STRENGTHENING THE CRIMINAL DEFENDANT’S RIGHT TO COUNSEL

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INTRODUCTION

A juvenile defendant faces robbery charges in juvenile court. The trial commences but, due to the judge’s schedule, cannot be completed the same day and is continued to a day the following week. On the appointed day, the original public defender is unavailable. With no advance notice to the defendant, the original lawyer simply arranges for one of his colleagues to take over the trial of the case. The defendant meets his new attorney for the first time when he arrives in court that morning and is represented for the rest of the proceedings by an attorney who was not present for the first part of the trial and did not participate in the pretrial proceedings. Yet neither the public defenders nor the court hesitates to allow the trial to continue with this substituted counsel.1

In another case, defendant, facing trial on burglary charges, is unaware that his attorney shares the distinction of being prosecuted by the County District Attorney’s Office. Defendant is oblivious to the fact that his attorney was arraigned on felony drug charges just two days before defendant’s trial was scheduled to begin. At the beginning of the trial, the court holds a conference in chambers, attended by the prosecutor and the defense attorney; defendant is not invited to attend and is not even aware that his attorney is meeting with the judge. In a brief conversation, the prosecutor informs the judge that the defense attorney is under indictment. The defense attorney offers no comment. The judge determines that there is no conflict of interest and allows the defense attorney to continue to represent defendant. The trial proceeds. Defendant first learns of his attorney’s criminal predicament and the in-chambers conference after his trial ends in conviction.2

Why would a trial court or a defense attorney proceed with such indifference to the defendant’s right to counsel? Why would a court address a question of such obvious importance to the defendant without having the defendant present? Why would this procedure be acceptable to the appellate courts that reviewed the case?

The answer lies in the way that courts perceive the role of the defendant in criminal proceedings. In the situations recounted above, the courts undervalued the defendants’ role, relying on counsel to protect the defendants’ rights. As a result, the courts did not afford

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1 Based on the author’s experience in juvenile court in a suburban county.
2 This scenario is based on the facts of Campbell v. Rice, 408 F.3d 1166 (9th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 735 (2005). Before the Ninth Circuit recognized the merit of Campbell’s claim, the California Supreme Court had affirmed his conviction, the California courts had rejected his petition for collateral relief and the federal district court had denied his petition for writ of habeas corpus. 408 F.3d at 1169.
either defendant an appropriate role addressing the question of substitution of counsel or continuity of representation raised in the examples.

Decisions considering the defendant’s role in the criminal proceeding are telling. When courts address issues of competency to stand trial, they ascribe the most limited role to the defendant, permitting the trial to proceed if the defendant is—barely—able to consult with counsel and to understand the proceedings. When courts address the propriety of excluding the defendant from various proceedings, they envision a defendant whose principle role is to support defense counsel. When courts consider the allocation of decision-making authority between the defendant and counsel, they often portray a defendant with a limited role, who is subject almost entirely to counsel’s decision making. In contrast, when the courts consider the responsibility of the pro se defendant, they emphasize the unusual amount of responsibility that shifts to a defendant who fully assumes the role of counsel. Thus, the way courts characterize and view the defendant’s role depends on the circumstances and the legal questions posed. But the represented defendant is most often perceived as dependent on and protected by counsel.

The importance of the defendant’s constitutional right to counsel guaranteed by the Sixth Amendment is well established. In *Powell v. Alabama*, the Court stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Despite the acknowledged importance of counsel, the justice system suffers from a pervasive disregard of the defendant’s right to counsel. This disregard falls most heavily on indigent defendants, who rely on the courts to select and appoint counsel and must appeal to the

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3 287 U.S. 45 (1932); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that Due Process Clause of the Fourteenth Amendment incorporates the Sixth Amendment right to counsel guarantees indigent criminal defendants appointed counsel in felony cases).

4 287 U.S. at 68-69.
court for relief if appointed counsel is unsatisfactory. Courts freely impose changes of counsel on indigent defendants and too easily shrug off complaints that counsel is unsatisfactory. They exclude defendants from discussions concerning their representation. This pervasive disregard appears to flow in part from the courts’ failure adequately to acknowledge the defendant’s limited role and the extent to which the defendant’s access to justice depends on defense counsel.

The defendant’s participation in the case, and ultimately the fairness of the proceeding, turn on the extent to which defense counsel actively and effectively represents the defendant. Recognizing counsel’s pivotal role, the courts should take four steps to strengthen the defendant’s right to counsel. First, the courts should protect the defendant’s interest in continuity of representation. Second, the courts should be more receptive when an indigent defendant who is not satisfied with the representation provided by assigned counsel moves to substitute counsel. Third, courts should ensure that the defendant is present at all discussions related to whether counsel will continue in the case. Finally, the courts should enforce rules disfavoring the decision to proceed pro se. Specifically, the courts should permit a defendant to proceed pro se only if the defendant unequivocally invokes the right and waives the right to assistance of counsel. A reluctant defendant must not be forced to select self-representation over proceeding to trial represented by an unsatisfactory defense attorney. In addition, the courts should enforce a strict standard of competence as a prerequisite to the waiver of assistance of counsel. A court faced with a defendant seeking to represent herself should scrutinize the defendant’s competence, and, be more exacting than the minimal test of competence prescribed by Godinez v. Moran5 requires.

In Part I of this Article, I explore the perception of the defendant’s role as reflected in several areas of jurisprudence. Part I.A examines the cases defining standards of competence to stand trial. Part I.B considers cases addressing the defendant’s absence from various stages of the criminal proceeding. Part I.C discusses how courts conceptualize the defendant’s role as they consider the allocation of decision-making responsibility between client and counsel. Part I.D contrasts the role assumed by a defendant who elects to proceed pro se. In each of the areas of jurisprudence the predominant message is that courts perceive the defendant as having a limited role in the process unless the defendant proceeds pro se. As a result, the represented defendant is entirely dependent on counsel throughout the process.

In Part II, I argue that the courts must therefore strengthen the defendant’s right to counsel in four specific areas. Part II.A argues in

favor of recognizing a constitutionally protected right to continuity of representation for indigent defendants, thereby protecting indigent defendants from having counsel changed unless the government offers adequate justification or the defendant requests the change. Part II.B examines the legal barriers to seeking substitution of counsel and argues that courts should be more receptive to indigent defendants’ requests for substitution of counsel. Part II.C argues that defendants have a right to be present at all hearings that relate to their representation. Finally, Part II.D argues that the courts should adopt two rules disfavoring self-representation: (1) requiring an unequivocal waiver before allowing a defendant to proceed pro se and (2) enforcing a standard of competence more demanding that the minimal standard that determines competence to stand trial.

I. PERCEPTIONS OF THE DEFENDANT’S ROLE

The criminal defendant’s role is consistently defined in relation to counsel. When courts address the defendant’s competence to stand trial or the significance of the defendant’s absence from some aspect of the proceeding, they assume that the defendant will benefit from the advice and protection of counsel. When the defendant disagrees with counsel on any issue other than the exercise of a constitutional right, counsel’s decision may control; for example, counsel can generally decide what witnesses to call or defenses to raise even if the defendant would choose a different course. Conversely, the constitutional law governing pro se representation allocates to the pro se defendant an extensive array of responsibilities that normally fall to counsel, such as decisions about every aspect of the case from motions to file to what witnesses to call and which defenses to raise. Doing so, it underscores the centrality of counsel’s role in the criminal process.

In this Section, I examine how courts conceptualize the defendant’s role in four contexts: determining competence to stand trial, assessing the need for the defendant’s presence at specific stages of the proceedings, determining the division of decision-making responsibility between defendant and counsel, and defining the increased responsibility assumed by a defendant who elects to proceed pro se.
A. Cases Addressing Competence

In assessing a defendant’s competence, courts necessarily focus on the defendant’s role; what the defendant must do to get through trial, to plead guilty or to fairly navigate other phases of the process. Because the government has a substantial interest in resolving the charges, the standard for competence to stand trial sets a low baseline, focusing on the bare essentials of the defendant’s involvement at trial. The standard for competency to stand trial requires only that the defendant have some level of comprehension and some ability to participate in the trial with the assistance of counsel. Under this standard, defendants who have limited understanding of the process, and limited mental capacity for evaluating the decisions they must make, will be held competent and required to proceed. Therefore, these defendants are entirely dependent on counsel for a fair proceeding. Furthermore, counsel may play a pivotal role in determining the competence of a defendant through counsel’s own assessment of the defendant. Thus, when courts determine competency, they perceive the role of the defendant as defined in relation to counsel.

The Court enunciated the prevailing standard for determining

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6 See Sell v. United States, 539 U.S. 166, 179 (2003) (holding that government may administer drugs to restore trial competency against incompetent defendant’s will when important government interests are at stake). A defendant found incompetent to stand trial may be committed until found to be mentally competent to stand trial or until the charges against the defendant are dismissed. See 18 U.S.C. §§ 4244-46 (2005); Jackson v. Indiana, 406 U.S. 715, 733-36 (1972) (listing state standards for trial competency); see also State v. Soares, 916 P.2d 1233, 1254-55 (Haw. Ct. App. 1996) (discussing reasons why defendant may prefer not to raise incompetence to stand trial); Robert A. Burt & Norval Morris, A Proposal for the Abolition of the Incompetency Plea, 40 U. CHI. L. REV. 66 (1972) (proposing eliminating incompetence plea and devising procedures to get even incompetent defendant to trial); Bruce J. Winick, Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie, 85 J. CRIM. L. & CRIMINOLOGY 571 (seeking approach to permit trial rather than institutionalization of incompetent defendants).

7 See Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (stating requirements); Johnson v. Norton, 249 F.3d 20, 28-29 (1st Cir. 2001) (holding that trial court should have held competency hearing when record suggested that defendant was physically incapacitated during jury selection and trial); Dusky v. United States, 362 U.S. 402 (1960) (defining standard); James v. Gibson, 211 F.3d 543, 551 (10th Cir. 2000) (concluding that schizoid defendant was competent and “capable of assisting his legal defense” despite mental disorder because disorder only slightly affected defendant’s decisional capacity); United States v. Rinchack, 820 F.2d 1557 (11th Cir. 1987) (holding that amnesiac defendant was competent to stand trial because defendant was still capable of thinking clearly and participating in his defense); Whitehead v. Wainwright, 447 F. Supp. 898, 902 (D. Fla. 1978) (finding that defendant who was manifestly affected by medication during trial was entitled to competency hearing because defendant “was unable to consult with his lawyer . . . and did not have a rational or factual understanding of the proceedings against him”); see also Rohan v. Woodford, 334 F.3d 804, 819 (9th Cir. 2003) (habeas proceedings cannot proceed if petitioner is incompetent and is raising claims that “could potentially benefit from his ability to communicate rationally”). The standard for competency to be executed requires only a level of comprehension. See Ford v. Wainwright, 477 U.S. 399, 417 (1986).
competency to stand trial in *Dusky v. United States,* a brief, per curiam opinion in which the Court merely agreed with the Solicitor General that the “test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” Thus, the defendant must have the fundamental ability to comprehend the significance, nature and purpose of the criminal proceedings, as well as sufficient communicative ability to work with counsel, serving as an essential source of information for counsel as well as the recipient of counsel’s advice. The defendant must also have the capacity to make the decisions that are reserved to the defendant, such as whether to plead...

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9 Id.; see also *Drope v. Missouri,* 420 U.S. 162, 171 (1975). In *Drope,* the Court stated: “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” In *Cooper v. Oklahoma,* 517 U.S. 348 (1996), the Court quoted from Justice Kennedy’s opinion in *Riggins* summarizing the centrality of competence to other constitutional rights: Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.

10 See Matheny v. Anderson, 377 F.3d 740, 744 (7th Cir. 2004) (noting that defendant’s own pro se motions served as sufficient indicia of competency because they evidenced fundamental understanding of proceedings); United States v. Boigegrain, 155 F.3d 1181 (10th Cir. 1998) (holding that trial court did not err in finding defendant incompetent to stand trial when psychiatric testimony and defendant’s own pro se motions indicated an inability to understand the proceedings); United States v. Simmons, 993 F. Supp. 168, 172 (W.D.N.Y. 1998) (finding that defendant who suffered from memory loss was still competent because defendant’s behavior indicated comprehension of trial proceedings); United States v. Evans, 704 F. Supp. 81, 84 (E.D. Pa. 1989) (finding defendant incompetent on grounds that defendant’s behavior at hearing indicated inability to understand nature of proceedings); Virgin Islands v. Crowe, 391 F. Supp. 987, 989 (D.C.V.I. 1975) (determining defendant was competent on the basis that defendant “had both a factual and rational knowledge of the charge and was capable of discussing the matter with an adequate degree of understanding”); see also Richard J. Bonnie, *The Competency of Criminal Defendants: Beyond Dusky and Drope,* 47 U. MIAMI L. REV. 539, 551 (1993) (noting that proceeding against incompetent defendants “offends the moral dignity of the [judicial] process because it treats the defendant not as an accountable person, but as an object of the state’s effort to carry out its promises”).

