Note
The Case Against Self-Representation in Capital Proceedings

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On November 5, 2009, Major Nidal Malik Hasan, an army psychologist facing an impending deployment to Afghanistan, entered Fort Hood's Soldier Readiness Processing Center in Killeen, Texas.[1] Equipped with a laser-sighted semi-automatic handgun, Hasan opened fire upon the military personnel therein.[2] In only ten minutes, thirteen soldiers were killed and thirty-two more were wounded[3]—the deadliest shooting to ever take place on a United States military base.[4] Once in custody, Hasan was charged with thirteen counts of premeditated murder, and thirty-two counts of attempted murder.[5] Nearly four years after the horrific shooting, Hasan's court-martial commenced on August 6, 2013.[6] Having exercised his right of self-representation,[7] Hasan began by offering a self-incriminating

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1. *See* James C. McKinley Jr. & James Dao, *Fort Hood Gunman Gave Signals Before His Rampage*, N.Y. TIMES (Nov. 8, 2009), http://www.nytimes.com/2009/11/09/us/09reconstruct.html.

2. *See* Ellen Wulfhorst & Jane J. Pruet, *Fort Hood Shooter Sentenced to Death for 2009 Killings*, REUTERS (Aug. 28, 2013, 7:06 PM), http://www.reuters.com/article/2013/08/28/us-usa-crime-forthood-idUSBRE97Q11A20130828.

3. Clifford Krauss, *Defendant in Court for Hearing at Ft. Food*, N.Y. TIMES (Oct. 12, 2010), http://www.nytimes.com/2010/10/13/us/13hearing.html.

4. *Cf. id.* (describing the events as the "bloodiest shooting on a United States military base in modern times").

5. *Id.*

6. *See* Josh Rubin & Matt Smith, *'I Am the Shooter,' Nidal Hasan Tells Fort Hood Court-Martial*, CNN (Aug. 6, 2013, 6:44 PM), http://www.cnn.com/2013/08/06/justice/hasan-court-martial/index.html.

7. *See* Angela K. Brown, *Nidal Hasan, Fort Hood Suspect, Granted Right To Represent Himself at Trial*, HUFFINGTON POST (June 3, 2013, 5:12 AM),

opening statement, informing the jury that the "evidence will clearly show that I am the shooter."[8] Hasan's controversial defense strategy[9]—or lack thereof[10]—resulted in the jury finding him guilty on all charges.[11] During the sentencing phase, Hasan did not offer mitigating evidence, and idly watched as the prosecution called victims and relatives of his victims to testify against him.[12] On August, 28, 2013, after merely two hours of deliberation, the jury sentenced Hasan to death.[13]

Hasan's court-martial ignited social commentary discussing a defendant's right of self-representation.[14] And while it may be hard to argue against the outcome of Hasan's case, the manner in which he represented himself belittled the nature of the capital proceeding, illustrating the need to rethink the right of self-representation. When the Supreme Court in *Faretta v. California* inferred this right from the text of the Sixth Amendment,[15] it was largely out of respect for the defendant's personal autonomy.[16] However, by overvaluing a defendant's autonomy, the Court undervalued not only a defendant's inter-

http://www.huffingtonpost.com/2013/06/03/nidal-hasan-represent-himself_n_3379274.html.

8. *See* Rubin & Smith, *supra* note 6.

9. Indeed, even Hasan's court-appointed standby counsel attempted to limit their roles because of their moral and ethical objections to, what they believed to be, Hasan's attempt to throw his own case and ensure the death penalty. *See* Manny Fernandez, *Calling No Witnesses, Defendant in Fort Hood Shooting Rests His Case*, N.Y. TIMES (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/us/fort-hood-shooting-suspect-rests-his-case.html.

10. *See id.* (discussing Hasan's decision not to cross-examine hundreds of witnesses and pieces of evidences set forth by the prosecution).

11. *See* Manny Fernandez, *Judge Denies Lawyers' Request in Fort Hood Case*, N.Y. TIMES (Aug. 27, 2013), http://www.nytimes.com/2013/08/28/us/judge-denies-defense-lawyers-request-in-fort-hood-case.html.

12. Bill Mears, *Fort Hood Shooting Jury Recommends Death Penalty for Nidal Hasan*, CNN (Aug. 29, 2013, 7:02 AM), http://www.cnn.com/2013/08/28/us/nidal-hasan-sentencing/index.html.

13. *Id.*

14. *See, e.g.*, Jonathan Turley, *Fort Hood Suspect's Fool of a Lawyer: Column*, USA TODAY (Aug. 8, 2013, 6:04 PM), http://www.usatoday.com/story/opinion/2013/08/08/malik-hasan-fort-hood-suspect-column/2629709; Micah Schwartzbach, *Fort Hood and the Right To Self-Representation*, UNCUFFED (Aug. 29, 2013, 12:22 PM), http://uncuffedcrime.blogspot.com/2013/08/the-fort-hood-attack-and-right-to-self.html (evaluating the policy considerations of self-representation following Hasan's court-martial).

15. Faretta v. California, 422 U.S. 806, 819 (1975) ("Although not stated in the Amendment in so many words, the right to self-representation . . . is thus necessarily implied by the structure of the Amendment.").

16. *See id.* at 833–34 (considering the history of the Sixth Amendment, and opining that "there can be no doubt that [the founding fathers] understood the inestimable worth of free choice").

est, but society's interest in a fair and efficient trial.[17] The legitimacy of the adversarial system and the integrity of judicial process each require that the rights of even the most heinous defendants be treated with absolute care.[18]

This Note argues that the right of self-representation (pro se representation), raises serious concerns when exercised in capital proceedings. By enabling a defendant to proceed pro se in a capital proceeding, the Court not only compromises the safeguards it sought to observe when a defendant's life is at stake,[19] but it jeopardizes the integrity of a trial's adversarial process. Part I discusses the origins and scope of the right of self-representation and concludes with a brief overview of the Supreme Court's treatment of the death penalty. Part II critiques the constitutional underpinnings of self-representation, examines the right's unique concerns during capital proceedings, and evaluates scholarly attempts to quell those concerns. Part III argues that judicial opinions and scholarly attempts to mitigate the legal and ethical implications of self-representation, while professing to retain a defendant's autonomy, are inherently contradictory. Ultimately, this Note concludes that the Sixth Amendment right of self-representation should be qualified by eliminating its availability to any defendant facing the death penalty.

I. THE ORIGINS OF SELF-REPRESENTATION, ITS SCOPE, AND AN OVERVIEW OF THE DEATH PENALTY

Part I provides the background necessary to understand the tensions implicated when courts allow a defendant to proceed pro se in a capital proceeding. Section A discusses the origins of the right of self-representation, and the right's qualifications since its fortification in *Faretta*. Section B offers a brief overview of the Supreme Court's treatment of the death penalty.

17. *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 61 (1998) ("Our purpose as a society is not only to respect the humanity of the guilty defendant and to protect the innocent from the possibility of an unjust conviction . . . we also seek through the adversary system to preserve the integrity of society itself . . . [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member." (internal quotation marks omitted)).

18. *Cf. id.* ("There is . . . an important systemic purpose served by assuring that even guilty people have rights.").

19. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

A. THE ROAD TO RECOGNIZING THE RIGHT OF SELF-REPRESENTATION

The Sixth Amendment explicitly guarantees that a criminal defendant be afforded the right to the assistance of counsel when making his defense.[20] Recognizing that the "average defendant does not have the legal skill to protect himself when brought before a tribunal with power to take his life or liberty,"[21] the right to assistance of counsel is considered indispensable to the "fair administration of our adversarial system of criminal justice."[22] The Supreme Court extends the right to all "critical stages" in the criminal justice process,[23] and most importantly for the purposes of this Note, a defendant's trial.[24]

Nevertheless, the right of self-representation has long been recognized by federal courts through the Judiciary Act of 1789[25] and the right is currently codified in 28 U.S.C. § 1654, providing that parties may appear in federal court "personally or by counsel."[26] However, because the Judiciary Act applied only to federal courts, it left states to regulate the right of self-representation on an individual basis.[27]

This Section offers a historical overview of the right of self-representation. Subsection 1 begins by reviewing the Supreme Court's decision in *Faretta*, and articulates the Court's justifications for constitutionalizing the right of self-representation. Subsection 2 describes the requirements necessary to assert an effective waiver of counsel—effectively invoking the right of

20. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

21. Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

22. Maine v. Moulton, 474 U.S. 159, 168 (1985); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) (holding that "the right to counsel plays a crucial role in the adversarial system.").

23. *Moulton*, 474 U.S. at 170; *see also* FED. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every state of the [criminal] proceeding from initial appearance through appeal, unless the defendant waives this right.").

24. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 73 (1932).

25. The right of self-representation was first codified in § 35 of the Judiciary Act of 1789, granting parties the right to "plead and manage their own causes personally or by the assistance of . . . counsel." Judiciary Act of 1789, ch. 20, 1 Stat. 92, § 35 (1789).

26. 28 U.S.C. § 1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

27. *See* Faretta v. California, 422 U.S. 806, 813, 814 n.10 (1975) (recognizing that thirty-six out of fifty states provided the right of self-representation expressly in their respective constitutions).

self-representation. Subsection 3 concludes by discussing the scope of self-representation.

