III.A.3 discussing *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006), and Part III.A.4 discussing *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012).

224. See *supra* Part III.A.1 discussing *Commonwealth v. Africa*, 353 A.2d 855 (Pa. 1976), Part III.A.2 discussing *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997), Part III.A.3 discussing *Commonwealth v. Fletcher*, 896 A.2d 508 (Pa. 2006), and Part III.A.4 discussing *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012).

225. See, e.g., Anne Bowen Poulin, *Ethical Guidance for Standby Counsel in Criminal Cases: A Far Cry From Counsel?*, 50 AM. CRIM. L. REV. 211, 217–45 (2013).

Comment, some of the major areas of concern include: whether an attorney-client relationship exists,<sup>226</sup> whether the attorney-client privilege applies,<sup>227</sup> and whether conflict of interest<sup>228</sup> rules apply.<sup>229</sup>

*D. A Solution to the Standby Counsel Problem: Revising Rule 121(D)*

To address the problems discussed in Section C, the Pennsylvania Criminal Rules Procedural Committee should revise Rule 121(D) and define the role of standby counsel more thoroughly and in a manner more consistent with current federal and Pennsylvania case law. Generally speaking, this reform should include a specific list of duties that standby counsel may undertake and a specific list of duties that standby counsel may not undertake.

1. Suggested Reform of Rule 121(D)

This proposed reform of Rule 121(D) would eliminate the second half of the second sentence of the current rule and would instead include two new subsections, which would prescribe the permissible and impermissible actions of standby counsel. A third subsection would state the remedies available to a pro se defendant if standby counsel does not act in accordance with the new language.

In application, the proposed reform would be the following italicized language:

(D) Standby Counsel. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings.

*(1) Permitted Conduct. Standby counsel shall explain courtroom procedure and rules to the pro se defendant. Upon request of the pro se defendant, standby counsel shall mark and record exhibits admitted into evidence and explain relevant*

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226. See, e.g., ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 448 (2007) (stating that it is impossible for an attorney to provide true representation when a defendant chooses to proceed pro se).

227. Compare, e.g., *State v. Bebb*, 740 P.2d 829, 834 (Wash. 1987) (holding that attorney-client privilege protects discussions between a pro se defendant and standby counsel), with *Robinson v. Gunja*, 92 F. App'x 624, 626–27 (10th Cir. 2004) (holding that no privilege attached to inmate's phone calls to standby counsel because the prison phones system did not provide for confidential communications and because the defendant was "proceeding pro se, and thus not represented by counsel").

228. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 448 (2007) (opining that counsel is not required to avoid conflicts of interest if the defendant has not accepted an attorney-client relationship).

229. For an in-depth discussion of the ethical issues faced by attorneys appointed to act as standby counsel see Poulin, *supra* note 225, at 217–45.

*legal concepts. Upon request of the pro se defendant, standby counsel may give his or her opinion regarding trial strategy and potential objections. Upon request of the pro se defendant or upon instruction by the trial judge, standby counsel may perform any other reasonable case-related actions as long as those actions do not expressly or implicitly conflict with the prohibited conduct described in subsection (2).*

*(2) Prohibited Conduct. Standby counsel shall not give an opening or closing argument, speak for or make arguments on behalf of the pro se defendant, direct or cross examine witnesses, make objections or motions during trial, prepare written motions or documents for the pro se defendant, or speak over the pro se defendant in the presence of the jury. Standby counsel shall not communicate with the court outside the presence or knowledge of the pro se defendant.*

*(3) Violation. The pro se defendant may not raise an ineffective assistance of standby counsel claim. If standby counsel fails to appear at the proceeding or fails to undertake conduct required by subsection (1), then the pro se defendant may petition the court for a new trial or other appropriate relief. If standby counsel engages in conduct prohibited by subsection (2), then the pro se defendant may raise a claim of error and the court may grant relief appropriate in kind and degree to the prohibited conduct undertaken by standby counsel.*