11 See Odle v. Woodford, 238 F.3d 1084, 1089 (9th Cir. 2001) (defendant must have “the ability to communicate with counsel in helping prepare an effective defense”); United States v. Sovic, 122 F.3d 122, 128 (2d Cir. 1997) (upholding trial court’s competency determination when defendant took notes and conversed with counsel during trial); United States v. Williams, 113 F.3d 1155, 1160-61 (10th Cir. 1997) (holding that defendant was entitled to competency hearing when defendant’s hysterical behavior prevented communication with defense counsel); see also Bonnie, supra note 10, at 545-46 (commenting that counsel cannot make appropriate decisions about what is in the defendant’s interest if the defendant is unable to convey important information); HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429-30 (Dennis & Co. Inc. 1954) (remarking on injustice suffered by convicted defendant who fails to communicate key facts to counsel due to incompetence).
guilty and, if not, whether to testify at trial.\textsuperscript{12}

The test for competence reflects a court’s assessment of the most minimal role a defendant can play consistent with notions of due process. A defendant who has amnesia but is capable of even limited participation in the trial is likely to be deemed competent.\textsuperscript{13} If the defendant understands the charges and can consult with counsel concerning strategic decisions, the defendant may be held competent even though the defendant cannot supply factual information concerning the events and cannot testify.\textsuperscript{14}

Mentally handicapped defendants are often held competent to stand trial.\textsuperscript{15} For example, in \textit{United States v. Oliver\textsuperscript{16}}, the court held that a defendant with an IQ of 68 was competent to stand trial because the tests administered to him failed to establish that the defendant could not assist counsel or understand the proceedings.\textsuperscript{17} A defendant who

\textsuperscript{12} See, e.g., \textit{Godinez v. Moran}, 509 U.S. 389, 391 (1993) (noting that defendant must have certain degree of competence to plead guilty); \textit{Johnson v. Zerbst}, 304 U.S. 458, 468 (1938) (indicating that a defendant may not waive right to counsel or plead guilty unless competent to do so); \textit{see also} Bonnie, supra note 10, at 553-55 (describing decisional competence). \textit{But see} Bonnie, supra note 10, at 594 (commenting that \textit{Dusky} does not clearly incorporate requirement of decisional competence).

\textsuperscript{13} In determining the competence of defendants with amnesia, the courts have specified factors to be considered:

\begin{itemize}
  \item whether the defendant has any ability to participate in his defense, whether the amnesia is temporary or permanent, whether the crime and the defendant’s whereabouts at the time of the crime can be reconstructed without his testimony, whether the government’s files will be of assistance in preparing the defense, and whether the government’s case is strong or weak.
\end{itemize}

\textit{United States v. Villegas}, 899 F.2d 1324, 1341 (2d Cir. 1990); \textit{United States v. Rinchak}, 820 F.2d 1557, 1569 (11th Cir. 1987); \textit{see also} \textit{State v. Gilbert}, 640 A.2d 61, 65 (Conn. 1994) (applying test and noting also that defendant had suffered no prejudice). In \textit{Gilbert}, the court emphasized that “the first factor is the extent to which the defendant’s amnesia has affected his ability to consult with and assist his attorney, separate and apart from his memory loss.” \textit{Id.}

\textsuperscript{14} \textit{See People v. Palmer}, 31 P.3d 863 (Colo. 2001).

\textsuperscript{15} \textit{Atkins v. Virginia}, 536 U.S. 304, 306-07 (2002) (holding that execution of mentally retarded defendant’s is cruel and unusual punishment but that “[t]hose mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes’’); \textit{see also} \textit{United States v. Chapple}, No. 94-5048, 1995 WL 6147, at *1-2 (6th Cir. Jan. 6, 1995) (affirming in an unpublished opinion conviction of defendant who was retarded and suffered from major depression even though experts testified that defendant had limited capacity to understand the proceedings, and one expert opined defendant would have difficulty assisting counsel); \textit{United States v. Dworshak}, 514 F.2d 716, 719 (8th Cir. 1975) (upholding trial court’s finding that defendant was competent despite substantial testimony that defendant had suffered from mental problems in the past); \textit{Miller v. Blalock}, 411 F.2d 548, 549 n.1 (4th Cir. 1969) (finding that schizophrenic defendant was competent to stand trial because of occasional “lucid intervals” where defendant was free of psychotic symptoms); \textit{see also} Bonnie, supra note 10, at 563 (noting that defendants may be deemed competent “after meeting a fairly low standard’’).

\textsuperscript{16} 626 F.2d 254 (2d Cir. 1980).

\textsuperscript{17} \textit{United States v. Oliver}, 626 F.2d 254, 259 (2d Cir. 1980). In \textit{Atkins}, 536 U.S. at 306-07, indications that the defendant was mentally retarded, with an IQ of 59, caused the Court to insist on further evaluation before he could be executed, but cast no doubt on the propriety of taking him to trial for a capital offense.
suffers from serious mental illness or raises an insanity defense is not necessarily incompetent. 18 Neither obstreperous behavior, including attacks on counsel, nor a self-proclaimed mental illness requires the court to find the defendant incompetent or even to explore competency sua sponte. 19 Indeed, even unbalanced behavior may be seen as signaling competence. For example, in *Beachem v. Williams*, the court pointed to the defendant’s exercise of her right of allocution at sentencing to read a speech. 20 The court treated her action as evidence of competence even though she did not benefit from assistance of counsel in this aspect of the case but instead acted against the advice of counsel and, in the court’s view, had unwisely rejected counsel’s advice. 21

The mere fact that the defendant is taking medication that may impede the ability to work with counsel or assist in the defense does not settle the question. In *United States v. Lopez*, 22 the defendant took medications to address a brain tumor diagnosed during trial. Because they tended to cause grogginess, counsel complained that the defendant could not fully cooperate, and the defendant claimed his testimony suffered as a result. 23 Nonetheless, the First Circuit affirmed the defendant’s conviction.

Medication taken voluntarily by a defendant renders the defendant incompetent only if it substantially interferes with the defendant’s functioning. 24 In *Sell v. United States*, 25 the Court emphasized the importance of considering “trial competence” when evaluating forced medication of a defendant. The court identified as a key concerns whether the medication will impair communication with counsel or prevent the defendant from playing an appropriate role in decisions, asking also whether it would prevent the defendant from reacting to the

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18 See, e.g., Jermyn v. Horn, 266 F.3d 257, 292 (3d Cir. 2001) (concluding trial court properly held defendant competent even though defendant had history of mental illness, displayed bizarre behavior, and raised an insanity defense); Miller v. Blalock, 411 F.2d 548, 549 n.1 (4th Cir. 1969) (finding that defendant was competent to stand trial even though he suffered from schizophrenia); *United States v. Burns*, 812 F. Supp. 190, 193-94 (D. Kan. 1993) (holding that defendant who had long history of mental illness was competent to stand trial but had valid insanity defense).

19 See *United States v. Ford*, 184 F.3d 566, 580 (6th Cir. 1999) (holding that defendant suffering “the effects of stroke and brain atrophy” who behaved inappropriately at trial was properly deemed competent); *United States v. Leggett*, 162 F.3d 237, 244 n.6 (3d Cir. 1998).


21 *Id.* at 812. The court noted that the attorney, advising against reading the speech, “probably had the better view.”

22 71 F.3d 954 (1st Cir. 1995).

23 *Id.* at 959 (concluding that “the trial judge acted within his discretion in deciding, with expert medical support and after careful investigation, to proceed”).

24 See, e.g., Whitehead v. Wainwright, 447 F. Supp. 898, 902 (D. Fla. 1978) (holding that defendant who was manifestly affected by voluntarily doses of Benadryl and valium was incompetent to stand trial).

proceedings and or alter the defendant’s behavior or testimony.26 Thus, the courts consistently look to the defendant’s interaction with counsel when assessing the defendant’s competence to stand trial.

In addition, counsel can play a key role in determining whether a defendant will be held competent. In assessing competence, courts consider not only the defendant’s conduct both in and out of court and any psychological testimony presented, but also the defense counsel’s assessment.27 If counsel does not raise a question concerning

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26 See Id. at 185 (“[w]hether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence”); Cooper v. Oklahoma, 517 U.S 348, 364 (1996) (noting that defendant must decide whether to exercise constitutional rights and must also make “myriad smaller decisions”); Riggins v. Nevada, 504 U.S. 127, 137 (“It is clearly possible that such side effects [as the experts had testified could occur from the medication forced on the defendant] had an impact upon not just Riggins’ outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.”). In Riggins, the Court noted that the effects of the medication would not necessarily be reflected in the trial transcript. Id. at 137. The Court also rejected the State’s argument that any negative impact of the medication was cured by the testimony of defense experts who explained to the jury the possible effects of the defendant’s medication. Id. at 137-38. The testimony “did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril.” Id.

27 See Drope, 420 U.S. at 180 (listing “defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence” as factors to be considered in determining competence); see also United States v. Coomes, 106 Fed. Appx. 967, 969 (6th Cir. 2004) (relying on experts’ reports and court’s observation of defendant in holding defendant competent); Benefiel v. Davis, 357 F.3d 655, 660 (7th Cir. 2004) (noting court’s opportunity to observe defendant and concluding “trial judge knew manipulation when he saw it”); United States v. Quintieri, 306 F.3d 1217, 1233 (2d Cir. 2002) (considering court’s observation of defendant, defendant’s delivery of statement, and counsel’s assessment that defendant was “lucid and able to understand the proceedings”); Jermyn v. Horn, 266 F.3d 257, 292 (3d Cir. 2001) (emphasizing fact that counsel did not raise question concerning defendant’s competence); United States v. Ford, 184 F.3d 566, 580 (6th Cir. 1999) (upholding decision where court considered expert testimony, observation of defendant, and defense counsel’s failure to raise issue until after trial); Acosta v. Turner, 666 F.2d 949, 954-56 (5th Cir. 1982) (relying on reports, and lack of reports, of experts and defendant’s out-of-court conduct to conclude mis-medication of defendant did not render him incompetent); United States v. Hoyt, 200 F. Supp. 2d 790, 795 (D. Ohio 2002) (emphasizing that defendant successfully represented himself in a related administrative hearing). But see Odle v. Woodford, 238 F.3d 1084, 1088 (explaining that calm demeanor in courtroom does not necessarily signal competence). The trial court’s determination will generally be upheld provided the court made appropriate inquiry. See Benefiel, 357 F.3d at 660 (upholding trial judge’s competency declaration when it was based on medical testimony); Quintieri, 306 F.3d at 1233-34 (holding that district court did not abuse its discretion in failing to hold competency hearing for heavily medicated defendant when defendant appeared lucid and counsel assured trial judge that defendant was capable of proceeding); Jermyn, 266 F.3d at 292-98 (3d Cir. 2001) (affirming state supreme court’s reversal of defendant’s conviction when there were “sufficient indicia of incompetence to require the court to make further inquiry into the defendant’s competence to stand trial and order an evaluation”); see also White v. Estelle, 666 F.2d 973, 977 (5th Cir. 1982) (holding that trial court did not err in declaring defendant competent to stand trial based on lay testimony of defendant’s jailor despite expert testimony to the contrary). If the court fails to make appropriate inquiry, the defendant will win reversal. See, e.g., Pate v. Robinson, 383 U.S. 375, 385-86 (1966) (holding that competency hearing is required in light of evidence
defendant’s competency, the defendant will have difficulty convincing a court that there is a substantial issue concerning competency.

Thus, the decisions addressing competence emphasize the defendant’s ability to work with counsel, as well as the defendant’s understanding of the criminal proceedings, and in some situations, the defendant’s ability to interact appropriately with the jury. They set a low threshold. A defendant who can assist counsel is competent even though the defendant suffers a serious disability that limits the assistance to counsel. The requirement that the defendant be able to work with counsel at a minimal level reflects the principal roles the defendant is expected to play at trial—providing counsel with information in the defendant’s possession, understanding and processing counsel’s advice, and participating in decision making with counsel’s assistance.