1. *Faretta v. California*

In *Faretta v. California*, Anthony Faretta was charged with grand theft.[28] Before his trial, Faretta requested to represent himself because he believed the public defender's office already suffered from a "heavy case load."[29] After entering a preliminary ruling accepting Faretta's waiver of the assistance of counsel,[30] the judge reconsidered Faretta's ability to conduct his own defense by questioning him about the hearsay rule and state laws governing challenges to potential jurors.[31] After considering Faretta's responses, the judge determined that Faretta had not only failed to make an "intelligent and knowing waiver of his right to the assistance of counsel,"[32] but he also held that Faretta had no constitutional right to conduct his own defense.[33] Accordingly, the trial court required Faretta to present his defense through appointed counsel, and he was ultimately found guilty and sentenced to prison.[34] The California Court of Appeal affirmed the trial court's decision, and the California Supreme Court denied review without opinion.[35] Subsequently, the United States Supreme Court granted certiorari to address the constitutionality of preventing Faretta from representing himself, and requiring appointed counsel to conduct his representation.[36]

Drawing upon a "consensus" of its prior precedent and state constitutions,[37] the Court—in a sharply divided opinion[38]—concluded that the Sixth Amendment guaranteed the right of self-representation in all criminal prosecutions.[39] The Court reached this conclusion after considering three inter-

28. *Id.* at 807.

29. *See id.* (internal quotation marks omitted).

30. *Id.* at 808.

31. *See id.* at 808–09.

32. *Id.* at 809–10; *see also id.* at 835 ("[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." (citing Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938))).

33. *Id.* at 810.

34. *Id.* at 811.

35. *Id.* at 812.

36. *Id.*

37. *Id.* at 817.

38. *See* People v. Dent, 30 Cal. 4th 213, 223 (2003) (Chin, J., concurring) (describing *Faretta* as being decided "over strong dissents"). Additionally, see the discussion *infra* Part II.A analyzing the dissenting opinions.

39. *Faretta*. 422 U.S. at 821.

related ideas: (1) the structure of the Sixth Amendment; (2) historical evidence identifying the right of self-representation since the country's founding; and (3) respect for the defendant's autonomy.[40]

The Court focused its textual construction of the Sixth Amendment by examining its pertinent parts: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."[41]

From this "compact statement of the rights necessary to a full defense"[42] the Court determined that the Sixth Amendment does more than guarantee that a defense will be made for the accused—it empowers the defendant to make his defense personally.[43] Reasoning that it is the defendant who must be informed of the nature and cause of the accusations against him, and the defendant who must be confronted by the witnesses against him, the Amendment grants the right to defend directly to the accused, "for it is he who suffers the consequences if the defense fails."[44] Further, because counsel only serves as an "assistant," thrusting counsel upon an unwilling defendant compromises the defendant's ability to present his defense as he sees fit.[45]

The Court buttressed its conclusion that the Sixth Amendment implies the right of self-representation through the right's origins in English and colonial legal history.[46] Examining English criminal jurisprudence, the Court noted that "it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime."[47] In fact, throughout the 16th and 17th centuries, felonious defendants were not permitted to be represented by counsel, and it was not

40. *See* Martinez v. Court of Appeals of Cal., Fourth Appellate Dist., 528 U.S. 152, 156 (2000).

41. U.S. CONST. amend. VI; *Faretta*, 422 U.S. at 818.

42. *Faretta*, 422 U.S. at 818.

43. *Id.* at 819.

44. *Id.* at 820.

45. *See id.* at 821 ("Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.").

46. *See id.* at 821–32 (discussing English and colonial jurisprudence).

47. *Id.* at 823. *But see id.* at 821–23 (discussing the Star Chamber—the only tribunal in Great Britain that required defendants be represented by counsel—which was "swept away" by revolution in 1641).

until 1836 when England formally lifted the ban on counsel in felony cases.[48]

The Court also considered colonial legal history, noting that the "insistence upon a right of self-representation was . . . more fervent than in England," a result of the colonists' "virtues of self-reliance and a traditional distrust of lawyers."[49] Nonetheless, unlike their English counterparts, colonial judges were more willing to permit felons the aid of counsel; however, the right to counsel continued to be seen as only supplementing the accused's primary right to defend himself.[50] Further, because § 35 of the Judiciary Act of 1789, which granted parties the right to "plead and manage their own causes personally or by the assistance of . . . counsel," was signed one day *before* the Sixth Amendment was proposed, the Court believed that "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the . . . right of self-representation, there would undoubtedly have been some debate or comment on the issue."[51]

Finally, having performed a textual analysis of the Sixth Amendment, as well as a historical inquiry, the Court rested its decision upon the value of individual autonomy.[52] Although the Court conceded that most defendants are better off with the as-

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48. *Id.* at 825 n.27 ("[T]he accused 'shall be admitted, after the Close of the Case for the Prosecution, to make full Answer and Defence thereto by Counsel learned in the Law, or by Attorney in Courts where Attornies practise as Counsel.'" (quoting 6 & 7 Will. 4, c. 114, s 1)).

49. *Id.* at 826 (describing the colonists' contempt for lawyers as resulting from prior experiences with lawyers "bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions."); *see also* Jeffrey P. Willhite, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro Se in Iowa*, 78 IOWA L. REV. 205, 208–09 (1992) (arguing that the colonists' "distrust for attorneys was more intense than their English counterparts because of the persecution they suffered for their opposition to the Crown"). For a detailed analysis of the colonial attitudes and practices that laid the foundations for the *Faretta* decision, see generally Aileen R. Leventon, Recent Development, *Constitutional Law—Criminal Procedure—Independent Right of Self-Representation in Sixth Amendment Permits Defendant To Act As Own Lawyer at State Criminal Trials*, 61 CORNELL L. REV. 1019, 1022–31 (1976).

50. *See Faretta*, 422 U.S. at 829–30.

51. *See id.* at 831–32. *But see id.* at 844 (Burger, J., dissenting) (arguing that the fact that the Sixth Amendment was proposed merely one day after § 35 of the Judiciary Act of 1789 was signed weakens the majority's belief, rather than reinforces it, because "under traditional canons of construction" the framers' omission—given the close temporal proximity—indicates that it was done so intentionally).

52. The majority opinion's final paragraph reads, "In *forcing* Faretta . . . to accept *against his will* a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." *Id.* at 836 (emphasis added).

sistance of counsel, the Court found this an insufficient reason to force counsel upon an unwilling defendant.[53] Because it is the "defendant, and not his lawyer or the State, [who] will bear the personal consequences of a conviction" a defendant must be empowered to decide whether he thinks it is advantageous to proceed with counsel[54]—even if it is to the defendant's detriment.[55]

Therefore, because the Court found that the structure of the Sixth Amendment implied the right of self-representation,[56] and that the right had been recognized throughout English and colonial jurisprudence,[57] as well as the fact that the framers of the Bill of Rights placed an emphasis on the importance of individual autonomy,[58] the Court emboldened Faretta's right of self-representation. This is evidenced by the Court's holding that Faretta's right was violated when the trial court required that counsel present his defense against his will.

2. Effectively Waiving Counsel

While *Faretta* was the first case authoritatively holding that the Sixth Amendment guarantees the right of self-representation in criminal prosecutions at the state and federal level,[59] the requirements to effectively waive counsel were already developing. Specifically, because a pro se defendant surrenders the benefits of counsel, a defendant's waiver of his right to counsel must be "knowing, voluntary and intelligent."[60] The Court considers an intelligent waiver as one reflecting that the defendant "knows what he is doing and his choice is made with eyes open."[61] However, when determining whether a defendant's waiver is made with "eyes open" the Court acknowledges that the defendant must be "warned specifically of the

53. *Id.* at 834 (opining that compelled representation bestows counsel's benefits "imperfectly" and that it would "lead [a defendant] to believe that the law contrives against him.").

54. The Court acknowledges that in "rare instances" a defendant may present his defense more effectively. *See id.*

55. *See id.*

56. *Id.* at 821.

57. *See id.* at 832.

58. *See id.* at 833–34 ("[T]here can be no doubt that [those who wrote the Bill of Rights] understood the inestimable worth of free choice.").

59. *See* Eugene Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 GEO. J. INT'L L. 919, 924 (2009).

60. Iowa v. Tovar, 541 U.S. 77, 88 (2004) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

61. *Id.* (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942) (internal quotation marks omitted)).

hazards"[62] and "disadvantages of self-representation" when proceeding to trial without counsel.[63] Determining whether the aforementioned requirements are satisfied involves a factual inquiry considering the "particular facts and circumstances surrounding that case."[64]

3. The Scope of the Right of Self-Representation

Having reviewed the origins of the right of self-representation, as well as the requirements of an effective waiver of counsel, it is important to understand the scope of the right. The right of self-representation is not absolute, and the Supreme Court has steadily narrowed and refined the reach of the right.[65] First, the *Faretta* Court made it clear that it does not consider a defendant's right of self-representation as equivalent to a "license to abuse the dignity of the courtroom," and held that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[66]

Second, the Supreme Court has circumscribed the right of self-representation in the context of mental competency. Because mental illnesses are prone to variation in time and in degree,[67] the Court distinguishes between the mental competency required to stand trial versus the competency required to proceed pro se.[68] Thus, in *Indiana v. Edwards*, the Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where

62. *Id.* at 89.

63. *Id.* (quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988)) (holding that the warnings must be "rigorously conveyed").

64. *Id.* at 92.

65. *See* Indiana v. Edwards, 554 U.S. 164, 171 (2008) (stating that *Faretta* "and later cases have made clear that the right of self-representation is not absolute").

66. Faretta v. California, 422 U.S. 806, 834 n.46 (1975); *see, e.g.*, United States v. Espinoza, 374 F. App'x 536, 539 (5th Cir. 2010) (finding that the defendant's refusal to answer the court's questions seeking to confirm the defendant's desire to proceed pro se provided "ample cause for concern that [the defendant] would be obstructionist" and held that his right to proceed pro se was properly denied).

67. *Edwards*, 554 U.S. at 175.