## 2. Explanation of Why Reform Will Work

The proposed reform will protect the interests of pro se defendants by helping to ensure that their *Faretta* rights are not easily violated and that the defendants maintain actual and apparent control of the trial, as required by *McKaskle*.<sup>230</sup> Moreover, “[t]he primary concern arising out of appointment of standby counsel, is that appointed standby counsel does too much[,] . . . not that counsel does too little.”<sup>231</sup> Thus, by reforming Rule 121(D) to include a list of prohibited conduct, courts can better ensure that standby counsel will respect the rights guaranteed to defendants by *Faretta* and *McKaskle*.

Additionally, the proposed reform will protect the interests of standby counsel by clarifying the extent of standby counsel’s obligations and giving specific parameters within which standby counsel may operate. This clarity will also alleviate some of the ethical concerns that

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230. See *supra* Part II discussing *Faretta v. California*, 422 U.S. 806 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

231. *Blackman v. McGrady*, No. 12-5160, 2013 U.S. Dist. LEXIS 184934, at \*36 (E.D. Pa. Nov. 26, 2013).

arise in the context of the pro se defendant-standby counsel relationship by clarifying the parameters of that relationship.<sup>232</sup> This proposed reform of Rule 121(D) affords much deference to the requests made by the pro se defendant to standby counsel. This proposed rule also expressly prohibits conduct, such as cross-examining witnesses or giving a closing argument, that by their very nature destroy the appearance of control by the pro se defendant, which is crucial under *McKaskle*.<sup>233</sup>

Holistically, a reform of this type should decrease the number of meritless ineffective assistance of standby counsel claims alleged by pro se defendants. Additionally, a reform of this type would standardize the appointment of standby counsel by trial judges across the state. When a trial judge exercises his or her discretion and chooses to appoint standby counsel, the trial judge can simply follow up the appointment by giving an instruction to both standby counsel and the pro se defendant to proceed as stated in the proposed reformed version of Rule 121(D). In giving such an instruction, all standby counsel across the state of Pennsylvania will be legally bound to act in the same manner, which will increase consistency and equality in the trials of pro se defendants.

#### IV. CONCLUSION

The current state of the law regarding standby counsel in Pennsylvania is complex and convoluted. It is clear (1) that a criminal defendant has the constitutional right to self-representation<sup>234</sup> and (2) that courts have discretion regarding whether to appoint standby counsel.<sup>235</sup> Beyond these two propositions, however, is a sphere of ambiguity, confusion, meritless claims, and ethical pitfalls.<sup>236</sup>

Under the current framework, courts in Pennsylvania delineate competing and contradictory descriptions of the proper role of standby counsel.<sup>237</sup> As a result, pro se defendants are left not knowing whether the actions undertaken by standby counsel are appropriate; thus, they raise ineffective assistance of standby counsel claims.<sup>238</sup> Nonetheless, Pennsylvania courts have consistently found ineffective assistance of standby counsel claims meritless.<sup>239</sup>

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232. See *supra* Part III.C.3 discussing ethical issues for attorneys appointed to act as standby counsel.

233. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

234. See *supra* Part II.A.

235. See *supra* Part II.B.

236. See *supra* Part III.C.

237. See *supra* Part III.A.

238. See *supra* Part III.C.2.

239. See *supra* Part III.B.

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Therefore, in order to address the disparity and uncertainty of the proper role of standby counsel, the Pennsylvania Criminal Rules Procedural Committee and the Pennsylvania Supreme Court should revise Rule 121(D) and thoroughly define the proper role of standby counsel.<sup>240</sup> A detailed rule revision would enable pro se defendants, attorneys appointed to act as standby counsel, and trial judges to better understand what is expected of standby counsel, thereby increasing judicial consistency across Pennsylvania.<sup>241</sup>

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240. *See supra* Part III.D.

241. *See supra* Part III.D.2.