B. Cases Addressing the Defendant’s Presence

Cases defining the defendant’s right to be present during specific parts of the criminal proceedings also signal how the courts envision the defendant’s role in relation to counsel. The defendant is calling defendant’s competency into question); Cobbs v. McGrath, 123 Fed. Appx. 794, 796 (9th Cir. 2005) (remanding for retrospective assessment of defendant’s competence to plead guilty); Johnson v. Norton, 249 F.3d 28, 29 (1st Cir. 2001) (concluding that trial court should have explored question of defendant’s competence given his head injury at the beginning of trial which caused him to become unconscious during the trial); Odle, 238 F.3d at 1089 (holding that competency hearing is required when defendant exhibits psychotic behavior); Haywood v. United States, 155 F.3d 674, 681 (3d Cir. 1998) (finding failure to hold competency hearing was error). In Pate the Court held that the state trial court had violated the defendant’s rights when it failed to inquire adequately into defendant’s competence to stand trial. The dissenting justices argued that there was sufficient evidence of competence in the trial record, pointing to defendant’s conduct during the trial, particularly a colloquy between the court and defendant, 383 U.S at 391 n.4, and the failure of defendant’s attorneys to question his competence at any time during the proceedings. Indeed, as the dissenting justices noted, one of the attorneys referred to the defendant’s “lucidity” at the time of trial, in contrast with the less lucid phases of his mental illness. Id. (referring to the comments of counsel set forth in 383 U.S at 385 n.8).

The requirement that the defendant understand the proceedings reflects the notion that due process requires sufficient awareness and comprehension so that the defendant is not effectively absent.

29 The defendant’s ability to function in the jury’s presence reflects the concern that the defendant be fairly judged by the jury, which requires that the defendant project an accurate impression to the jury through demeanor during trial and through presentation on the witness stand if the defendant elects to testify.

30 Violations of the right to be present are generally subject to harmless error review and, as a result, rarely lead to reversal. See, e.g., United States v. Bishawi, 272 F.3d 458 (7th Cir. 2001). In addition, the law is clear that a defendant may waive the right to be present by voluntarily electing to be absent from the trial. See Taylor v. United States, 414 U.S. 17 (1973) (holding that the defendant’s voluntary absence from the trial constituted a valid waiver of the right to be present at trial); Diaz v. United States, 223 U.S. 442, 455 (1912) ("[A]fter the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent
constitutionally entitled to be present during the trial and related proceedings whenever the defendant’s absence would jeopardize the fairness of the proceeding.\(^3\) In addition, the rules of criminal procedure in some jurisdictions grant the defendant the right to be present at all aspects of the trial except proceedings that involve only a question of law.\(^3\) Courts, therefore, focus on the defendant’s role in relation to the fairness of the process as well as on the division between questions of law, where the defendant’s input is seen as having little value, and issues where the defendant can play a larger role.

Taking testimony on the question of guilt or innocence in the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.”); United States v. Latham, 874 F.2d 852, 857 (1st Cir. 1989). Voluntary absence does not always permit the trial to proceed without the defendant, but instead merely provides a basis for exercising discretion not to proceed. \(id\). at 857. Otherwise, the trial cannot proceed unless the defendant is present without risking a violation of the defendant’s right to confrontation and right to due process. \(id\). at 856; LaChappelle v. Moran, 699 F.2d 560, 564 (1st Cir. 1983).

\(^3\) See United States v. Gagnon, 470 U.S. 522, 526 (1985) (recognizing also that defendant’s right to presence rests on the Confrontation Clause and the Due Process Clause); Rushen v. Spain, 464 U.S. 114 (1983); Faretta v. California, 422 U.S. 806, 819 n.15 (1975); Shields v. United States, 273 U.S. 583 (1927) (recognizing defendant’s right to be present); Bradley v. Henry, No. 04-15919, 2005 WL 1459544, at *4 (9th Cir. Jun. 22, 2005) (discussing recognition of right in Supreme Court decisions); Cohen v. Senkowski, 290 F.3d 485, 489 (2d Cir. 2002) (quoting Faretta); United States v. Rosales-Rodriguez, 289 F.3d 1106, 1109 (9th Cir. 2002); Bishawi, 272 F.3d at 462; United States v. Stratton, 649 F.2d 1066, 1080 (5th Cir. 1981). The defendant may waive the right through voluntary absence or misconduct. \(see Diza\), 223 U.S. at 455; \(cohen\), 290 F.3d at 491; Norde v. Keane, 294 F.3d 401, 413 (2d Cir. 2002); Williams v. State, 438 A.2d 1301, 1308-09 (Md. 1981) (establishing prospective rule that defendant’s right to be present can be waived by action or inaction of counsel). \(but see United States v. Novaton, 271 F.3d 968, 996 (11th Cir. 2001) (rejecting argument that trial court made sufficient finding of voluntary absence); United States v. Beltran-Nunez, 716 F.2d 287, 290 (5th Cir. 1983) (finding abuse of discretion because court decided to proceed in defendant’s absence after finding absence was voluntary and without further inquiry).\)

The waiver need not be express. \(see Gagnon\), 470 U.S. at 528 (commenting that the trial court need not get express waiver from defendant to hold hearing in defendant’s absence; defendant must assert right to presence under Rule 43); \(cohen\), 290 F.3d at 491-92; United States v. Riddle, 249 F.3d 529, 533-34 (6th Cir. 2001) (declining to require colloquy of defendant before permitting voluntary absence from voir dire); \(williams\), 438 A.2d at 1308-09 (establishing prospective rule that waiver of defendant’s right to be present need not be express). \(but see United States v. Gomez, 67 F.3d 1515, 1528 (10th Cir. 1995) (stating that defense attorney cannot present waiver of defendant’s right to presence without having consulted with and obtained consent from the defendant); Carter v. Sowders, 5 F.3d 975, 981 (6th Cir. 1993) (concluding evidence was insufficient to support implied waiver); United States v. Clark, 475 F.2d 240, 247-48 (2d Cir. 1973) (expressing doubt that defense attorneys accession to absence and defendant’s “silence in absentia” could establish waiver of the defendant’s right to be present at suppression hearing).\)

In a number of cases, the defendant, and sometimes defense counsel as well, was unaware of the conference. \(see, e.g., Rushen, 464 U.S. at 116 (noting that defendant and his attorney learned of judge’s communications with juror after conviction); Shields, 273 U.S. at 585 (noting that neither defendant nor his attorney knew of question from jury and judge’s response until long after the trial).\)

\(^3\) The federal rule does not require a defendant to be present at hearings that involve only a question of law. \(see, e.g., Fed. R. Crim. P. 43(b)(3); AK. CT. R. Crim. P. 38; LA. STAT. ANN. C. CRIM. P. 831; PA. R. CRIM. P. 602; see also Gagnon, 470 U.S. at 526; Bishawi, 272 F.3d at 462; United States v. Johnson, 859 F.2d 1289, 1294 (7th Cir. 1988).\)
defendant’s absence implicates both the right to confrontation and basic due process rights even if counsel is present.\footnote{See \textit{Latham}, 874 F.2d at 856; \textit{LaChappelle}, 699 F.2d at 564 (considering both aspects of constitutional protection); \textit{Novaton}, 271 F.3d at 997-98.} A defendant who is absent when witnesses testify loses the opportunity to participate in a number of significant aspects of the defense. The defendant loses the opportunity for actual in-court confrontation of adverse witnesses guaranteed by the constitution.\footnote{See \textit{Novaton}, 271 F.3d at 999; \textit{Latham}, 874 F.2d at 856; see also \textit{Coy}, 487 U.S. 1012 (1988) (discussing importance of face-to-face confrontation of defendants and witnesses in court room as part of Sixth Amendment guarantee).} In addition, regardless of which party offers the testimony, the defendant misses the chance to observe the witnesses, to provide relevant information to defense counsel, to suggest additional lines of questioning on direct or cross examination, and to discuss possible additional evidence to introduce, whether to rebut or to bolster the testimony already presented.\footnote{\textit{Latham}, 874 F.2d at 856.} Further, depending on the timing of the defendant’s absence, the defendant may lose the opportunity to consult with counsel concerning whether to testify and the opportunity to act on the resulting decision.\footnote{\textit{Novaton}, 271 F.3d at 1000.} The presence of counsel does nothing to protect or implement these aspects of the absent defendant’s constitutional role.\footnote{\textit{Gagnon}, 470 U.S. at 527 (holding that trial court did not violate defendant’s rights by holding an \textit{in camera} proceeding without the defendant to question a juror who had expressed concern upon seeing the defendant sketching members of the jury).}

The defendant’s presence is also critical during some of the other proceedings that occur during the course of the trial. But holding a proceeding in the defendant’s absence does not always violate the defendant’s constitutional rights, particularly if defense counsel is present.\footnote{291 U.S. 97 (1934).} Courts view the defendant’s absence from a proceeding as critical only if the defendant could have played a significant role had the defendant been present. In \textit{Snyder v. Massachusetts},\footnote{Id. at 106.} the Court assumed that the Fourteenth Amendment assured the defendant the right to be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,” but explained that “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”\footnote{Id. at 107-08. The Court concluded that the defendant’s absence from a view attended by the judge, the jurors, the district attorney, and defense counsel did not violate his rights, emphasizing that it was not a part of the trial. \textit{Id.} at 113. In fact, the Court’s description of the view of the gas station suggests that it provided specific evidence under the guidance of the district attorney. The district attorney pointed out specific aspects of the location, at one point...}
decisions that determine which proceedings require the defendant’s presence, and which proceedings do not, provides insight into the courts’ perception of the defendant’s role and again demonstrate the counsel’s essential role.

As reflected in the decisions considering the defendant’s absence, the defendant’s role has three aspects. The defendant provides counsel with information, plays a role in decision making, and, sometimes, simply must be present for the jury to see.42

The courts consistently recognize that the defendant has a role assisting counsel.43 This role has two dimensions. The first dimension
of the defendant’s role in relation to counsel is informational. The
defendant may know facts crucial to the proceeding, as in a hearing on a
motion to suppress. If so, courts ascribe substantial weight to the
defendant’s presence.\textsuperscript{44} On the other hand, when the defendant
possesses no information relevant to a particular proceeding, the court is
likely to view the defendant’s absence as lawful because the defendant
could provide no assistance to counsel.\textsuperscript{45}

The second dimension of the defendant’s interaction with counsel
is decisional.\textsuperscript{46} The defendant plays a role in making strategic
decisions, advising and even over-riding defense counsel.\textsuperscript{47}
Recognition of this dimension of the defendant’s role expands the
number of proceedings in which the defendant’s presence is essential.
For example, the defendant’s presence during jury selection is justified
by the defendant’s role in selection decisions rather than any special
store of information.\textsuperscript{48}

If the proceeding would neither mine the defendant’s factual
knowledge nor give the defendant an opportunity to play a decision-

\textsuperscript{44} See, e.g., Blackwell, 562 F.2d at 600 (holding that defendant’s absence from hearing
violated his rights in part because defendant might have consulted with counsel during the
hearing, “particularly with respect to whether any of the jurors had obtained an impression that
[the defendant] himself had precipitated the altercation”). In \textit{Blackwell}, the court did not
recognize that the defendant was a fact witness to the events and could also have helped counsel
assure the accuracy of the discussion.

\textsuperscript{45} See, e.g., United States v. Boyd, 131 F.3d 951, 954 (11th Cir. 1997) (emphasizing trial
court’s conclusion that defendant “had no personal knowledge or relevant information”).

\textsuperscript{46} See United States v. Durham, 287 F.3d 1297 (11th Cir. 2002). In \textit{Durham}, the Eleventh
Circuit held that the use of a stun belt to control the defendant at trial impaired the defendant’s
ability to participate too severely. \textit{Id.} at 1309. The court noted the interference with the
defendant’s ability to confer with counsel if the defendant feared that any movement might
provoke a shock and with the defendant’s ability to follow the proceedings and participate in the
choice of trial strategy due to the distraction caused by the belt. \textit{Id}.

\textsuperscript{47} It is worth noting that when evaluating a defendant’s absence and considering the
defendant’s possible decision-making role, courts ascribe to the defendant a far more
circumscribed range of decisions than they do in decisions considering disagreements between
defendant and counsel. \textit{See generally} Part II.C infra.

\textsuperscript{48} See, e.g., United States v. Camacho, 955 F.2d 950, 953 (4th Cir. 1992) (explaining that due
process clause is implicated when absent defendant is denied opportunity to consult with counsel
during voir dire); United States v. Alikpo, 944 F.2d 206, 210 (5th Cir. 1991) (noting that jury
selection is a phase of trial where defendant can meaningfully assist counsel as opposed “as
distinguished from a proceeding involving solely points of law”); People v. Sloan, 592 N.E.2d 784, 786-87 (N.Y. 1992) (explaining that “[d]efendants’ presence at the questioning on such
matters and the resultant opportunity for them to assess the jurors’ facial expressions, demeanor
and other subliminal responses”).
making role, the court is unlikely to find a violation. For example, excluding the defendant right before closing arguments was held to be, at worst, harmless error, because the defendant could obtain only negligible benefit by consulting with counsel at that stage of the trial.49

In sum, the cases dealing with the defendant’s absence reflect the defendant’s secondary part and counsel’s primary role. The decisions emphasize the defendant’s role as a source of information for counsel and not as an equal, or even as an essential participant, in the legal decision-making process. The procedural dynamics of these cases also illustrate the defendant’s dependence on counsel and vulnerability to counsel’s failings.50 Courts often conclude that the defendant’s absence does not violate the defendant’s rights because they assume that counsel will protect the defendant’s interests in the hearing.51 But the defendant depends on counsel to raise the issue of the defendant’s absence as well as all other issues important to the defense. If counsel does not object to proceeding without her client, the courts are often unreceptive to a later challenge.52 In addition, if the defendant is aware that the proceeding will be held in her absence and does not object, the court may find a waiver,53 even though the defendant will not realize an objection is essential unless counsel tells her so.54

49 United States v. Shepherd, 284 F.3d 965, 968 (8th Cir. 2002). The court in Shepherd also noted that meaningful communication was unlikely to occur in the case because the defendant was complaining of counsel’s deficiency and was removed from the courtroom because he became angry when the court did not agree with his claim of ineffective assistance. Id.