68. The *Edwards* Court found that prior cases dealing with a defendant's mental competency had "assume[ed] representation by counsel and emphasize[d] the importance of counsel." *See id.* at 174. In light of this, the Court determines that a defendant's choice to "forgo counsel at trial presents a very different set of circumstances . . . [calling] . . . for a different standard." *Id.* at 174–75.

they are not competent to conduct trial proceedings by themselves."[69] The Court reached this determination because it believed that "a right of self-representation at trial will not affirm the dignity of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[70]

Third, in *Martinez v. Court of Appeal of California, Fourth Appellate District,* the Supreme Court held that a defendant has no constitutional right of self-representation on a direct appeal in a criminal case and counsel can be required to conduct the defendant's appeal at the court's discretion.[71] Because the defendant is the one that ordinarily initiates the appellate process, and because the defendant no longer demands the presumption of innocence, "the States are clearly within their discretion to conclude that the government's interests [in the fair and efficient administration of justice] outweigh an invasion of the appellant's interest in self-representation."[72]

Fourth, the Court has held that when a defendant elects to represent himself, a judge may appoint standby counsel—even over the defendant's objection—to relieve the judge's need to "explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[73] Although the precise role of standby counsel remains undefined,[74] the Court has made clear that so long as the defendant's general control over his defense remains intact, the presence of standby counsel will not violate a defendant's Sixth Amendment rights.[75] In fact, it is permissible for standby coun-

69. *Id.* at 178.

70. *See id.* at 176 (internal quotation marks omitted).

71. *See* Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 160 (2000).

72. *See id.* at 162–63.

73. McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984) (holding that "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel . . . .").

74. *See* Anne Bowen Poulin, *Ethical Guidance for Standby Counsel in Criminal Cases: A Far Cry From Counsel?*, 50 AM. CRIM. L. REV. 211, 212 (2013) (describing standby counsel expectations as undefined, while noting varying jurisdictional interpretations).

75. *See Wiggins*, 465 U.S. at 183–84 (finding that a defendant's Sixth Amendment rights are not infringed when standby counsel "assists . . . in overcoming routine procedural or evidentiary obstacles" nor when "counsel . . . helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure" because, in the aforementioned instances, there is no "significant interference with the defendant's actual control over the presenta-

sel "to steer a defendant through the basic procedures of trial" even if it "undermines the *pro se* defendant's appearance of control over his own defense."[76]

B. THROWING THE SWITCH ON THE DEATH PENALTY, THEN FLIPPING IT BACK ON

The death penalty—capital punishment—is a polarizing issue with a long history of constitutional and moral debate.[77] Nevertheless, this Note neither advocates for nor against the death penalty. Instead, it presumes the validity of the Supreme Court's justifications for the death penalty's constitutionality under *Gregg v. Georgia*, and considers the relevant implications of those justifications when a defendant chooses to exercise his or her right of self-representation in a capital proceeding. This Section provides a brief overview of the Supreme Court's treatment of the death penalty.[78] Subsection 1 discusses the Court's holding in *Furman v. Georgia*, which rendered capital punishment unconstitutional as it was then applied. Subsection 2 examines the Court's later holding in *Gregg v. Georgia* and considers its rationale for reinstating the death penalty.

1. Power Out: *Furman v. Georgia*

In *Furman v. Georgia*,[79] the Supreme Court, for the first time, ruled directly on the constitutionality of capital punishment under the Eighth Amendment's cruel and unusual punishment clause.[80] The case, a consolidation of three separate

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tion of his defense"); John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CALIF. L. REV. 697, 712 (1984) (explaining that what this imposition sacrifices with regard to the defendant's autonomy, it makes up by furthering "society's interest in fairness").

76. *Wiggins,* 465 U.S. at 184.

77. *See, e.g.*, Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 42–49 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (arguing against the maxim that "death is different" when juxtaposed with a sentence of life without parole).

78. Brief indeed. The death penalty, in and of itself, is so controversial that it has been the topic of countless pieces of literature. *See, e.g.*, DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE (Hugo Adam Bedau & Paul G. Cassell eds., 2004); Bowers, *supra* note 77. For the purpose of this Note, however, I will consider the Supreme Court's treatment of two pivotal cases and extrapolate the reasoning from those cases into the context of self-representation.

79. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

80. *Id.* at 239–40; *see* U.S. CONST. amend. XVIII; *see also The Death Pen-*

cases, involved petitioner Furman, who had been convicted of murder, petitioner Jackson, who had been convicted of rape, and petitioner Branch, who had also been convicted of rape.[81] All three men were black males, and all three were sentenced to death.[82] In a 5–4 decision consisting of nine separate opinions, the majority found that Georgia's imposition of the death penalty unconstitutionally violated the cruel and unusual punishment clause of the Eight Amendment.[83] Justices Douglas, Stewart, and White relied largely upon the fact that the death sentences at issue were not being mandatorily imposed by the respective state legislatures and, instead, were being imposed at the discretion of the jury.[84]

Justice Douglas' concurrence embodies the Court's concern over the discretionary nature of the death penalty, observing that "the discretion of judges and juries . . . enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, . . . lacking political clout, or if he is a member of a[n] . . . unpopular minority. . . ."[85] Further, Justice Douglas interpreted the cruel and unusual punishment clause of the Eighth Amendment to "require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary" and judges to ensure the laws are not applied "sparsely, selectively, and spottily to unpopular groups."[86] Therefore, because "no standards govern[ed] the [jurors'] selection of the [death] penalty,"[87] the Court held that the state statutes operated unconstitutionally.[88]

Justice Stewart's concurrence added to the concerns articulated by Justice Douglas. Stewart believed that "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocabil-

alty, 86 HARV. L. REV. 76, 76 (1972).

81. *See Furman*, 408 U.S. at 252–53 (Douglas, J., concurring).

82. *Id.*

83. MICHAEL A. FOLEY, ARBITRARY AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY 62 (2003).

84. *The Death Penalty*, *supra* note 80, at 77. Justices Marshall and Brennan—rounding out the majority—"relied less heavily . . . on the discretionary nature of the death sentences" and could be construed as advocating for the death penalty to be per se unconstitutional. *Id.* at 79.

85. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

86. *Id.* at 256.

87. *Id.* at 253.

88. *Id.* at 256–57 (finding the laws "pregnant with discrimination [, which] is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishment").

ity."[89] However, Justice Stewart,[90] like Justices Douglas[91] and White,[92] refrained from determining whether a mandatory death penalty for a particular crime would sufficiently eliminate the discretionary nature of the death penalty, thus rendering such a statute constitutional.

2. Power On: *Gregg v. Georgia*

Because three of the five Justices comprising *Furman*'s majority opinion held that the death penalty was unconstitutional because its *administration* was "haphazard, arbitrary, and [a] capricious infliction of . . . punishment inconsistent with general constitutional protections that guarantee people the ideal of equal dignity under the law,"[93] the case did not categorically hold that the death penalty was unconstitutional. Nevertheless, the fallout from *Furman* resulted in a moratorium on the death penalty.[94] While some states decided to formally abolish the death penalty from their state constitutions,[95] other state legislatures went back to the drawing board and began crafting new death penalty statutes with *Furman* in mind.[96]

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89. *Id.* at 306 (Stewart, J., concurring). The sentiment that the death penalty is fundamentally *different* has been a recurring theme in death penalty opinions. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

90. *See Furman*, 408 U.S. at 308 (Stewart, J., concurring) (noting that "[t]he constitutionality of capital punishment in the abstract is not, however, before [the court] in these cases").

91. *See id.* at 257 (Douglas, J., concurring) ("Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.").

92. *See id.* at 310–11 (White, J., concurring) (opining that "[t]he facial constitutionality of statutes *requiring* the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues . . . than are posed by the cases before [the court]" (emphasis added)).

93. FOLEY, *supra* note 83, at 89.

94. *Introduction to the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Apr. 3, 2015) (discussing the suspension of the death penalty after *Furman* and the reinstatement of the death penalty four years later in *Gregg*).

95. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Apr. 3, 2015) (noting that North Dakota abolished the death penalty in 1973).

96. *Introduction to the Death Penalty*, *supra* note 94 (noting that 35 states drafted and enacted new death penalty statutes following *Furman*).

In *Gregg v. Georgia*,[97] the state of Georgia was back in front of the Supreme Court, but this time it was equipped with a new death penalty statute incorporating *Furman*.[98] The 7–2 majority began its analysis by examining the statutory scheme implemented to impose the death penalty. Primarily, the Court considered the effect of Georgia's decision to bifurcate the trial into two distinct parts: (1) determining the defendant's guilt or innocence—either by judge or jury; and (2) after a verdict, finding, or guilty plea is entered, consisting of the sentencing phase of the trial.[99] During the sentencing phase, after hearing additional aggravating or mitigating evidence, a judge or jury had to find that at least one out of a possible ten aggravating circumstances was present, and would then elect to impose the corresponding sentence.[100] "If the verdict [was] death, the jury or judge must specify the aggravating circumstance(s) found. In jury cases, the trial judge [would be] bound by the jury's recommended sentence."[101]

Significantly, *Furman* held that when making a determination as irrevocable as life or death, "discretion must be suitably directed and limited so as to minimize the risk of . . . arbitrary and capricious action"[102] for "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that *every* safeguard is observed."[103] In light of Georgia's bifurcated trial for capital cases, as well as the comprehensive list of factors on which a judge or jury must base their decision, the Court determined that the statute successfully alleviated the arbitrary and capricious concerns that plagued Georgia's previous statute.[104]

Having examined the origins of the right of self-representation, as well as a broad overview of the two seminal cases encapsulating death penalty jurisprudence, Part II discusses the corresponding tensions between the doctrine of self-representation and death penalty jurisprudence.

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97. Gregg v. Georgia, 428 U.S. 153 (1976).

98. GA. CODE ANN. §§ 27-2503–27-2537 (1975); *see also Gregg*, 428 U.S. at 162–68 (walking through the Georgia death penalty statute step-by-step).

99. *See Gregg*, 428 U.S. at 162–64.