50 United States v. Rhodes, 32 F.3d 867, 874 (4th Cir. 1994) (finding a violation of Rule 43 when defendant was not present at in-chambers discussion regarding jury instructions but nonetheless affirming conviction because absence did not affect defendant’s substantial rights); Carter v. Sowders, 5 F.3d 975, 981 (6th Cir. 1993) (reporting that absent defendant’s counsel left the deposition of the prosecution’s key witness, allowing the deposition to proceed with no cross-examination); see also Rodney J. Uphoff, Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant’s Tactical Choices, 68 U. Cin. L. Rev. 763, 816 (2000) (discussing factors that may compromise counsel’s decision making).

51 See, e.g., United States v. Shukitis, 877 F.2d 1322, 1330 (7th Cir. 1989) (holding no due process violation when defendant was kept from in camera testimony because his interests were represented by his attorney); United States v. Parker, 836 F.2d 1080, 1084 (8th Cir. 1987) (finding that “because [defendant] was ably represented by his attorneys at the chambers conference . . . no reasonable possibility of prejudice exists”).

52 See, e.g., United States v. Leisure, 377 F.3d 910, 915 (8th Cir. 2004) (noting that counsel did not object to client’s absence); United States v. Gunter, 631 F.2d 583, 587-89 (8th Cir. 1980) (concluding that counsel’s failure to object to defendant’s absence waived issue, even though elsewhere in the opinion the court noted that the trial judge became an advocate for the prosecution and counsel was reluctant to object); United States v. Jones, 542 F.2d 186, 213 (4th Cir. 1976) (explaining that counsel’s failure to object to defendant’s absence constituted waiver of issue, particularly when defendant was aware of proceeding); People v. Martine, 478 N.E.2d 262, 266 (Ill. 1985) (finding that while counsel failed to object, defendant waived right to be present when defendant had “complete understanding” of what was transpiring in courtroom). But see Bustamante v. Eyman, 456 F.2d 269, 274 (9th Cir. 1972) (concluding that counsel could not waive defendant’s right to be present when instructions were presented to the jury).


54 See, e.g., Cohen v. Senkowski, 290 F.3d 485, 491-492 (2d Cir. 2002) (holding defendant
The sections that follow assess the courts’ view of the defendant’s role during jury selection, hearings held during trial, jury instructions and deliberation, and the taking of the verdict. Although courts sometimes recognize that the defendant has an important role to play independent of counsel, generally they do not. In most instances, the courts see the defendant’s presence as dispensable unless the defendant will act as an essential resource for counsel.

1. Jury Selection

The defendant is entitled to be present during the selection and impaneling of the jury.\(^{55}\) In *People v. Antommarchi*,\(^ {56}\) the Court of Appeals of New York explained one aspect of the role the defendant may play during voir dire: “Defendants are entitled to hear questions intended to search out a prospective juror’s bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person’s answers so that they have the opportunity to assess the juror’s ‘facial expressions, demeanor and other subliminal responses.’”\(^ {57}\) Having this information, the defendant may guide or even override defense counsel’s approach and decisions in the selection process.\(^ {58}\) Thus, the courts perceive the defendant’s role as one of gathering information and making decisions with counsel, exercising both objective and subjective judgment.\(^ {59}\)

2. Hearings During Trial

During the course of a trial, the court may hold a variety of hearings, including a voir dire proceeding where the defendant is present. See *Diaz v. Herbert*, 317 F. Supp. 2d 462, 473 (S.D.N.Y. 2004) (discussing *Antommarchi*).

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55 See *Norde v. Keane*, 294 F.3d 401, 414 (2d Cir. 2002); *Cohen*, 290 F.3d at 489; see also *Williams v. State*, 438 A.2d 1301, 1306 (Md. 1981) (concluding that state rule was violated when defendant was excluded from interview of prospective jurors).
57 *Id.* The decision appears to rest on a state rule rather than a constitutional right. See *Diaz v. Herbert*, 317 F. Supp. 2d 462, 473 (S.D.N.Y. 2004) (discussing *Antommarchi*).
59 *Cohen*, 290 F.3d at 490 (expressing concern for defendant’s “prerogative to challenge a juror simply on the basis of the ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another’”). In *Cohen*, the court concluded that the trial court adequately protected defendant’s rights even though it required the parties to exercise their challenges to jurors during an *in camera* proceeding at which the defendant was not present. *Id.* The questioning of the jurors occurred in the defendant’s presence, the defendant had an opportunity to consult with counsel concerning the challenges, and the challenges were put into effect in open court with the defendant present. *Id.*
hearings that do not entail presentation of evidence on the question of guilt or innocence. Courts are more likely to see a relevant role for the defendant if the hearing involves fact finding rather than addressing only questions of law, because they view fact finding as an area in which the defendant can meaningfully assist counsel. When a hearing does not involve fact finding, the courts assume that counsel can adequately represent the absent defendant.

Generally, courts hold that if a hearing held during the trial entails fact finding, the defendant should be present. In United States v. Clark, the Second Circuit held that defendant’s exclusion from the hearing on his motion to suppress violated his constitutional rights. In justifying its holding, the court emphasized the role that the defendant could have played assisting counsel if he had been present:

Without having the benefit of Clark’s presence at her elbow to point out potential inaccuracies in the testimony of the two witnesses and to furnish factual information for use in cross-examining them, Clark’s counsel was handicapped. Moreover . . . she may have been unaware of facts that could conceivably have led a court to conclude that the search . . . was unlawful.

Thus, the defendant’s presence is required to allow the defendant to serve as a source of factual information for counsel. As a result, if the proceeding focuses on a question of law or concerns a factual question as to which the defendant has no special knowledge, the court is likely to discount the importance of the defendant’s presence. For

60 See United States v. Parker, 836 F.2d 1080 (8th Cir. 1987) (ruling that a defendant does not need to be present during a chamber conference); LaChappelle v. Moran, 699 F.2d 560, 565 (1st Cir. 1983) (holding that an in camera interview of a witness was an event separate from the trial); United States v. Gunter, 631 F.2d 583 (8th Cir. 1980) (holding that an in chamber evidentiary hearing was not a stage of the trial).

61 See United States v. Peterson, 385 F.3d 127 (2d Cir. 2004); Parker, 836 F.2d 1080. Rules of procedure requiring the defendant’s presence also draw the line between hearings on questions of law and other hearings. See, e.g., FED. R. CRIM. P. 43(b)(3).

62 475 F.2d 240 (2d Cir. 1973).

63 Id. at 245. The court rejected the argument that the error was harmless because the defendant had the opportunity to confront and cross-examine the same witnesses at trial. Id. at 247.

64 See LaChappelle, 699 F.2d at 564. In LaChappelle, the court disapproved of the trial court’s questioning of a witness outside the presence of defendant and counsel, even though it held that the court did not violate the defendant’s rights. Expressing its preference for holding such hearings in the defendant’s presence, the court emphasized the role a defendant might play:

Matters may be asserted before a factfinder which the defendant alone knows how to answer or to correct. Tactical decisions vital to defendant may have to be made on the spot. And a defendant’s presence may deter improper communications to those on whose shoulders rest the ultimate decision of his guilt or innocence.

Id. at 564.

65 See, e.g., Peterson, 385 F.3d at 138 (holding that the defendant is not entitled to be present at an in camera meeting discussing juror misconduct); United States v. Boyd, 131 F.3d 951, 953 (11th Cir. 1997) (post-trial hearing on motion for new trial is proceeding from which defendant may be excluded); United States v. Shukitis, 877 F.2d 1322, 1330 (7th Cir. 1989) (finding the
example, in *United States v. Gunter*, the court rejected the defendant’s claim that his absence from an evidentiary hearing was error. The court noted that the hearing, which concerned the prosecution’s plan to introduce additional, but “essentially neutral,” identification evidence, was a conference on a question of law under the rule, and the defendant suffered no prejudice through his absence.

In *Kentucky v. Stincer*, the Supreme Court concluded that the defendant’s rights were not violated when the trial court conducted its inquiry into the competence of two child witnesses in the defendant’s absence, even though the inquiry was partly factual. The defendant was represented by his attorney at the in camera hearing on the witnesses’ competence to testify. The Court emphasized that the defendant had not demonstrated that his presence would have advanced the fairness of the hearing, noting that “[h]e has presented no evidence

In rare circumstances, courts may constitutionally hold *in camera* proceedings without either the defendant or defense counsel. For example, the court may properly question a juror outside the presence of defendant and counsel in the interest of promoting the juror’s candor. In *Peterson*, the court noted that the meetings “were more akin to hearings on an issue of law to which a defendant has little to contribute than to stages of trial at which a defendant has a due process or statutory right to be present.” *Peterson*, 385 F.3d at 138. Moreover, the trial court read the transcript of the conversation with the juror before excusing the juror, thus allowing the defendants the opportunity to suggest additional questions. *Peterson*, 385 F.3d at 139.

However, such *in camera* hearings can yield troubling results. In *LaChappelle v. Moran*, the trial court held a brief *in camera* discussion with the 16-year old victim in the defendant’s rape trial to determine why she was declining to answer specific questions posed on cross-examination relating to the alleged rape. Neither the defendant, defense counsel, nor the prosecutor were present. The court reporter recorded the conference. Although the court was troubled by the fact that the judge helped the complaining witness compose herself for further cross-examination and determine the appropriate answer to defense counsel’s question, the court nevertheless found no violation of the defendant’s rights. *LaChappelle*, 699 F.2d at 566. The court concluded that the proceeding did not implicate the defendant’s right to confrontation and assessed the constitutionality of the proceeding under due process principles. *LaChappelle*, 699 F.2d at 565. The court concluded that the procedure fell within the discretion retained by trial judges to hold *in camera* proceedings, excluding the defendant, in rare circumstances to protect jurors and witnesses and maintain the fairness of the trial. *LaChappelle*, 699 F.2d at 565. In determining that the defendant’s rights were not violated, the court noted several key aspects of the hearing which made the defendant’s participation less critical:

- The in camera conference took place outside the courtroom and wholly apart from any formal session of the court. It occurred while the jury was not present and the court was in recess. The judge was not performing in an adjudicatory role at the conference:
  - he was not resolving any issue of fact or law in the state’s criminal case against the defendant, nor was he instructing the jury concerning the case or its own role.

*LaChappelle*, 699 F.2d at 565. Asking whether the *in camera* proceeding was “so egregious and fundamentally unfair as to deprive the defendant of his constitutional rights,” the court concluded that the judge’s conduct was inadvisable and troubling, but did not violate the defendant’s right to due process. *LaChappelle*, 699 F.2d at 567.

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66 631 F.2d 583 (8th Cir. 1980).
67 Id. at 589.
68 Id.
that his relationship with the children, or his knowledge of facts regarding their background could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency." Thus, even though the inquiry had a factual dimension, the Court saw no role for the defendant because he had not demonstrated particular knowledge of the pertinent facts. The Court assumed that counsel’s presence adequately protected the defendant’s interests.

Similarly, in United States v. Shukitis, the court overlooked the possibility that the defendant could play a key role at a hearing addressing questions of both law and fact, relying on counsel’s presence to protect the defendant’s interests. The court held that the trial court did not violate the defendant’s rights by excluding the defendant from conferences held in chambers to address possible violations of the court’s order that witnesses remain separate. The possible violations consisted of alleged conversations among the defendant’s relatives. The court noted that the defendant could not have helped the court determine how to proceed in light of the alleged violations. The court did not consider the possibility that the defendant’s knowledge of the relevant facts or familiarity with his witnesses could have made him a valuable resource for counsel had he attended the initial information gathering conferences, nor did the court recognize any value in having the defendant participate in devising a remedy for the witnesses’ violation.

Thus, the defendant’s role at hearings during trial is primarily viewed as assisting counsel as a source of factual information. In most instances, counsel’s presence provides adequate protection for the absent defendant.

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70 Id. at 747.
71 Id.
72 877 F.2d 1322 (7th Cir. 1989).
73 Id. at 1330.
74 Id. The court also noted that the defendant’s attorney could not explain at oral argument how the defendant’s absence hurt the defense strategy. Id. The court further noted that the trial court held an evidentiary hearing in open court after the closed conferences and before remedying the violation by instructing the jury that it could consider the violation of the court order in assessing the credibility of the defendant’s witnesses. Id. The court concluded that the defendant’s presence at the conferences “was not required to ensure ‘a reasonable opportunity . . . to defend against the charge.’” Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934)).
75 Interestingly, even when the court proceeds without a defendant who is pro se, the resulting conviction may be upheld. In Diaz v. Secretary of the Department of Corrections, the court concluded that the defendant’s rights were not denied because the defendant’s presence would have offered negligible benefit, applying the standard developed for cases in which a represented defendant is absent. 402 F.3d 1136, 1143 (11th Cir. 2005); see also United States v. Mills, 895 F.2d 897, 904-05 (2d Cir. 1990) (rejecting defendant’s argument that his exclusion from side-bar conferences violated his right to self-representation). Even if proceeding in the defendant’s absence is error, the court may view it as harmless. See, e.g., United States v. Bullard, 37 F.3d 765 (1st Cir. 1994) (no prejudice occurred where pro se defendant was not
3. Jury Instructions and Deliberations

The defendant is entitled to be present in the courtroom when instructions are presented to the jury and when the court addresses jury questions raised during deliberations. Nevertheless, the defendant’s absence from these stages is not generally a ground for post-conviction relief. Absence from the instruction of the jury will rarely constitute reversible error, given the limited role the defendant can play at that stage. Courts that view the defendant’s absence at this stage as reversible error emphasize the psychological function of the defendant’s presence rather than any active role the defendant might play. Generally, however, the courts deem the presence of counsel as adequate protection for the absent defendant.

included in conference between judge, prosecutor, and stand-by counsel at which judge inquired about juror’s apparent inattention at trial). But see United States v. Mack, 362 F.3d 597, 603 (9th Cir. 2004) (holding that trial court violated pro se defendant’s constitutional rights when it excluded him from court, leaving him without representation for part of the trial).

See Rogers v. United States, 422 U.S. 35, 39-41 (1975) (holding that trial court should not have responded to jury’s question in absence of defendant and his attorney); United States v. Fontanez, 878 F.2d 33, 38 (2d Cir. 1989) (concluding that trial court committed reversible error by proceeding in defendant’s absence); United States v. Bustamante, 456 F.2d 269, 273 (9th Cir. 1972).

See, e.g., United States v. Brika, 416 F.3d 514, 527 (6th Cir. 2005) (holding that defendant was not prejudiced by absence from supplemental instructions given to jurors); United States v. Rosales-Rodriguez, 289 F.3d 1106, 1111 (9th Cir. 2002) (finding that defendant’s absence from supplemental jury instruction was harmless error); United States v. Slim, No. 98-10074, 1999 U.S. App. LEXIS 1432, at *3-4 (9th Cir. Jan. 29, 1999) (concluding (in an published opinion) that defendant’s absence from discussions regarding proposed jury instructions involved question of law and did not implicate defendant’s right to be present); United States v. Alper, 449 F.2d 1223, 1232 (3d Cir. 1971) (explaining that trial judge could appropriately infer defendant’s acquiescence to jury instruction from counsel’s presence); Booker v. Israel, 610 F. Supp. 1310, 1313-14 (E.D. Wis. 1985) (reasoning that defendant’s constitutional rights were not violated when judge gave supplemental instruction to jury out of presence of both counsel and defendant).

See United States v. Fontanez, 878 F.2d 33, 38 (2d Cir. 1989) (holding that proceeding in defendant’s absence required reversal, emphasizing “psychological function” of defendant’s presence); Bustamante v. Eyman, 456 F.2d 269, 274 (9th Cir. 1972) (“The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights.”).

See United States v. Rhodes, 32 F.3d 867, 874 (4th Cir. 1994); United States v. Gomez, 67 F.3d 1515, 1528 (10th Cir. 1995) (“The interaction between the court and counsel in formulating an answer to the question is somewhat akin to the jury instruction conference, where the defendant’s personal input will generally be minimal at best.”); Rosales-Rodriguez, 289 F.2d at 1110-11 (holding absence of defendant and counsel from discussion of supplemental instruction to jury to be harmless error); United States v. Clark, 409 F.3d 1039, 1043 (8th Cir. 2005) (holding that meetings between court and counsel to determine how to respond to notes from the jury were properly held in defendant’s absence, remarking that the defendant “was ably represented therein by his attorney”). In Clark, the court apparently saw no role for the defendant to play in assessing the issues raised by the jury even though the jury had difficulty reaching a verdict and did so only after the court gave an Allen charge. Id.

Answering a question from the jury without first informing either the defendant or defense counsel is more likely to violate the defendant’s rights. See United States v. Toliver, 330 F.3d 607, 617 (3d Cir. 2003) (acknowledging error but holding it harmless). To proceed without any
Usually, the range of possible responses to the inquiry is extremely limited, and the issues raised in response are purely legal.  Given those circumstances, courts generally conclude that the defendant could play no meaningful role and, therefore, that proceeding in the defendant’s absence does not violate the defendant’s rights. Thus, although the defendant is entitled to be present in the courtroom when instructions are presented to the jury and when the court addresses jury questions raised during deliberations, the court nonetheless perceives a limited role for the defendant.

However, permitting testimony to be read back to the jury without informing either the defendant or defense counsel violates the Constitution. In Fisher v. Roe, the court’s explication of the risk of prejudice suggests a role for the defendant as well as defense counsel:

If present and participating, [the defendants] or their lawyers could have made certain, where appropriate, that testimony of defense witnesses was read as well as that of the state’s witnesses. They could also have ensured that any cross-examination of prosecution witnesses would be read in addition to direct testimony. They could also have made certain that the court reporter’s notes were accurate, that her notes accurately reflected the witnesses’ testimony, and that she did not unduly emphasize any part of the requested testimony or use any improper voice inflections.

Nevertheless, the defendant plays no essential role at this stage. The defendant cannot help resolve the legal question of whether to provide information to the jury. Moreover, even though a defendant may be as able as an attorney to assess the factual accuracy and fairness of the reprise of evidence for the deliberating jury, the defendant’s presence is not necessarily critical even when the testimony is read by a court reporter.

deference presence deprives the defendant of the opportunity to argue for or against any particular response and thereby places the judge in the position of exercising discretion based on limited information. Id. at 616.

80 See, e.g., Esnault v. Colorado, 980 F.2d 1335, 1337 (10th Cir. 1992).

81 Id.; see also Rosales-Rodriguez, 289 F.2d at 1110 (holding that absence of both defendant and counsel from discussion to prepare supplemental instruction to jury violated defendant’s rights, but emphasizing only steps counsel could have taken).

82 See Fisher v. Roe, 263 F.3d 906 (9th Cir. 2001). It appears that if the testimony was recorded and is merely being replayed, the presence of counsel alone is sufficient to protect the defendant’s rights. See Valdez v. Gunter, 988 F.2d 91 (10th Cir. 1993); United States v. Sobamowo, 892 F.2d 90, 96 (D.C. Cir. 1989) (holding that counsel’s presence when audiotape of testimony was played adequately protected the defendant).

83 Fisher, 263 F.3d at 915. In Fisher, the court also emphasized the attorney’s distinct role. The court noted that the presence of the defense team would have permitted them to create a clear record of what occurred for the appellate court, a task that would fall to defense counsel. Id. In addition, the court distinguished decisions that held the defendant had no right to be present on the grounds that, in those cases, defense counsel had been present. Id. at 915-16.

84 See Valdez, 988 F.2d at 94.

85 See Hegler v. Borg, 50 F.3d 1472 (9th Cir. 1995) (holding defendant’s absence to be
4. Verdict

When a verdict is returned, whether at the guilt phase or at sentencing, the defendant’s presence is critical in order to place the defendant face to face with the jurors as they announce their verdict and are polled.86 Addressing the importance of the defendant’s presence when the jury returns a death sentence, the Ninth Circuit stated:

[I]t was critically important that the return of the death verdict and the polling of the jurors take place in Rice’s presence, where each juror would have to look Rice in the eye and reaffirm his or her jury room vote for declaring in open court that Rice did not deserve to live.87

At this stage of the trial, then, the defendant’s presence per se is critical. The defendant’s role is not to assist counsel, but to confront the jurors.

C. Cases Addressing the Allocation of Decision-Making Responsibility

The allocation of decision-making responsibility between the defendant and defense counsel necessarily turns on the perception of the proper role of the defendant in the proceedings.88 Therefore, decisions in which the defendant disagrees with defense counsel about whether to investigate, present a specific defense, or call certain witnesses, shed light on the courts’ understanding of the defendant’s role. While views

86 Rice v. Wood, 44 F.3d 196, 1402 (9th Cir. 1995) (emphasizing importance of having “each juror . . . look [the defendant] in the eye and reaffirm his or her jury room vote by declaring in open court that [the defendant] did not deserve to live”).
87 Id.
88 Conversely, one’s understanding of the attorney’s proper role also plays a part in this assessment. Commentators distinguish between lawyer-centered and client-centered “models of lawyering” when it comes to decision making in the attorney-client relationship. See, e.g., Rodney J. Uphoff & Peter B. Wood, The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking, 47 KAN. L. REV. 1, 5-10 (1998). Lawyer-centered representation places the highest priority on counsel’s autonomy to make all tactical and strategic decisions, while the defendant takes a more passive role in any decision making. Id. at 7-8. The client-centered model of lawyering delegates most decision-making responsibility to the defendant after defense attorney has counseled the client on the fundamentals and ramifications of each decision. Id. at 8-9. There are, however, some strategic decisions that must be made by the lawyer, even in a client-centered approach. Id. Rules on lawyers ethics provide extremely limited guidance concerning the precise contours of decision-making responsibility and are rarely mentioned by the courts. Id. at 11-16 (citing the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) and the MODEL RULES OF PROFESSIONAL CONDUCT (1989)); Joel S. Newman, Doctors, Lawyers, and the Unabomber, 60 MONT. L. REV. 67, 80 (1999).
of the defendant’s proper decision-making responsibility vary, courts hold that counsel controls all but a few decisions.

When the defendant and counsel disagree, courts generally conclude that counsel’s judgment governs. Counsel may even forfeit rights for the defendant through the exercise of bad, or at least questionable, judgment. The legal system allocates to the attorney responsibility for all tactical decisions and does not expect the attorney to speak for the defendant when the attorney disagrees with the defendant. Making decisions over the defendant’s objection does not render counsel ineffective; counsel has that prerogative and controls all but a few decisions at trial. Only by electing to proceed pro se can the defendant assert control over the myriad tactical and strategic decisions that must be made in the course of any criminal case. There are, however, some decisions that are the sole province of the defendant.

1. Decisions Affecting Constitutional Rights

Some decisions entail the exercise or waiver of constitutional rights. In those decisions, the wishes of the defendant control, and the defendant must reach a decision guided by advice of counsel. For example, one study surveyed approximately 700 attorneys from public defenders’ offices and asked them whether they believed their client’s consent was necessary to make a range of trial decisions. Uphoff & Wood, supra note 88, at 6. The study found that in decisions whether to seek a plea bargain from the prosecutor, whether to raise an affirmative defense, and whether to seek a lesser included offense instruction, responding attorneys were almost at an even split as to whether they believed they should secure their client’s consent. Uphoff & Wood, supra note 88, at 34 tbl.2; see also Lynn Mather, What Do Clients Want? What Do Lawyers Do?, 52 EMORY L.J. 1065, 1072-77 (2003) (discussing variation of views concerning role of counsel).

90 See infra note 104.

91 See generally ANTHONY A. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 85-A (5th ed. 1988) (describing allocation of responsibility, advising counsel to inform defendant of options and allow defendant to fully consider options unless time does not permit and stating that counsel is not defendant’s “mouthpiece”); Judith L. Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. DAVIS L. REV. 1049, 1099-1106 (1984) (discussing allocation of responsibility); Richard H. Chused, Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics, 65 CAL. L. REV. 636, 638-49 (1977) (discussing allocation of decision-making responsibility between attorney and defendant). As a result, the defendant may feel insufficiently involved in her own case and conclude that the attorney is not paying attention to her views.

92 See infra Part II.C.2. In this area, the defendant receives the worst of both worlds: defendant receives no protection from decisions made over her objection, but a patently harmful decision made in deference to the defendant’s preference will generally be excused because the defendant’s choice governed.