100. *See id*. at 164–66 (citation omitted).

101. *Id.* at 166.

102. *Id.* at 189.

103. *Id.* at 187 (citing Powell v. Alabama, 287 U.S. 45, 71 (1932)) (emphasis added).

104. *See id.* at 206–07 (finding that the jury's discretion had been sufficiently channeled).

II. CONSTITUTIONAL CROSSROADS: ANALYZING THE IMPLICATIONS OF THE RIGHT OF SELF-REPRESENTATION IN A CAPITAL PROCEEDING

The Supreme Court has never squarely addressed the right of self-representation at trial during a capital proceeding.[105] Nevertheless, as courts and commentators continue to grapple with the parameters of self-representation, the Supreme Court appears willing to reconsider the right of self-representation if a worthy case were to present itself.[106] This Note suggests that such a case can be found when a defendant proceeds pro se in a capital proceeding. This Part addresses the implications of the right of self-representation in light of the Court's treatment of the death penalty. Section A begins by discussing *Faretta*'s constitutional underpinnings and examines why that foundation is unstable. Section B builds upon Section A by analyzing the tensions between the right of self-representation and the safeguards required in a capital proceeding. Section C critiques two commonly asserted solutions to address the negative implications stemming from the right of self-representation.

A. REVISITING THE CONSTITUTIONAL UNDERPINNINGS OF *FARETTA*

Recall that the majority opinion in *Faretta* relied upon three pillars when reaching its decision.[107] First, the majority conducted a textual interpretation of the Sixth Amendment to infer the right of self-representation.[108] Second, it conducted a historical inquiry into English and colonial legal history.[109] Third, it emphasized the importance of a defendant's free choice in criminal prosecutions.[110] Ultimately, the majority so-

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105. *See* Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 134 (1985). The Supreme Court tangentially heard a case dealing with the right of self-representation in a capital case, *see* Godinez v. Moran, 509 U.S. 389 (1993), but that case dealt with a defendant who wished to discharge court appointed counsel and enter a guilty plea. *Id.* at 392. Thus, *Godinez* only stands for the proposition that the competency required to plead guilty is the same competency required to stand trial. *Id.* at 399.

106. *Cf.* Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 164–65 (2000) (Breyer, J., concurring) (suggesting that the Court may be willing to reconsider the constitutional assumptions underlying *Faretta* upon a showing that the holding has proved "counterproductive in practice").

107. *See supra* note 40 and accompanying text.

108. *See supra* notes 41–45 and accompanying text.

109. *See supra* notes 46–51 and accompanying text.

110. *See supra* notes 52–55 and accompanying text.

lidified the defendant's right to waive assistance of counsel, thereby respecting their decision to proceed pro se.[111] However, three justices vehemently disagreed with the majority's characterization of the "right" of self-representation[112] and contested the majority's rationale.

Both dissenting opinions take issue with the majority's reliance on the fact that because the Judiciary Act of 1789—which expressly provided for the right of self-representation—was passed the day before the Sixth Amendment was proposed,[113] it lends credence to the interpretation that the Sixth Amendment implied a right of self-representation.[114] Conversely, both opinions appropriately point out that the timing of the two enactments could just as persuasively, if not more so, be used to suggest that the framers purposely left out a right of self-representation.[115] Chief Justice Burger argues that, "under traditional canons of construction, *inclusion* of the right in the Judiciary Act and its *omission* from the [Sixth Amendment] drafted at the same time by many of the same men, supports the conclusion that the omission was intentional."[116]

The dissent also takes issue with the majority's reliance on historical analysis, arguing that the majority exaggerates when it analogizes the practice of imposing counsel upon a defendant with the "notorious procedures of the Star Chamber" in Great Britain.[117] This notion is supported by the recent scholarship of

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111. *See supra* Part I.A.1.

112. Faretta v. California, 422 U.S. 806, 836–46 (1975) (Burger, C.J., dissenting); *id.* at 846–52 (Blackmun, J., dissenting).

113. Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 35 ("[P]arties may plead and manage their own causes *personally* or by the assistance of such counsel or attorneys at law . . . ." (emphasis added)).

114. *See Faretta*, 422 U.S. at 844–45 (Burger, C.J., dissenting); *id.* at 846–49 (Blackmun, J., dissenting).

115. *See id.* at 844–45 (Burger, C.J., dissenting) (opining that the "contemporaneous action of Congress" passing the right of self-representation in the Judiciary Act, should "lead judges to conclude that the Constitution leaves to the judgment of legislatures, and the flexible process of statutory amendment" to determine whether criminal defendants should be permitted to proceed pro se at trial); *id.* at 850 (Blackmun, J., dissenting) (taking the view that because the Sixth Amendment remained "conspicuously silent on any right of self-representation" despite the passing of the Judiciary Act the day before, "the Framers simply did not have the subject in mind when they drafted" the Sixth Amendment).

116. *Id.* at 844 (Burger, C.J., dissenting).

117. *Id.* at 848 (Blackmun, J., dissenting). The Star Chamber was a tribunal used in Great Britain for nearly 200 years. Cerruti, *supra* note 59, at 929–30. It required "every defendant to be represented by counsel who was willing to vouch for the defendant's intended defense." *Id.* at 930. However, the Star Chamber became tainted with corruption, and defendants felt increasingly un-

Professor Eugene Cerruti, who argues that the majority opinion in *Faretta* "misstated" the real significance of the Star Chamber's abolition, finding that the Star Chamber's downfall was not an objection to "the presence of counsel *per se* but rather to the obligation to be represented by counsel effectively in service to the crown."[118] Thus, the dissent finds that the majority reads too far into the role of self-representation in the Chamber's downfall, which, instead, merely represented the pronouncement that the corruptness of lawyers imposed upon defendants of the Star Chamber was "a punishing imposition" that put the defendants in a worse position than if they were to represent themselves.[119] However, it would be a stretch to equivocate between the context and procedures used in the Star Chamber and the modern practice of court appointed counsel in the United States. The Supreme Court has long recognized that a defendant is generally better off with court appointed counsel.[120]

Finally, Chief Justice Burger pointedly questions the majority's reliance on the significance of free choice in justifying a defendant's right of self-representation.[121] Believing that the prosecuting attorney and trial judge are "charged with . . . insuring that justice, in the broadest sense of that term, is achieved in every criminal trial," the Chief Justice argues that not only are the defendant's interests at stake, but also that the "integrity of and public confidence in the [judicial] system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel."[122] Thus, the Sixth Amendment should be read as ensuring that every criminal defendant be afforded the "fullest possible defense" and the determination as to whether the defendant can proceed pro se

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comfortable with obligatory representation by lawyers who many felt were loyal to the crown. *See id.* at 931.

118. *See* Cerruti, *supra* note 59, at 930–31. This sentiment is supported by Justice Blackmun's observation that remedies exist to alleviate a defendant from overbearing counsel, and that Faretta had no "distrust, animosity, or other personal differences" with his counsel that would have made effective counsel unlikely. *See Faretta*, 422 U.S. at 848 (Blackmun, J., dissenting).

119. Cerruti, *supra* note 59, at 931.

120. *See, e.g.*, *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."); Powell v. Alabama, 287 U.S. 45, 69 (1932) (discussing the disadvantages of self-representation, and envisioning a scenario in which the defendant, "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence").

121. *Faretta*, 422 U.S. at 839–40 (Burger, C.J., dissenting).

122. *Id.* at 839.

should be left to the discretion of the trial judge.[123] For, "[t]rue freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel . . . ."[124]

In light of the foregoing discussion, some commentators advocate that *Faretta* ought to be overruled entirely and the Sixth Amendment should no longer be read as implying a right of self-representation.[125] However, this Note argues that this is unnecessary. Although the previous discussion highlighted the weaknesses in *Faretta*'s majority opinion, there is reason to believe that the six justices comprising the majority were not so misguided.[126] In fact, the majority acknowledged that the "help of a lawyer is essential to assure" a fair trial and that "a strong argument [could] surely be made that the whole thrust of [prior precedent] most inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant."[127] However, the majority balked over the concern of a defendant's free choice, and used autonomy principles to justify curtailing the "interest of the State in seeing that justice is done in a real and objective sense."[128] Justice Blackmun argued that "[t]he procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself."[129] While the procedural concerns that worried Justice Blackmun at the time he penned his dissent proved to be valid issues that the Court would go on to address in subsequent cases,[130] the next Section focuses on the procedural, ethical, and justness concerns implicated when courts allow a

123. *Id.* at 840.

124. *Id.*

125. *See, e.g.*, John F. Decker, *The Sixth Amendment Right To Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 598 (1996) (calling the *Faretta* decision a "foolish Sixth Amendment doctrine" and finding that the "right to self-representation does not have a sound constitutional basis and raises serious policy concerns").

126. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, N.C. L. REV. 621, 638 (2005) (acknowledging that, despite the fact that *Faretta* resorted to such "flimsy" free choice rhetoric when it justified the right of self-representation, the importance of a criminal defendant's freedom nevertheless plays an "essential part [in] our modern criminal justice system").

127. *Faretta*, 422 U.S. at 832–33.

128. *Id.* at 851 (Blackmun, J., dissenting).

129. *Id.* at 852.

130. *Id.* (raising the possible procedural concerns, and lack of guidance surrounding the effective waiver of counsel, the use and parameters of standby counsel, the timeliness of waiving counsel, etc.).

defendant facing the death penalty to proceed pro se at trial.