93 See Jones v. Barnes, 463 U.S. 745, 751 (1983); United States v. Burke, 257 F.3d 1321, 1323 (citing Jones and noting that the United States Supreme Court gives the defendant “ultimate authority to make fundamental decisions for his case,” the Court concluded these fundamental decisions were whether to plead guilty, whether to waive a trial by jury, whether to testify on one’s own behalf and whether to appeal); United States v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996); ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (3d ed. 1999); see also Wainwright v.
example, the defendant decides whether to plead guilty or go to trial, whether to have a jury, and whether to testify. Defense counsel cannot waive any of these rights for the defendant or take action that effectively waives these rights.

In these areas, it is critical that the defendant make a knowing, intelligent, and voluntary decision about whether to waive or exercise each right. The defendant depends on, and is entitled to, the guidance of counsel concerning the exercise of these rights. Thus, while the decision to waive is the defendant’s, defense counsel bears primary responsibility for assuring that the waiver is knowing and intelligent.

That said, even with questions close to the defendant’s zone of constitutional prerogative, courts have sometimes ceded decision making to counsel. A defendant may sometimes relinquish a

Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) (“Only such basic decisions as whether to plead guilty, waive a jury, or testify in one’s own behalf are ultimately for the accused to make.”). But see Uphoff & Wood, supra note 88 (discussing attorneys’ views and practice concerning who makes these decision).

94 See Thompson v. Wainwright, 787 F.2d 1447, 1452 (11th Cir. 1986) (noting “[t]he ultimate decision whether to testify is for the defendant, and a defendant who rejects his lawyer’s advice on such a matter may not later challenge the lawyer’s effectiveness”); United States v. Mullins, 315 F.3d 449, 454 (5th Cir. 2002) (“decision of whether to testify belongs to the defendant and his lawyer cannot waive it over his objection”); United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984) (holding that counsel may not waive client’s right to testify truthfully as a matter of strategy, although counsel may refuse to permit client to commit perjury); United States v. Leggett, 162 F.3d 237, 245 (3d Cir. 1998) (noting that the right to testify can be waived only by defendant); see also Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) (holding attorney was ineffective and violated defendant’s right to testify by threatening to withdraw if defendant testified).

95 For example, counsel’s decision to stipulate may not be effective if the stipulation established an element of the offense and thereby effectively waives the defendant’s constitutional right to have the prosecution prove every element beyond a reasonable doubt. See United States v. DeWilliams, 28 Fed. Appx. 913, 916-17 (10th Cir. 2001) (vacating conviction on ground that defendant had not agreed to stipulate to an element of the offense). By contrast, stipulations that do not establish an element of the offense and therefore do not implicate the defendant’s constitutional rights are likely to be regarded as legitimate strategic decisions for counsel to make. See United States v. Zylstra, 713 F.2d 1332, 1339 (7th Cir. 1983).

96 In fact, it is required that the defendant’s decision to waive a constitutional right be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969) (holding a defendant’s decision to plead guilty or not guilty must be made intelligently and voluntarily by the defendant).

97 For example, in Burnett v. Kerr, 835 F.2d 1319, 1321 (10th Cir. 1988), the Tenth Circuit stated that “[f]ailure by counsel to advise a client of his right to remain silent, and a representation by counsel that a client has no choice under law but to take the stand would be among the most serious instances of attorney error.” The courts are reluctant, however, to find that defense counsel made such an error. See, e.g., id. at 1322 (crediting defense counsel’s assertion in affidavit that counsel informed defendant of his right to refuse to testify); United States v. Nguyen, 997 F. Supp. 1281, 1292 (C.D. Cal. 1998) (rejecting defendant’s claim that he was not informed of his right not to testify even though defense counsel’s affidavit did not refute defendant’s claim and stating “[t]he Court finds it incredible that [defendant’s counsel], and experienced criminal defense attorney and member of the Criminal Justice Act panel, would omit to inform [the defendant] of one of the most fundamental rights afforded criminal defendants”).
constitutional right without making a conscious decision to do so. In *Florida v. Nixon*, the Court rejected the conclusion of the Florida court that counsel violated the defendant’s right to effective assistance by conceding the defendant’s guilt in opening statement. The Court explained that counsel had determined the best strategy was to concede guilt and target the defense at avoiding the death penalty. Counsel attempted to explain the strategic choice to the defendant at least three times, but received neither approval nor disapproval from the defendant. The Court concluded that counsel could make the strategic decision to concede guilt without obtaining the defendant’s consent. The Court held that the burden was on the defendant to object if he did not agree with this tactical choice, even though the defendant was mentally unstable and his unbalanced behavior resulted in his absence for essentially the entire trial. In the Court’s view, in light of the defendant’s inability to assume a decision-making role, counsel appropriately exercised his professional judgment and proceeded accordingly.

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98 See, e.g., United States v. Oplinger, 150 F.3d 1061, 1072 (9th Cir. 1998) (discussing defendant’s failure to testify only in terms of counsel’s decision with no consideration of defendant’s relevant constitutional rights).
100 Id. at 180. But see United States v. Thomas, 417 F.3d 1053, 1056 (assuming that concession of guilt without consultation or consent was ineffective representation).
101 Nixon, 543 U.S. at 181. In the hearing on the defendant’s challenge to his conviction, the lawyer explained that “[t]here are many times lawyers make decisions because they have to make them because the client does nothing.” Id. at 182.
102 Id. at 187-88. The Court distinguished the concession of guilt during trial from a guilty plea, which cannot be accepted based on counsel’s authority or the defendant’s “tacit acquiescence.” Id.; see also Taylor v. Illinois, 484 U.S. 400 (1988) (allowing trial court to bar defendant from calling witness in exercise of his right to compulsory process because of attorney’s failure to comply with discovery rules).
103 543 U.S. at 178; see also Dean v. Superintendent, Clinton Corr. Facility, 93 F.3d 58, 62 (2d Cir. 1996) (holding that the petitioner “[b]ears the burden of showing that he in fact objected”).
104 543 U.S. at 188. In Nixon, the Court acknowledged that concession of guilt by an attorney “in a run-of-the-mine trial” would pose a closer question. Id. at 190. Other decisions have held concessions of guilt by counsel not to be a reasonable strategy, sometimes stressing the importance of the defendant’s consent. See, e.g., United States v. Holman, 314 F.3d 837, 841-43 (7th Cir. 2002) (summarizing cases emphasizing consent); United States v. Hernandez-Ocampo, 1993 U.S. App. LEXIS 2696 (9th Cir. 1993) (holding that concession of guilt by counsel was incompetent but did not result in prejudice to the defendant); Haynes v. Cain, 298 F.3d 375, 382-383 (5th Cir. 2002) (finding counsel’s decision to acknowledge to the jury that the evidence against defendant was overwhelming, without defendant’s consent to such a strategy, was error but did not prejudice the defendant); see also Uphoff & Wood, supra note 88, at 23-24. All these sources pre-date *Nixon*. They are cited here for their indication of the view of the defendant’s role. It is beyond the scope of this article to determine the precise ramifications of *Nixon* on defense counsel’s freedom to make tactical choices that limit the utility of the defendant’s constitutional rights. But see Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (holding defense counsel’s decision to acknowledge the weight of the evidence against defendant as to the lesser included offense in order to win the confidence of the jury was a tactical maneuver and “[a] lawyer is not required to consult with his client on tactical moves”); Clozza v. Murray, 913 F.2d 1092, 1099-1100 (4th Cir. 1990) (quoting Francis v. Spraggs, 720 F.2d 1190 (11th Cir. 1983))
Thus, there is general agreement that the defendant absolutely controls the decision to waive constitutional rights and that decision is protected by the requirement of a knowing, intelligent and voluntary waiver by the defendant. However, at the margins, in cases like *Nixon*, counsel can assume a decision-making role that effectively preempts the defendant’s control of the decision.105

### 2. Tactical and Strategic Decisions

In contrast to their recognition that the defendant controls decision making regarding constitutional rights, courts generally recognize that defense counsel controls most tactical and strategic decisions.106 Defense counsel can make decisions concerning matters such as what motions to file, what witnesses to call, what objections to raise and what arguments to make.107 On these matters, the defendant’s preferences do

105 United States v. Thomas, 417 F.3d 1053 (finding no prejudice and therefore granting no relief).

106 See United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987) (noting that counsel “is in charge of the choice of trial tactics and the theory of defense”); Emerson v. Gramley, 91 F.3d 898, 902 (7th Cir. 1996) (noting that “the decision whether or not to call a witness is a lawyer’s tactical decision on which consultation with the client is not required”); Virgin Islands v. Weatherwax, 77 F.3d 1425, 1435 (3d Cir. 1996) (concluding that whether to file motion related to possible exposure of jury to publicity was question of strategy and for counsel to make); State v. Soares, 916 P.2d 1233, 1257 (Haw. Ct. App. 1996) (noting that strategic and tactical decisions are generally for counsel to make); State v. Lee, 689 P.2d 153, 158 (Ariz. 1984) (explaining that “[t]actical decisions require the skill, training, and experience of the advocate”); People v. Ramey, 604 N.E.2d 275, 281 (Ill. 1992) (stating that defense theory is question of tactics or strategy for counsel to determine); State v. Rubenstein, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (holding “decisions on what witnesses to call, whether and how to conduct cross-examination, and all other strategies or tactical decisions are the province of the lawyer after consultation with the client”); see also Jones v. Barnes, 463 U.S. 745, 754 (1983) (holding that counsel representing convicted defendant on appeal is not required to raise a non-frivolous issue merely because the defendant asked that the issue be included); Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). Chief Justice Burger summarized defense counsel’s authority:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and—ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions with would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds. See also ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (3d ed. 1999); Uphoff & Wood, *supra* note 88, at 7 (noting that in the traditional lawyer-centered model, counsel controls tactical and strategic decisions); Bonnie, *supra* note 10, at 568 (noting that attorneys control wide range of decisions).

107 See, e.g., State v. Davis, 506 A.2d 86, 101 (Conn. 1986) (holding attorney could decide not
not necessarily control. There are, however, some courts that ascribe to the defendant significant decision-making responsibility—even in tactical and strategic decisions.

Nevertheless, the majority of courts view counsel as controlling the tactical and strategic decisions. Further, many courts hold that defense counsel is not bound even to follow the defendant’s specific directives. In *State v. Lee*, the Supreme Court of Arizona explained why the defendant has limited ability to make appropriate litigation decisions:

Counsel is deemed to have the training, familiarity, and experience needed to decide what tactic or strategy will best serve a client; clients generally lack that training, familiarity, and experience and are, therefore, less competent to make those decisions.

Other courts similarly emphasize the limitations on the defendant’s role and the need for counsel to exercise independent judgment. As a result, counsel’s strategic choice, made over the defendant’s objection, will rarely constitute ineffective assistance. For example, counsel’s
to call witness over defendant’s objection); People v. Williams, 471 P.2d 1008, 1015 (Cal. 1970) (noting that counsel “ordinarily may waive his client’s rights as to matters of trial tactics and control of the court proceedings”); Lovett v. Flotz, 687 F. Supp. 1126, 1135 (E.D. Mich. 1988) (finding no ineffective assistance for counsel’s failure to call defendant as witness); State v. Johnson, 714 S.W.2d 752, 766 (Mo. Ct. App. 1986) (finding failure to object to inadmissible evidence did not render counsel’s performance ineffective); *Weatherwax*, 77 F.3d at 1433-1436 (finding counsel’s failure to raise juror misconduct issue at request of defendant not ineffective assistance); *Ramey*, 604 N.E.2d 281 (holding counsel’s choice to proffer self-defense theory against defendant’s wishes did not deny defendant his right to counsel); see also *Yarbrough v. Gentry*, 540 U.S. 1 (2003) (emphasizing counsel’s control of strategic decisions concerning closing argument).

See *Uphoff*, supra note 50, at 772 (noting that ethical rules provide limited guidance and that most rules support the allocation of tactical and strategic decisions to counsel); see also *Soares*, 916 P.2d at 1258 (discussing difficulty of drawing line between decisions that may be controlled by counsel and those controlled by defendant).

See *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004) (holding counsel controls decision whether to seek lesser included offense instruction; summarizing authority and characterizing position that defendant controls decision as minority decision); *Uphoff*, supra note 50, at 791 (asserting that state courts generally hold defendant is bound by counsel’s decision even if defendant disagreed).


Id. at 159.

See *Blanco v. Singletary*, 943 F.2d 1477, 1501 (11th Cir. 1991) (holding counsel ineffective for deferring to defendant’s preference not to pursue mitigating evidence).