B. The Tension Between the Right of Self-Representation and the Death Penalty

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. *Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.*"[131]

Whether or not society unanimously agrees with the notion that the death penalty is qualitatively different from a sentence of imprisonment, the sentiment has been a recurring theme in death penalty cases,[132] and it provided the motive force behind the Supreme Court's command in *Furman* that the death penalty must be administered free of arbitrariness and capriciousness, or else it would be a violation of the defendant's Eight Amendment rights against cruel and unusual punishment.[133] Nevertheless, the Court subsequently held in *Gregg* that so long as the procedural safeguards in place during capital proceedings ensure that the jury's decision to impose, or not to impose, the death penalty is implemented in a way that sufficiently reduces juror discretion, the death penalty is constitutional.[134]

However, it is interesting to note that *Faretta*, which constitutionalized the right of self-representation in criminal prosecutions, was decided in 1975—three years after the Court had found the death penalty's administration to be unconstitutional, and one year *before* the Court would decide *Gregg* and effectively lift the moratorium on the death penalty. Coincidence? Perhaps. But it is at least plausible to believe that when the Supreme Court considered the right of self-representation in *Faretta*, the Court failed to consider the implications that such a broad right would have in capital proceedings. This Section examines the nature of those implications. Subsection 1 discusses the untenable proposition of permitting a defendant to proceed pro se in a capital proceeding while simultaneously

131. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (emphasis added).

132. *See* Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (referring to the notion that death is different as a recurring "motto").

133. *See* Furman v. Georgia, 408 U.S. 238, 313–4 (1972) (White, J., concurring) (per curiam).

134. *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (finding that the jury's discretion had been sufficiently channeled).

hoping to protect the safeguards that the Court has sought to ensure when a defendant's life is at stake.[135] Subsection 2 examines the damaging effects that self-representation has with regards to the State's and society's interests in the fair administration of judicial proceedings, which are amplified in the context of capital proceedings.

1. Over the Centerline: Tensions Between Free Choice and Safeguards in Capital Proceedings

When the majority in *Faretta* declared that the Sixth Amendment right to assistance of counsel implied the right of self-representation, it was cognizant of the fact that a pro se defendant would relinquish "many of the traditional benefits associated with the right to counsel."[136] Without the aid of counsel, the pro se defendant must wade through intricate trial procedures, successfully raise time-sensitive issues, and decipher the judge and prosecuting attorney's legal jargon, all the while trying to present their best defense through the submission of admissible evidence. Ultimately, the lay defendant runs the risk of being "put on trial without a proper charge, and convicted upon incompetent evidence" because without "the guiding hand of counsel" at each stage of the criminal proceeding, "though he [may] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[137]

Therefore, given the serious disadvantages that a pro se defendant inflicts upon himself when he chooses to litigate his own case,[138] the severity of his potential sentence ought to be a relevant consideration when assessing the soundness of the right of self-representation. And there is no sentence that carries a more severe punishment than the imposition of death.[139] Because of the severity and uniqueness of the death penalty, the Supreme Court has heightened the procedural safeguards

135. *See id.* at 187 (citing Powell v. Alabama, 287 U.S. 45, 71 (1932)).

136. Faretta v. California, 422 U.S. 806, 835 (1975).

137. Powell v. Alabama, 287 U.S. 45, 69 (1932); *see also* Pearson, *supra* note 75, at 708 ("A typical untrained defendant is no more likely to know her way through the trial ritual than the average layperson is to comprehend the intricacies of how a priest performs a religious ritual.").

138. It is worth noting that there may be exceptional circumstances in which a defendant is especially intelligent or legally-versed. However, this is truly the exception and not the rule. And even a lay defendant that is familiar with legal concepts will not have the same proficiency as a regularly practicing defense attorney.

139. *See Furman*, 408 U.S. at 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity.").

in capital proceedings to minimize the potential for the "haphazard, arbitrary, and capricious" imposition of the death penalty.[140] Accordingly, the Court recognizes death penalty statutes that incorporate a bifurcated trial—consisting of two separate phases: (1) the guilt determination phase; and (2) the sentencing phase, where the jurors consider aggravating and mitigating factors in order to guide their decision—as a valid way of imposing the death penalty.[141] Essentially, "[i]n order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case' the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime."[142]

However, the Court's reliance upon the sentencing phase to quell its concern over juror discretion—and fear of arbitrarily imposing the death penalty—is undermined by two observations. First, there is no mandatory requirement that mitigating evidence be introduced during the sentencing phase of a capital proceeding.[143] Second, even for the states that do require the presentation of mitigating evidence during the sentencing phase,[144] there is good reason to believe that the professed arbitrariness-correcting effects that trial bifurcation has in the context of capital proceedings are overstated.[145]

In William Bowers' study of juror decision making in bifur-

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140. FOLEY, *supra* note 83, at 89.

141. *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976).

142. Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (citation omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

143. *See* Toone, *supra* note 126, at 630 ("Lower state and federal courts have reached conflicting conclusions as to whether defendants should be allowed to waive [the presentation of mitigating evidence] . . . . The majority of courts, however, have concluded that the Constitution permits defendants to waive [the presentation of mitigating evidence].").

144. *See, e.g.*, Russ v. State, 73 So. 3d 178, 189–90 (Fla. 2011) (per curiam) (holding that when a defendant waives the right to present mitigation evidence, the trial court is required to order the preparation of a pre-sentencing investigation (PSI) and "in its discretion, may call witnesses to present mitigation evidence to the extent that the PSI alerts the court to the existence of significant mitigation"); State v. Koedatich, 548 A.2d 939, 951 (N.J. 1988) (finding that the constitutional necessity to ensure that the death penalty is not "wantonly and . . . freakishly imposed" requires that the defendant present mitigating evidence to the jury (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring))).

145. *See generally* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (finding that a great number of jurors serving in capital cases admit to "early punishment decision making" and examining the potential explanations for this occurrence).

cated capital trials, he surveyed 916 capital jurors in eleven states, and his findings suggested that "many jurors reached a personal decision concerning punishment before the sentencing stage of the trial"[146] and revealed that "jurors who take an early stand on punishment [tend] to stick with it" and "are largely unreceptive to both evidence and arguments presented later in the trial."[147] Thus, because "virtually half of the capital jurors" reach a decision about a defendant's punishment on the basis of what they learn during the *guilt determination phase* of a capital proceeding,[148] well before mitigating factors are presented to the jury during the sentencing phase, the significance of the defendant's quality of advocacy during the guilt determination phase is intensified. Therefore, the inherent tension between a defendant's free choice and the procedural safeguards during capital proceedings is apparent. Because each time a defendant elects to proceed pro se—manifesting his right to freely choose the manner with which to personally present his defense—he not only disadvantages himself against the prosecution, but he undermines the effectiveness of state death penalty statutes in avoiding the arbitrary and capricious imposition of the death penalty.[149]

2. Compromising Fairness, Legitimacy and the Adversarial Nature of a Criminal Trial in Favor of Free Choice

The Supreme Court believes that criminal trials under the Constitution serve the "clearly defined purpose[] to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."[150] One critical way in which the United States' criminal justice system aims to effectuate this goal is through its adversarial process.[151]

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146. *Id.* at 1477.

147. *Id.* at 1493.

148. *See id.* at 1488 (finding that "(48.3%) [of jurors] in the eleven . . . states indicated that they thought they knew what the punishment should be during the guilt phase of the trial").

149. *See id.* at 1489 ("This blatant departure from the Court's expectations concerning the timing of jurors' sentencing decisions suggests that post-*Furman* capital statutes are not operating as the Court supposed."). This furthers the argument that counsel should be required in capital proceedings, regardless of whether the presentation of mitigating evidence is required or not. For a discussion of the effects of requiring mitigating evidence, see *infra* Part II.C.2.

150. Estes v. Texas, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring).

151. *See* Toone, *supra* note 126, at 641 (explaining that the American criminal justice system depends on the "parties' aggressive pursuit of their own

The fact that the criminal justice system utilizes an adversarial system should not be taken for granted. It reflects societal values regarding personal dignity, security, and legitimacy.[152] For instance, Professor Fuller hypothesized that a judge acting "without the aid of partisan advocacy" has a tendency to reach premature conclusions or pursue certain theories satisfying their "understandable desire" to bring coherence and order to the trial.[153] However, Fuller notes that "what starts as a preliminary diagnosis designed to direct the inquiry tends . . . to become a fixed conclusion."[154] This preliminary diagnosis subtly ensures that all evidence confirming the judge's theory makes a "strong imprint" on his mind "while all [evidence] that runs counter to it is received with diverted attention."[155]

Fortunately, this sort of judicial evidentiary-funneling is minimized in an adversarial system. By inserting dueling advocates, the prosecution and defense strive to ensure that all material facts are vetted. In a study comparing adversarial and inquisitorial fact-finding, it was found that both regimes tend to "cease their fact search as soon as they became confident of their assessment of the legal conflict."[156] Essentially, when the distribution of facts affirms their "preliminary diagnosis," fact-finders take their foot off the gas and begin coasting toward the finish line—confident that the facts support their position. However, the study's most revealing finding was that in adversarial contexts, once an attorney learns that his client's position is "least supported by the initial distribution of evidence" those attorneys tended to conduct their fact-finding investigations more diligently than in non-adversarial contexts.[157] This not only effectuates the United States' requirement that a criminal defendant be found guilty "beyond a reasonable doubt,"[158] but it increases the public's confidence in the judicial system as a whole. When the public trusts that the adversarial system is tirelessly working to ensure that all pertinent facts are consid-

interests").

152. *See* Freedman, *supra* note 17, at 73–74.

153. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

154. *Id.*

155. *Id.*

156. E. Allen Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1141 (1973).

157. *See id.* at 1142–43.

158. *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

ered, the process is legitimized because the public can see justice through the protection of the innocent from erroneous convictions, while holding guilty persons accountable.

Accordingly, Sixth Amendment jurisprudence, which guarantees the effective assistance of counsel to all criminal defendants,[159] is premised upon the idea of "promoting 'partisan advocacy on both sides of a case'" in furtherance of the adversarial system's goal to ensure "'that the guilty be convicted and the innocent go free.'"[160] Thus, the right to counsel is a mechanism working to ensure the integrity of the criminal justice system, which is "a common, *societal* interest embodied both in the Due Process Clause of the Fifth Amendment and in the Cruel and Unusual Punishment Clause of the Eighth Amendment."[161]

Conversely, the Sixth Amendment's embedded right of self-representation safeguards the autonomy of the accused, which is an *individual* interest intimate to the defendant alone.[162] Consequently, the two rights are at a "philosophical tension" in which the right of self-representation "often corrupts the criminal process by replacing trained and experienced counsel with an autonomous yet ineffective advocate."[163] Because the typical pro se defendant lacks the legal skill required to adequately protect himself,[164] he makes the jury's decision to convict all the easier. And when a conviction carries a potential death sentence—a sentence that is unique in its finality[165]—the importance of zealous advocacy is of the utmost priority.[166] Assis-

159. U.S. CONST. amend. VI.

160. *See* Toone, *supra* note 126, at 641 (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

161. Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 169 (2001) (emphasis added).

162. *See* Faretta v. California, 422 U.S. 806, 834 (1975) ("The right to defend is *personal*. The defendant, and not his lawyer or the State, will bear the *personal* consequences of a conviction. It is the defendant, therefore, who must be free *personally* to decide whether in his particular case counsel is to his advantage." (emphasis added)).

163. *See* Sabelli & Leyton, *supra* note 161, at 169.

164. *See* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

165. *See* Whitmore v. Arkansas, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting) (recognizing the "unique" and "irrevocable nature of the death penalty").

166. This need for effective advocacy is amplified in light of the previous Section discussing the lack of a constitutional requirement to present mitigation evidence during sentencing, as well as Professor Bowers' study, which revealed that nearly fifty percent of jurors reach their determination of whether the defendant should receive a sentence of life or death during the guilt-

tance of counsel not only offers the defendant his best chance to present a formidable defense,[167] but it effectively transforms a one-sided affair into a more even playing field, functioning to legitimize the public's confidence in the capital proceeding by thwarting an "easy conviction."[168]

Moreover, the crux of the tension between the right of self-representation and capital proceedings begins by effectively removing one adversary from the proceeding. Due to the lay defendant's unfamiliarity with the intricacies of the practice of law,[169] the right of self-representation unjustly compromises the quality of the adversarial process,[170] which ultimately diminishes the public's confidence in the integrity of the judicial system as a whole.[171] With this in mind, Section C proceeds to consider various suggestions that scholars and commentators often advance as viable ways to minimize the effect of the aforementioned concerns.

C. SCHOLARLY ATTEMPTS HAVE FAILED TO REACH A SATISFACTORY SOLUTION

Having now considered the constitutional infirmity of *Faretta*, as well as the tensions that arise when considering the right of self-representation in the context of a capital proceeding, this Section considers two frequently advanced proposals to alleviate these concerns. Subsection 1 examines suggestions that courts should enhance, and improve, the implementation of standby counsel in pro se cases. Subsection 2 considers arguments advancing the notion that the presentation of mitigation evidence should be required in all capital proceedings, even if the defendant desires not to proffer such a defense.

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determination phase of a capital proceeding. *See* Bowers et al., *supra* note 145, at 1493; discussion *supra* Part II.B.1.

167. An effective defense is not merely an impassioned one, which surely a pro se defendant could provide—but it requires the legal skill and proficiency with trial procedure that can only be guaranteed through assistance of counsel.

168. *See* Faretta v. California, 422 U.S. 806, 839–40 (1975) (Burger, C.J., dissenting) (expressing concern that a defendant's waiver of counsel might result in an easy conviction that would undermine the integrity of the judicial proceeding).

169. *See Johnson*, 304 U.S. at 462–63.

170. *See* Sabelli & Leyton, *supra* note 161, at 169 (explaining that self-representation effectively removes one adversary from the adversarial process).

171. *Cf. Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting) ("Nor is it accurate to suggest . . . that the quality of his representation at trial is a matter with which only the accused is legitimately concerned.").

1. Increasing or Mandating the Role of Standby Counsel

When a defendant exercises his right of self-representation, the Supreme Court holds that a pro se "defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant" that would normally be handled by appointed counsel.[172] These considerations often motivate judges to appoint standby counsel to a pro se defendant, whereby the standby counsel guides the defendant through the basic procedural and courtroom protocols[173] and remains prepared in case the defendant's self-representation is revoked.[174]

However, the Supreme Court has not granted a constitutional right to the appointment of standby counsel, nor has it prescribed a minimum right of assistance to be performed by standby counsel once one is appointed.[175] Nevertheless, the increased role of standby counsel has been a frequent rallying cry by commentators wishing to retain the defendant's Sixth Amendment right of self-representation, while alleviating the fairness and efficiency concerns it entails.[176] Professor Poulin, one of the leading advocates for increasing the role of standby counsel, believes that "[t]he courts should permit, and standby counsel should provide, the maximum assistance consistent with the limits imposed by *McKaskle*."[177] Therein lies the problem—the guidance that the Court has provided regarding the scope of standby counsel is largely undefined.[178] When a court exercises its discretion to appoint standby counsel, the benefits

172. McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984).

173. *Id.* at 183.

174. *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 704 (2000) (stating that some courts expect standby counsel to be "prepared to assume representation of the defendant" if he or she abandons pro se representation).

175. *See* Decker, *supra* note 125, at 532–33 (citing Molino v. Dubois, 848 F. Supp. 11, 13–14 (D. Mass. 1994)).

176. *See* Poulin, *supra* note 174, at 681 ("*Faretta* created tension between the defendant's right to proceed pro se and society's interest in maintaining the fairness of the criminal justice system."); *see also* Pearson, *supra* note 75, at 713 (advocating for mandatory standby counsel in California criminal proceedings and arguing that standby counsel can "serve to significantly lessen the negative effects of a pro se defense, without hampering its exercise").

177. Poulin, *supra* note 174, at 720.

178. *See* Pearson, *supra* note 75, at 715 ("[T]he exact nature of the proposed standby counsel is a complex question."); Poulin, *supra* note 174, at 676 (referring to standby counsel as occupying a "twilight zone of the law" in which "an attorney may be unsure of her duties and the extent of her obligation").

are readily apparent; standby counsel is an effective way to ensure a pro se defendant follows regular courtroom protocol and minimizes "the inefficiency and disruptions of a layperson presenting her own case."[179] However, at the same time, standby counsel enters a "treacherous zone of representation" where he must avoid "undermin[ing] either the defendant's actual control of the defense or the appearance that the defendant controls the defense."[180] What would it look like to undermine the control of pro se defendant's defense? Would it undermine a pro se defendant's control if a judge appointed standby counsel against the pro se defendant's objection? The Supreme Court believes not.[181] Similarly, what would constitute undermining a pro se defendant's *appearance* of control? Would permitting standby counsel to conduct the pro se defendant's closing argument diminish his appearance of control?[182] What if standby counsel cross-examined witnesses?[183] What if a judge literally introduced standby counsel to the jury as "the attorney for the defendant"?[184] In each instance, courts have ruled in the negative—proving that it is exceedingly difficult to "destroy [a] jury's perception that the defendant is representing himself."[185]

Nevertheless, even if the scope of standby counsel was more carefully prescribed, it seems like an utter contradiction to assert that the Sixth Amendment is entrenched in notions of personal autonomy, while simultaneously permitting standby counsel to have such far-reaching influence on the pro se defendant's defense. Further, it is hard to believe that the *Faretta* Court, after expressly discussing the importance that a defendant's waiver of counsel be done "knowingly" once made "aware

179. Poulin, *supra* note 174, at 702.

180. Poulin, *supra* note 74, at 212–13.

181. McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection . . . .").

182. *See id.* at 182–83 (finding that standby counsel's closing argument did not infringe upon Defendant's right of self-representation because Defendant permitted standby counsel to do so).

183. *See* United States v. Heine, 920 F.2d 552, 555 (8th Cir. 1990) (rejecting Defendant's assertion that standby counsel interfered with his right of self-representation and, instead, holding that Defendant "impliedly waived his right to proceed *pro se* by acquiescing to [standby counsel's] increasingly active role at trial").

184. Ramos v. Racette, 726 F.3d 284, 289 (2d Cir. 2013) (finding that the "mischaracterization did not cross *McKaskle*'s substantial interruption threshold for a constitutional violation" (internal quotation marks omitted)).

185. *McKaskle*, 465 U.S. at 178.

of the dangers and disadvantages of self-representation,"[186] would have anticipated such intrusive action on behalf of court appointed standby counsel.

2. Requiring the Presentation of Mitigating Evidence During the Sentencing Phase of Capital Proceedings

Although the previous Section discussed the appointment of standby counsel when a defendant elects to proceed pro se, which applies generally to all criminal prosecutions, this Section deals exclusively in the context of a pro se defendant in a capital proceeding. Many scholars have suggested that the presentation of mitigating evidence must be required—even over a pro se defendant's objection—during the sentencing phase of a capital proceeding in order to comply with the heightened procedural safeguards of death penalty jurisprudence.[187] Because most courts allow pro se defendants to waive the presentation of mitigating evidence during sentencing, these scholars believe that the effect is irreconcilable with the constitutional requirement that the death penalty not be arbitrarily imposed.[188] A jury that "hears only the prosecutor's . . . presentation of the aggravating circumstances that support execution will lack the ability to assess 'the uniqueness of the individual'" which exacerbates, instead of alleviates, the concern of juror discretion.[189]

However, most courts grant pro se defendants the discretion to forgo presenting mitigation evidence during the sentencing phase because "[t]he core of a defendant's right to pro se representation is his ability to preserve actual control over the case he chooses to present to the jury."[190] Thus, requiring a pro se defendant to present mitigating evidence against his will would effectively usurp the defendant's ability to control what

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186. Faretta v. California, 422 U.S. 806, 835 (1975).