See *United States v. Burke*, 257 F.3d 1321, 1324 (11th Cir. 2001) (rejecting argument that counsel was ineffective for opposing mistrial when defendant wanted to request mistrial); *Faust v. United States*, 1992 U.S. App. LEXIS 29989, at *4-5 (9th Cir. Nov. 6, 1992) (holding failure to call witnesses a tactical choice by counsel and one which does not render assistance ineffective); *United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998) (holding counsel not ineffective for raising question of competency over defendant’s objection); *State v. Wilkinson*, 474 S.E.2d 375, 381-382 (N.C. 1996) (finding no error where court allowed counsel to call psychological experts over defendant’s objection); *Ramey*, 604 N.E.2d at 281-282 (concluding defendant’s rights were not violated when defense counsel raised a self-defense claim over his objection); *Trimble v. State*, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985) (noting that courts will
choice to oppose a mistrial that the defendant wanted to request\textsuperscript{114} or to enter a stipulation over the defendant’s objection\textsuperscript{115} did not constitute ineffective assistance, but represented virtually unassailable strategic decisions by counsel.\textsuperscript{116}

Nevertheless, despite the accepted allocation of tactical and strategic decisions to counsel, some opinions advance a view that the defendant should control even these decisions. Dismissing claims of ineffective assistance of counsel, courts excuse the counsel’s arguably inappropriate choices by attributing them to directives from the defendant.\textsuperscript{117} Courts have upheld convictions where the defendant generally approve counsel’s choice made over defendant’s objection). In \textit{Burke}, the Eleventh Circuit explained the deference to counsel’s decisions in the face of the defendant’s opposition:

If we add to the list of circumstances in which a defendant can trump his counsel’s decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel. The sound functioning of the adversarial system is critical to the American system of criminal justice.

257 F.3d at 1323; \textit{see also} People v. Wilkerson, 463 N.E.2d 139, 144 (Ill. App. Ct. 1984) (concluding that “the lawyer is the manager of the lawsuit, and therefore decisions on trial strategy and tactics may be made by counsel alone.”); Newman, \textit{supra} note 88, at 86 (“it is pretty hard to show ineffective assistance even if the lawyer does not do what the client asks.”). But see People v. Frierson, 705 P.2d 396, 402 (Cal. 1985) (noting that some strategic decisions are “of such fundamental importance” that the defendant’s decision controls and concluding that counsel could not override defendant’s desire to present defense that was supported by some evidence). In addition, counsel’s failure to advise the defendant as to counsel’s view of the wisest course of action may constitute ineffective assistance even though counsel expects defendant to reject the advice. \textit{See} Boria v. Keane, 99 F.3d 492 (2d Cir. 1996).

114 \textit{Burke}, 257 F.3d at 1324 (upholding conviction where counsel opposed mistrial and defendant wanted to request mistrial).

115 \textit{Wilkerson}, 463 N.E.2d at 143-144 (upholding conviction where attorney entered into stipulation over defendant’s objection).

116 \textit{See} Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (explaining that a court judging an ineffective assistance claim “should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”).

117 \textit{See}, e.g., Hayes v. Woodford, 301 F.3d 1054, 1070 (9th Cir. 2002), \textit{reh’g} granted, \textit{en banc, and vacated} by Hayes v. Woodford, 382 F.3d 920 (9th Cir. 2004) (concluding that defendant was not prejudiced by counsel’s failure to investigate because “nothing could have changed his mind regarding his family’s involvement in the penalty phase.”); Coleman v. Mitchell, 244 F.3d 533, 545 (6th Cir. 2001) (holding that counsel’s decision to follow his client’s instruction to pursue the arguably deficient defense of residual doubt theory and present no mitigating evidence did not make counsel’s representation ineffective because the court found defendant was competent enough to instruct his attorney on trial strategy and “[a]n attorney’s conduct is not deficient simply for following his client’s instructions”); Wallace v. Ward, 191 F.3d 1235, 1247-48 (10th Cir. 1999) (concluding that counsel was not ineffective because he complied with defendant’s requests not to conduct cross-examination, raise objections, or present mitigating evidence); Jeffries v. Blodgett, 5 F.3d 1180, 1198 (9th Cir. 1993) (holding counsel not ineffective for failing to present mitigating evidence because client instructed him not to do so); Mitchell v. Kemp, 762 F.2d 886, 889-90 (11th Cir. 1985) (finding failure to present mitigating evidence pursuant to defendant’s request was not ineffective assistance and stating, “[w]hen a defendant preempts his attorney’s strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made,” but also noting that counsel “did not blindly follow” his client’s directive); Alvord v. Wainwright, 725 F.2d 1282, 1288-89 (11th Cir. 1984) (holding counsel not ineffective for failing to investigate and present insanity defense over defendant’s objection); United States v.
foreclosed the presentation of mitigating evidence\textsuperscript{118} or specific defenses,\textsuperscript{119} and even where the defendant directed counsel to remain

Masat, 896 F.2d 88, 92-93 (5th Cir. 1990) (holding counsel not ineffective where he was following defendant’s wishes); Mulligan v. Kemp, 771 F.2d 1436, 1441 (11th Cir. 1985) (recognizing defendant’s “broad power to dictate the manner in which he is tried” and noting deference given to counsel’s choices following defendant’s direction); People v. Galan, 261 Cal. Rptr. 834, 835-36 (Cal. Ct. App. 1989) (holding counsel not ineffective for calling witness to comply with defendant’s wishes against counsel’s advice); In re Trombly, 627 A.2d 855 (Vt. 1993) (holding counsel not ineffective for acceding to defendant’s preference on lesser included defense instruction); Trimble v. State, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985) (commenting that court is unlikely to deem counsel ineffective when counsel accedes to client’s demand); State v. Rubenstein, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (holding representation effective despite counsel’s waiving opening arguments and cross examination of witnesses because defendant instructed him to do so); see also Newman, supra note 88, at 80 (noting that “when the lawyer does exactly what the client asks, courts rarely find ineffective assistance of counsel.”). Uphoff & Wood, supra note 88, at 24 (“State judges, like their federal counterparts, have been quite willing to find that a lawyer has rendered constitutionally adequate and effective representation even though counsel permitted her client to make a strategic decision typically made by counsel.”). But see Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983) (noting that defendant’s directive, characterized as “jailhouse bravado,” to get either an acquittal or the death penalty did not justify failure to investigate intoxication defense); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (noting that “as a general matter, it is not inappropriate for counsel, after consultation with the client, to override the wishes of the client when exercising professional judgment regarding ‘non-fundamental’ issues”); United States v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996) (noting that “[d]ecisions on selection of a jury are among the many entrusted to counsel rather than to defendants personally” and “a lawyer is an agent, with the power to make binding decisions, rather than just an advisor”); State v. Lee, 689 P.2d 153, 157 (Ariz. 1984) (holding counsel was ineffective for “acceding to his client’s demand that he call two witnesses notwithstanding his professional judgment that it would be both unethical and detrimental to his client’s case”).

In some instances, counsel’s accession to the defendant’s directive may itself be characterized as a strategic decision. See, e.g., Hance v. Zant, 981 F.2d 1180, 1183 (11th Cir. 1993) (noting that counsel complied with defendant’s instruction not to contact his family members because counsel feared he would otherwise lose defendant’s cooperation); Ramer v. Thomas, No. 91-351 JC/DJS, 1994 U.S. Dist. LEXIS 20476, at *9 (D.N.M. Apr. 25, 1994) (concluding that attorney made appropriate strategic decision to follow defendant’s instructions to “get the best deal (plea) possible” rather than go to trial); Rubenstein, 531 N.E.2d at 740 (finding no ineffective assistance when counsel followed his client’s instructions not to make opening arguments or cross-examine witnesses, noting that “decisions on what witnesses to call, whether and how to conduct cross-examination, and all other strategies or tactical decisions are the province of the lawyer after consultation with the client); Lowenfield v. Phelps, 817 F.2d 285, 291 (5th Cir. 1987) (concluding that counsel made strategic decision in consultation with defendant to forego psychiatric testimony at sentencing hearing).

\textsuperscript{118} See, e.g., Wallace, 191 F.3d at 1247-48 (concluding that counsel was not ineffective because he complied with defendant’s requests not to conduct cross-examination, raise objections, or present mitigating evidence); Jeffries, 5 F.3d at 1197-98 (holding counsel not ineffective for adhering to defendant’s decision not to present mitigating evidence at sentencing hearing); Gilreath v. Head, 234 F.3d 547, 551-52 (11th Cir. 2000) (focusing consideration of prejudice on whether defendant would have changed his mind about directing his attorney not to introduce mitigating evidence in capital sentencing hearing); Frye v. Lee, 235 F.3d 897, 904 (4th Cir. 2000) (rejecting claim of ineffective assistance in part because defendant “adamantly refused to permit his lawyers to contact his family members or to engage their services in securing mitigation evidence”); Trimble, 693 S.W.2d at 280 (holding counsel not ineffective for acceding to defendant’s directive that no mitigating evidence be presented and no argument be made in capital sentencing hearing).

\textsuperscript{119} See, e.g., Landrigan v. Stewart, 272 F.3d 1221, 1228 (9th Cir. 2001), reh’g granted, en
mute throughout the trial.120

Some courts take the position that defense counsel is required to defer to the defendant.121 In Foster v. Strickland,122 for example, counsel explored two viable defense strategies with the defendant, but the defendant adamantly rejected both, advancing a third, more tenuous theory.123 The court concluded that counsel was ethically required to defer to the defendant’s wishes.124 Similarly, in State v. Ali,125 the court ascribed broad control over decision making to the defendant. In Ali, the defendant unsuccessfully argued that he was denied assistance of counsel altogether when the trial court allowed him to permit a particular juror to be selected for service contrary to his attorneys’ recommendation that he exercise a peremptory challenge to remove the juror.126 The court emphasized that the attorney is the client’s agent and is therefore “bound to comply with her client’s lawful instructions.”127 The court cited Standard 4-5.2 of the American Bar Association Standards for Criminal Justice, which provides that most strategic and tactical decisions are to be made by counsel after consultation with the client, and that when the client disagrees with counsel “on significant

banc, and vacated by Landrigan v. Stewart, 397 F.3d 1235 (9th Cir. 2005) (concluding that defendant was not prejudiced by counsel’s failure to investigate mitigating evidence because he was adamantly opposed to presenting such evidence and insisted he would only agree to present a single theory of defense, which the court concluded was untenable); Troby, 627 A.2d at 856-857 (holding counsel not ineffective for advancing client’s position that jury should not be instructed on lesser included offense); see also Welsh S. White, Defendants Who Elect Execution, 48 U. Pitt. L. Rev. 853, 855-61 (1987) (discussing attorney’s decision-making role when client does not want to oppose execution).

120 United States v. Terranova, 309 F.2d 365, 366 (2d Cir. 1962) (rejecting defendant’s ineffective assistance of counsel claim where he directed counsel to remain mute).

121 See Alvord, 725 F.2d at 1289 (finding failure to assert an insanity defense was competent assistance of counsel because defendant instructed counsel not to raise such a defense); Foster v. Strickland, 707 F.2d 1339, 1343 n.3 (11th Cir. 1983) (holding that “[i]n light of [defendant’s] adamance, [counsel] had an ethical obligation to comply with his client’s wishes and was thus unable to present an insanity defense” and citing the MODEL CODE OF PROF’L RESPONSIBILITY Canons 7-7 & 7-8 (1980)); Autry v. McKaske, 727 F.2d 358, 362 (5th Cir. 1984) (noting that counsel was ethically bound to follow defendant’s wishes); Burton v. State, 651 So. 2d 641, 656 (Ala. Crim. App. 1993) (noting counsel is ethically bound to follow client’s wishes about which witnesses to call); see also State v. Brown, 451 S.E.2d 181, 187 (N.C. 1994) (concluding that counsel did not violate his ethical obligations by following defendant’s opinions with which he disagreed). But see People v. Wilkerson, 463 N.E.2d 139, 143 (Ill. App. Ct. 1984) (stating that lawyer is bound to follow client’s instructions but nevertheless concluding that lawyer may make strategic decision over defendant’s objection).

122 707 F.2d 1339 (11th Cir. 1983).

123 Counsel suggested defending either by establishing the defendant’s “depraved mind,” attempting to reduce the conviction from capital to second degree murder, or by pleading and establishing an insanity defense. Id. at 1343. The defendant instead “insisted that [counsel] pin the blame on the two women present at the murder and attribute [the defendant’s] inaction at the time of the killing to one of his infrequent epileptic fits.” Id. at 1343.

124 Id. at 1343-44.


126 Id. at 188.

127 Id. at 189.
matters of tactics or strategy,” counsel should make a record of the disagreement and the conclusion. The court held that in the event of an “absolute impasse,” the client’s wishes control. In State v. White, the court applied the reasoning of Ali and affirmed the trial court’s decision to allow the defendant to preclude presentation of a history of domestic violence in his family during the sentencing phase of his capital case. The court concluded that counsel and defendant had reached an impasse. As a result, the defendant must prevail in his assessment that the information would aggravate rather than mitigate. The court’s treatment of the defendant’s assessment of the role of evidence in capital sentencing as superior to defense counsel’s demonstrates the extreme deference sometimes given to the defendant’s decision-making authority.