187. *See, e.g.*, Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right To Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 96 (2002) ("[S]ociety's interest in non-arbitrary and consistent application [of the death penalty] requires assurances of guilt and the appropriateness of the death sentence. These assurances are undermined when a defendant [waives the presentation of mitigation evidence].").

188. *See* Rieder, *supra* note 105, at 152 (arguing that "courts should require that mitigating evidence be presented on the defendant's behalf over and above his objections").

189. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

190. United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002) (citing *McKaskle*, 465 U.S. at 178).

he presents to the jury—violating his Sixth Amendment right of self-representation.[191]

Moreover, not only does requiring the presentation of mitigating evidence encroach upon the free-choice ideal that the right of self-representation seeks to embolden, but there is good reason to believe that any fairness or procedural-correcting effects its presentation might have in the context of a capital proceeding are overstated.[192] Recall, in William Bowers' study of juror decision making in bifurcated capital trials,[193] the results indicated that most jurors admit to having been "absolutely convinced" of their early stance on the defendant's punishment and adhered to their respective stance throughout the trial.[194] In fact, there is evidence that a juror's "[p]re-existing feelings that "death is the only acceptable punishment for many kinds of aggravated murder" and the belief that "premeditated murder requires the death penalty substantially contribute[s] to an early pro-death stand."[195] On the other hand, evidence also suggests that "[e]arly pro-life stands are largely independent of death penalty values . . . but they are strongly influenced by lingering doubt about the defendant's guilt."[196] Therefore, as Bowers astutely points out, the guilt-determination phase of trial "has become a venue for advocating punishment stands and for injecting punishment considerations into the guilt decision."[197] Accordingly—in the context of a capital proceeding—not only would requiring a pro se defendant to present mitigating evidence fail to sufficiently respect the defendant's autonomy to choose the manner in which he presents his defense to the jury, but evidence suggests that the coerced presentation of mitigating evidence would fail to meaningfully lessen the discretionary and arbitrariness concerns that bifurcated trials seek to eliminate in the first place.[198]

To reiterate, as the forgoing discussion indicates, due to

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191. *Id.* (holding that standby counsel's attempt to present mitigating evidence against the wishes of the pro se defendant would violate the defendant's Sixth Amendment right of self-representation).

192. *See* discussion *supra* Part II.B.1.

193. *Id.*

194. *See* Bowers et al., *supra* note 145, at 1546.

195. *Id.*

196. *Id.*

197. *Id.*

198. *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1041 (2001) (finding a pattern that "mitigating factors play a disturbingly minor role in jurors' deliberations about whether a defendant should be sentenced to death").

the inherent tension between self-representation and the safeguards necessary to ensure that capital proceedings avoid arbitrary and capricious impositions of the death penalty,[199] some commentators suggest that standby counsel offers an effective way for pro se defendants to assert their autonomous right to present their own defense, while still allowing a defendant to navigate his way through complex capital proceedings.[200] However, not only has standby counsel been inconsistently applied,[201] but due to its imprecise scope, standby counsel frequently encroaches upon a pro se defendant's autonomous representation—the very notion that commentators attempt to sustain.

Additionally, other commentators suggest that requiring the presentation of mitigation evidence during the sentencing phase of capital proceedings affords an alternative way to conserve self-representation, while effectuating the safeguards demanded in capital proceedings.[202] Nevertheless, aside from the untenable suggestion that a pro se defendant's autonomy is maintained despite *requiring* that they present mitigating evidence during the sentencing phase, Professor Bower's' study—indicating that most jurors determine their stance on sentencing during the guilt-determination stage[203]—undermines the perceived effectiveness of such a proposal. Thus, Part III proposes a novel approach that squarely addresses the tension between self-representation and the safeguards required in capital proceedings.

III. QUALIFYING THE RIGHT OF SELF-REPRESENTATION TO ACCOMMODATE FOR CAPITAL PROCEEDINGS

Nearly four decades ago, *Faretta v. California* held that the Sixth Amendment implied the right of self-representation.[204] As a 6–3 decision, the majority and dissenting opinions were utterly divided. Although the majority grounded its holding in a textual interpretation, which it supported through a historical inquiry, the true lynchpin of the right of self-representation has proved to be the respect for a defendant's autonomy when con-

199. *See supra* note 133 and accompanying text.

200. *See supra* Part II.C.1.

201. *Cf. supra* note 178 and accompanying text (explaining the complex and undefined role of standby counsel).

202. *See supra* Part II.C.2.

203. *See supra* notes 194–94 and accompanying text.

204. Faretta v. California, 422 U.S. 806, 821 (1975).

ducting his criminal defense.[205] In *Martinez v. Court of Appeal of California, Fourth Appellate District*, a case illustrating the continuing polarization of *Faretta*, Justice Breyer candidly acknowledged that judges sometimes express "dismay about the practical consequences of that holding."[206] In fact, Justice Breyer expressed a willingness to "reconsider the constitutional assumptions that underlie" *Faretta* if it could be shown that the right of self-representation has proved "counterproductive in practice."[207]

Given the tensions existing between the right of self-representation and the fair and non-arbitrary administration of the death penalty,[208] self-representation in capital proceedings is counterproductive. A solution to this problem cannot be sufficiently achieved through mere peripheral modifications, such as expanding and defining the use of standby counsel,[209] or by requiring the presentation of mitigating evidence during the sentencing phase.[210] Instead, the right of self-representation should be categorically denied to capital defendants. Section A proposes that the right of self-representation be eliminated in capital proceedings, and discusses how to effectuate such an elimination. Section B suggests that the courts can use the right to effective assistance of counsel to serve as a check on court-appointed counsel, ensuring that a defendant's autonomy

205. This is supported by the Supreme Court's admission that "the original reasons for protecting [the right of self-representation] do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need—although not always the desire—for self-representation." Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 158 (2000). Thus, whatever historical *need* there may have been for the right of self-representation when the nation was founded—presumably stemming from the colonists' distrust of lawyers—has been tempered by increased availability of competent counsel. However, the Court notes that just because the need is no longer as apparent, it does not change a potential defendant's "desire" for self-representation. *Id.*; *see also* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right To Control the Case*, 90 B.U. L. REV. 1147, 1155 (2010) (explaining that the concept of autonomy provided the background for the Court's "recognition of the right of self-representation" and that "the Court has since made clear that '[t]he right to appear *pro se* exists to affirm the dignity *and autonomy* of the accused'" (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984))).

206. *Martinez*, 528 U.S. at 164 (Breyer, J., concurring) (citing United States v. Farhad, 190 F.3d 1097, 1107 (9th Cir. 1999) (Reinhardt, J., concurring) ("The right to self-representation . . . frequently, though not always, conflicts squarely and inherently with the right to a fair trial.")).

207. *See id.* at 164–65.

208. *See* discussion *supra* Part II.B.

209. *See* discussion *supra* Part II.C.1.

210. *See* discussion *supra* Part II.C.2.

is respected through his ability to influence his defense.

A. REMOVING THE RIGHT OF SELF-REPRESENTATION FOR CAPITAL DEFENDANTS

As the number of defendants electing to proceed pro se continues to rise,[211] courts and scholars alike have continued to grapple with the right of self-representation. And, as defendants exercise their right of self-representation in capital proceedings, courts are becoming increasingly uncomfortable with the inherent tension of respecting a defendant's Sixth Amendment right of self-representation while attempting to simultaneously administer the death penalty in a way that does not violate that defendant's Eight Amendment rights—i.e., guarding against arbitrary and discretionary sentencing.[212] Justice Chin of the California Supreme Court—the State that spawned *Faretta*—suggests that "[t]here is much to be said for modifying *Faretta*, at least in capital cases;" however, he follows *Faretta* and its progeny "under compulsion" because it is the law of the land.[213] This does not need to be the case.

Article III of the Constitution vests the "judicial Power of the United States . . . in one supreme Court."[214] Further, it is the "province and duty of the judicial department to say what the law is,"[215] and that pronouncement "shall be the supreme Law of the Land."[216] Thus, if the Supreme Court were to grant certiorari over a case involving a pro se defendant in a capital proceeding, it would be entirely within the Court's authority to determine, as a matter of first impression,[217] whether allowing a defendant to proceed pro se in a capital proceeding inherently violates the defendant's Eighth and Fourteenth Amendment

211. *See* Marie Higgins Williams, Comment, *The* Pro Se *Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 815 (2000) (noting that "it is clear that 'increasing numbers of Americans are going solo in every venue'" (quoting Laura Parker & Gary Fields, *Do-It-Yourself Law Hits Courts*, USA TODAY, Jan. 22, 1999, at 3A)).

212. *See* Rieder, *supra* note 105, at 134 ("[L]ower federal and state courts have begun to confront the conflict between the right of self-representation proclaimed in *Faretta* and the state's duty to prevent the arbitrary imposition of the death penalty.").

213. *See* People v. Dent, 65 P.3d 1286, 1291, 1293 (Cal. 2003) (Chin, J., concurring).

214. U.S. CONST. art. III, § 1.

215. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

216. U.S. CONST. art. VI, cl. 2.

217. *See* Rieder, *supra* note 105, at 134 (finding that "the Supreme Court has never addressed the issue" of self-representation in a capital proceeding).

rights to a fair and non-arbitrary death penalty proceeding.

Accordingly, much like the Court's previous decisions limiting the right of self-representation, such as when a defendant acts in a way that defies the dignity of the courtroom,[218] or when a defendant lacks the requisite mental competency to conduct his own defense at trial,[219] or its holding that there is no right of self-representation on appeal from a criminal conviction[220]—the Court can, and should, similarly deny the right of self-representation during capital proceedings.

The assistance of counsel empowers defendants to present a formidable defense at trial,[221] it levels the playing field with the prosecution, and it serves to legitimize the public's confidence in the capital proceeding by thwarting an "easy conviction."[222] Thus, requiring counsel in capital proceedings not only furthers the adversarial nature of the trial, but it enables the defendant to put forth his best defense before the jury at a time when it has been statistically determined that jurors tend to entrench themselves in their decision regarding a sentence of life or death.[223] Although detractors might suggest that court appointed counsel is largely ineffective,[224] the fact remains that these are licensed, experienced trial attorneys that are far more

218. *See* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (declaring that the "right of self-representation is not a license to abuse the dignity of the courtroom" and doing so warrants the termination of "self-representation by a defendant who deliberately engages in serious and obstructionist misconduct").

219. *See* Indiana v. Edwards, 554 U.S. 164, 178 (2008) ("[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.").

220. *See* Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 163 (2000) (finding that the "autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*" and, therefore, "[s]tates are clearly within their discretion to conclude that the government's interests outweigh the invasion of the *appellant's* interest in self-representation" (emphasis added)).

221. *See supra* note 175.

222. *See Faretta*, 422 U.S. at 839–40 (Burger, C.J., dissenting) (expressing concern that a defendant's waiver of counsel might result in an easy conviction that would undermine the integrity of the judicial proceeding).

223. *See* Bowers et al., *supra* note 145, at 1488 ("Virtually half of the capital jurors (48.3%) in the eleven . . . states indicated that they thought they knew what the punishment should be during the guilt phase of the trial.").

224. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 467 (2007) (suggesting that "the quality of court-appointed counsel is breathtakingly low in many jurisdictions").

prepared to navigate the procedural landscape of a capital proceeding than a lay defendant.[225]

Thus, when the opportunity presents itself (i.e., a pro se defendant litigating a capital case), the Supreme Court should grant certiorari to finally address the tension between the right of self-representation and the procedural safeguards required in capital proceedings. Then, in light of the foregoing discussion, the Justices should act in accordance with their constitutional authority to qualify the right of the self-representation[226] by eliminating it in the context of capital proceedings.

B. INVIGORATING THE ASSISTANCE OF COUNSEL

In order for the Supreme Court to most effectively institute its modification of the Sixth Amendment right of self-representation—by denying it in capital proceedings—it should strengthen its commitment to assistance of counsel. For, not only does the Constitution guarantee the assistance of counsel to a criminal defendant,[227] but the Court must provide *effective* assistance of counsel.[228] When a court appoints counsel to represent a defendant in a capital proceeding, the lawyer-client relationship is unquestionably formed.[229] Thus, the lawyer is ethically required to zealously advocate on behalf of his client in a way that furthers the defendant's objectives,[230] and in a fashion that respects the defendant's decisions.[231] However, as scholars

225. *See Martinez*, 528 U.S. at 161 ("Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'" (quoting Decker, *supra* note 125 at 598)).

226. Recall that the Supreme Court has already qualified the right of self-representation in a number of contexts. *See* discussion *supra* Part I.A.3.

227. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

228. *See* Strickland v. Washington, 466 U.S. 668, 685–86 (1984) (finding it "is not enough" that a lawyer be "present at trial alongside the accused" but, instead, "'the right to counsel is the right to the effective assistance of counsel'" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))).

229. Although the ABA Model Rules of Professional Conduct are silent with regards to the formation of the lawyer-client relationship, the Restatement provides that, "A relationship of client and lawyer arises when . . . (2) a tribunal with power to do so appoints the lawyer to provide the services." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

230. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2013) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

231. *See id.* ("A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

often point out, counsel can find themselves in situations where a client's desires are inconsistent with what the lawyer believes is in the client's best interest.[232] This scenario—while challenging to counsel—provides courts with a meaningful opportunity to ensure that a defendant's autonomy is respected by appointed counsel through the doctrine of ineffective assistance of counsel.

In order for a defendant to prove that counsel was ineffective, he must show: (1) that the defense counsel's performance was deficient; and (2) that the defense counsel's "deficient performance prejudiced the defense."[233] In order for a defendant to establish counsel's deficiency, the errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[234] This requires a showing that "counsel's representation fell below an objective standard of reasonableness."[235] Further, to establish prejudice, the defendant must show that the errors "were so serious as to deprive the defendant of a fair trial" with a reliable result.[236] Some scholars believe that this standard is too difficult for a defendant to satisfy[237] because, as the *Strickland* Court announced, "[i]t is not enough for the defendant to show that the errors had some *conceivable* effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test."[238] Moreover, it has been suggested that the *Strickland* standard merely allows reviewing courts to deal "efficiently" with claims of ineffectiveness, "rather than seriously address the potential injustice problems caused by incompetent trial counsel."[239]

However, others believe that various exonerations of inno-

232. *See, e.g.*, Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 807 (1990) (discussing a scenario in which a defendant wants to waive offering mitigating evidence while counsel believes that doing so would be against the client's interests).

233. *Strickland*, 466 U.S. at 687.

234. *Id.*

235. *Id.* at 688 ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

236. *Id.* at 687.

237. *See* Hashimoto, *supra* note 224, at 467 ("The Court . . . has set the standard for proving ineffective assistance of counsel very high." (emphasis omitted)).

238. *Strickland*, 466 U.S. at 693 (emphasis added).

239. Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 67 (1986).

cent individuals have resulted in courts beginning to do more to protect the rights of the accused by ensuring the effective assistance of counsel.[240] The Supreme Court should continue this trend and use the doctrine of ineffective assistance of counsel as a mechanism to ensure a capital defendant's autonomy interests are still respected, despite the fact that self-representation was denied.

This can be evidenced by a showing that a defendant successfully influenced the way in which counsel presented his defense to the jury. Furthermore, not only can the courts use the doctrine of ineffective assistance of counsel as a sword to defend a capital defendant's autonomy, but courts can also take measures to shield it as well. For example, lower courts can better see that a capital defendant receives effective assistance by employing judicial monitoring initiatives, whereby court-appointed counsel would be monitored throughout the capital proceeding in order to reduce the potential of ineffective assistance of counsel—or at least identify the issue, and rectify the situation.[241]

Indeed, Professor Richard Klein noted that trial courts are well equipped to monitor a defense counsel's competence at trial,[242] and further argues that trial courts have a "special burden" when presiding over court-appointed counsel.[243] In such a case, the court must "notify the attorney about the appointment early enough in the process so that [counsel] has adequate time to prepare the defense. The court must also ensure that the counsel appointed is qualified" to handle cases raising "complex and serious allegations against the defendant."[244] To facilitate these objectives, Professor Klein cleverly proposed that criminal cases adopt a pretrial conference similar to a Rule 16 conference in civil litigation.[245] During the conference, or "monitor-

240. *See* Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, CRIM. JUST., Fall 2003, at 37, 37.

241. *See* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 532 (1988) (suggesting that courts adopt "judicial monitoring" procedures where courts examine an attorney's degree of preparation leading up to the trial).

242. *Id.* at 566 ("The trial judge has immense advantages over the appellate courts in observing the quality of representation; [the judge] may become aware of inadequate lawyering that would not be obvious by the mere review of the record.").

243. *Id.* at 570.

244. *Id.*

245. *Id.* at 580. *See generally* FED. R. CIV. P. 16 (requiring attorneys to appear for a pretrial conference designed to schedule and effectively manage a

ing session," the judge would meet with defense counsel to discuss discovery requests, what legal issues have been researched, potential witnesses, and "how frequently he has met with the client."[246] Within the parameters of this Note, Professor Klein's proposed monitoring session provides an opportunity for a judge to conduct a formal inquiry into the defendant's objectives and inclinations. By incorporating Professor Klein's hands-on approach, a trial judge can effectively ensure that a defendant's autonomy interests are not entirely jeopardized in capital proceedings.

Moreover, despite the potential contentions that assistance of counsel is generally ineffective, when considering the alternatives—either self-representation, or self-representation with court-appointed standby counsel—it is hard to believe that a defendant's defense would be any less effective *with* appointed counsel. Indeed, just the opposite, it is much more likely that a defendant's defense, with assistance of counsel, will be superior to a defense he presented himself.

CONCLUSION

When *Faretta v. California* held that the Sixth Amendment implied the right of self-representation, the Court empowered criminal defendants to waive their rights to assistance of counsel—even against their own self-interest—and enabled defendants to represent themselves as they see fit, "for it is he [the defendant] who suffers the consequences if the defense fails."[247] Since *Faretta*, the right of self-representation has proved to be, by and large, a right undergirded by a respect for a criminal defendant's individual autonomy.[248] However, this sentiment can only go so far before concerns of judicial integrity and the public's waning confidence in the judiciary compromises the legitimacy of the American criminal justice system. This effect is especially pronounced when the right of self-representation encroaches upon other constitutional rights.

This Note argues that when a defendant exercises his Sixth Amendment right of self-representation in a capital proceeding, he does so at the expense of his Fourteenth Amendment due process rights and unduly compromises his Eighth Amendment right against the arbitrary imposition of the death penalty. Therefore, this Note suggests that the right of self-

case).

246. Klein, *supra* note 241, at 581.

247. Faretta v. California, 422 U.S. 806, 820 (1975).

248. *See supra* note 205 and accompanying text.

representation be categorically denied when a defendant faces a capital sentence. Doing so furthers the adversarial nature of a capital proceeding and allows for the death penalty—a punishment that is viewed as "qualitatively different" from all others[249]—to be administered in a way that maximizes a defendant's ability to persuade a jury of not only his innocence, but that he is undeserving of death.[250]

249. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

250. This is in light of the fact that jurors tend to make their pro-death or pro-life decisions during the guilt determination stage of the capital proceeding, and these views tend to remain unchanged following the subsequent sentencing stage. *See* discussion *supra* Part II.C.2.