Decisions dealing with mentally ill defendants also ascribe substantial control to the defendant even when the defendant’s limitations would appear to mandate increasing counsel’s decision-making responsibility rather than restricting it. In a number of decisions considering the extent to which a defendant can determine whether to raise a defense based on mental health evidence, or to present mental health evidence in mitigation at sentencing, courts have taken the position that the defendant controls the decision, particularly

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128 Id. (citing ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (3d ed. 1999)).
129 Id.; see also State v. Brown, 451 S.E.2d 181, 186-187 (N.C. 1994) (applying Ali and rejecting defendant’s argument that the trial court should have ordered him to “abide by the decisions of his attorney”).
130 508 S.E.2d 253 (N.C. 1998).
131 Id. at 273.
132 Id. But see State v. Wilkinson, 474 S.E.2d 375, 382 (N.C. 1996) (concluding that trial court properly allowed counsel to present mitigating evidence over defendant’s objection where there was not an “absolute impasse”).
133 In some cases, courts point to a defendant’s special limitations to explain allocation of decision-making responsibility to counsel. In Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit grappled with the division of responsibility between a client who was mentally handicapped and counsel. Petitioner alleged ineffective assistance of counsel, arguing in part that his trial attorney was incompetent in failing to investigate and present mitigating evidence. Id. at 1450. Although the attorney believed his client was mentally handicapped, he did not investigate his childhood, family life, school records, or service records. Id. at 1451. His justification was that his client had directed him not to conduct the investigation. Id. at 1451. The court concluded that counsel’s failure to investigate represented incompetence because of the “expanded duties” imposed on counsel by the rules of professional responsibility when the client’s mental condition “prevents him from exercising proper judgment.” Id. at 1451-52. The court stated, “[i]f counsel followed such commands is that although the decision whether to use such evidence in court is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.” Id. at 1451 (citations omitted). The court ultimately denied relief on the grounds that the petitioner had suffered no prejudice. Id. at 1453-1454; see also Bundy v. Dugger, 816 F.2d 564, 566 n.2 (11th Cir. 1987) (noting that counsel could not act on the basis of the client’s instruction not to challenge his competency to stand trial); State v. Soares, 916 P.2d 1233, 1253-56 (Haw. Ct. App. 1996) (discussing difficulty of representing mentally ill defendant).
when the question is whether to advance an insanity defense.\textsuperscript{134}

However, in some circumstances, a defendant’s mental handicap prevents her from exercising the usual decision-making authority. In \textit{Alvord v. Wainwright}, the court noted, “there may be cases in which the client’s faculties are so impaired that the client cannot choose for [her]self what to do.”\textsuperscript{135} But it is not clear that the legal system knows how to, or even tries to distinguish \textit{Alvord}-type cases from any others. Generally, the courts assume that a defendant who is deemed competent to stand trial necessarily possesses the mental ability to participate fully in all decisions.\textsuperscript{136}

Thus, although there is no uniform and universal approach to the division of decision making between the defendant and defense counsel

\textsuperscript{134} See, e.g., Grandison v. Corcoran, No. 00-5, 2000 U.S. App. LEXIS 17958 (4th Cir. July 24, 2000) (treating as a significant factor counsels’ understanding that defendant had foreclosed presentation of a mental health defense); Stafford v. Saffle, 34 F.3d 1557, 1564-65 (10th Cir. 1994) (noting that defendant had right to preclude mitigation based on mental condition); United States v. Marble, 940 F.2d 1543, 1548 (D.C. Cir. 1991) (concluding that trial court did not abuse its discretion when it failed to impose insanity defense on defendant and accepted his competent decision not to raise the defense); Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984) (holding counsel not ineffective where defendant would not allow counsel to pursue insanity defense); Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994) (holding that counsel’s presentation of insanity defense over defendant’s objection violated defendant’s constitutional rights); Treece v. State, 547 A.2d 1054, 1055-56 (Md. 1988) (suggesting that counsel had obligation to raise the defense but holding a competent defendant controls decision whether then to withdraw insanity defense); \textit{see also} Bonnie, supra note 10, at 569 (asserting that client controls decision concerning insanity defense); Newman, supra note 88, at 80 (noting that in majority of reported decisions counsel defers to defendants’ wishes as to what defenses to pursue).

The insanity defense is generally inconsistent with a claim of innocence, making assertion of the defense tantamount to an acknowledgment of guilt. See Jacobs, 870 S.W.2d at 418; Treece, 547 A.2d at 1059. In some cases, however, courts have concluded that counsel has an obligation at least to pursue the option of presenting mental health evidence even if the defendant opposes that choice. See Carter v. Bell, 218 F.3d 581, 596 (6th Cir. 2000) (concluding that defendant’s objection “to present a mental health defense or to testify should not preclude counsel’s investigation of these potential factors”); Douglas v. Woodford, 316 F.3d 1079, 1085-1087 (9th Cir. 2003) (concluding that counsel was not ineffective in failing to obtain further psychological testing given that the defendant would not cooperate and adamantly opposed presenting a mental health defense, but nevertheless finding counsel deficient for failing to further investigate defendant’s mental health); Weber v. Israel, 730 F.2d 499, 508 (7th Cir. 1984) (holding that withdrawal of insanity plea is a matter of trial strategy to be determined by counsel); Galu v. Attias, 923 F. Supp. 590, 597 (S.D.N.Y. 1996) (holding defendant-attorney could not be held liable for failing to continue to oppose the government motion for a competency examination as requested by client where attorney reasonably believed client’s preferred approach was uncolorable).

\textsuperscript{135} 725 F.2d at 1289; \textit{see also} Brennan v. Blankenship, 472 F. Supp. 149, 156 (W.D. Va. 1979) (“Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect.”).

\textsuperscript{136} See, e.g., Alvord, 725 F.2d at 1289 (“Hopefully, if the client cannot adequately help prepare his defense, the trial judge will rule him incompetent to stand trial.”); State v. Rubenstein, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (commenting that it would not be appropriate for an attorney to take direction from a defendant who is not competent to stand trial and noting that no question of defendant’s competency was raised in the case).
in regard to tactical decisions, counsel’s role is always critical. When courts treat defendants as having absolute control, the defendant’s decision will be informed by advice of counsel. When courts conclude that counsel controls the decision, counsel is free to override the defendant’s choice even if the defendant expressly disagrees.

D. The Defendant’s Right to Self-Representation

Defendants who decide to proceed pro se have complete control over all decision-making in the proceeding. Indeed, a defendant who elects self-representation assumes the most robust and burdensome role ever ascribed to a defendant. In *Faretta v. California*, the Court recognized that a defendant has a right to self-representation guaranteed by the Sixth Amendment. Under *Faretta*, a defendant can waive the right to counsel and gain control of all decisions in the case by invoking the right to self-representation. The courts’ interpretation of the defendant’s *Faretta* right not only clarifies the increased responsibilities of the pro se defendant but also provides insight into the division of responsibility between defendant and counsel in cases where the defendant is represented by counsel.

In *Faretta*, the trial court rejected the defendant’s offer to waive his Sixth Amendment right to assistance of counsel and represent himself. The Supreme Court held that the refusal to allow the defendant to proceed pro se violated his Sixth Amendment right to self-representation. In a decision that pitted the right to autonomy against the right to a fair trial, the Court recognized the defendant’s right to autonomy and held that a trial court cannot refuse a defendant’s

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137 422 U.S. 806 (1975).
138 This right has been discussed in detail elsewhere, so this article will focus primarily on the view of the defendant’s role reflected in *Faretta* and the decisions interpreting it.
139 *Faretta*, 422 U.S. at 810. The judge probed the defendant’s understanding of voir dire procedure and evidence law and concluded that the defendant could not function as a competent attorney. *Id.* at 808 n.3.
140 *Id.* at 836.
141 See *id.* at 832-33 (acknowledging that holding seems antithetical to right to counsel cases, which posit that assistance of counsel is essential to fair trial); *id.* at 839 (Burger, C.J., dissenting) (arguing that goal of justice is undermined and integrity of system suffers when easy conviction results from defendant’s decision to proceed pro se); *id.* at 849 (Blackmun, J. dissenting) (arguing that majority ignores principle that justice be done); see also John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 Cal. L. Rev. 697 (1984); Paul H. Bytus, Comment, *Pro Se Defendants and Advisory Counsel*, 14 Land & Water L. Rev. 227, 232 (1979); Mark S. Coco, Case Note, *The Right to Defend Pro Se in Criminal Proceedings Faretta v. California*, 37 Ohio St. L.J. 220, 226 (1976); John S. Teetor, Note, *Faretta v. California: The Constitutional Right to Defend Pro Se*, 5 Cap. U. L. Rev. 277, 280 (1976). Concurring in *United States v. Farhad*, Judge Reinhardt of the Ninth Circuit detailed his view that the exercise of *Faretta* rights jeopardizes the fairness of the proceeding and outlined the ways in which the defendant’s self-representation in that case
request to proceed pro se merely because the defendant is unlikely to provide effective self-representation.\textsuperscript{142}

The Court’s reasoning in \textit{Faretta} stressed the importance of the defendant’s role in the relationship with counsel. The Court emphasized that the Sixth Amendment “contemplate[s] that counsel . . . shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.”\textsuperscript{143} The Court noted that counsel has the power to make strategic decisions, but that this power is based on the defendant’s consent to be represented by counsel.\textsuperscript{144} Thus, the Court opined that imposing an unwanted lawyer on the defendant might “lead him to believe that the law contrives against him.”\textsuperscript{145}

A defendant who proceeds pro se necessarily plays a larger role in the proceedings than the defendant who accepts assistance of counsel. The precise parameters of the pro se defendant’s role were clarified in \textit{McKaskle v. Wiggins}.\textsuperscript{146} In \textit{McKaskle}, the defendant, Wiggins, invoked his right to represent himself at trial, and the court appointed two lawyers as standby counsel.\textsuperscript{147} Standby counsel took an active role in the trial, arguing legal points, performing specific tasks and occasionally making motions over Wiggins’ objection.\textsuperscript{148} Once convicted, Wiggins complained that standby counsel had been overzealous and had interfered with his \textit{Faretta} right to self-representation by their “distracting, intrusive and unsolicited participation.”\textsuperscript{149} The Supreme Court concluded that Wiggins’ standby counsel had not overstepped the constitutional boundaries of their undermined the fairness of the trial. \textit{Id.} at 1105-07. A critique of \textit{Faretta} is beyond the scope of this Article.

\begin{itemize}
  \item \textsuperscript{142} \textit{Faretta}, 422 U.S. at 836 (refusing to consider defendant’s lack of knowledge about law when considering if waiver was knowing and intelligent).
  \item \textsuperscript{143} \textit{Id.} at 820. The court noted that the only tribunal in British history to “forc[e] counsel upon an unwilling defendant in a criminal proceeding” was the Star Chamber. \textit{Id.} at 821.
  \item \textsuperscript{144} \textit{Id.} at 820-21.
  \item \textsuperscript{145} \textit{Id.} at 834.
  \item \textsuperscript{146} 465 U.S. 168 (1984).
  \item \textsuperscript{147} \textit{Id.} at 170. In \textit{Faretta}, the Court held that the trial court may appoint standby counsel to assist the pro se defendant, even over the defendant’s objection. \textit{See Faretta}, 422 U.S. at 834 n.46. \textit{See generally} Anne Bowen Poulin, \textit{The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System}, 75 N.Y.U. L. REV. 676 (2000) (discussing role of standby counsel).
  \item \textsuperscript{148} \textit{McKaskle}, 465 U.S. at 180. As the case progressed, Wiggins repeatedly changed his mind about what he wanted standby counsel to do. \textit{Id.} at 172 (noting that defendant had objected to any interference by standby counsel and at different periods actively requested the aid of standby counsel). At times he objected to their very presence; at others he consulted with them or asked them to take over aspects of the case. \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 176.
\end{itemize}
role. The Court held that the right to self-representation has two dimensions: the right actually to control the defense and the right to have the jury perceive the defendant as controlling the defense. The defendant’s right to have the jury perceive the defendant as in control relates only to the in-court dynamic and not to the actual allocation of decision-making authority. However, the guarantee of actual control means that the defendant makes all significant tactical decisions and is entitled to speak on all matters of importance. Specifically, the Court stated:

The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial. Thus, all disagreements between the defendant and standby counsel—decisions that would normally be controlled by counsel—must be resolved in the pro se defendant’s favor.

The courts’ perception of the role of the pro se defendant thus represents the high water mark of the defendant’s involvement and control. The pro se defendant is constitutionally entitled “to present his case in his own way,” making all tactical and strategic decisions. The role of the pro se defendant is particularly instructive as it contrasts with the more limited role of the represented defendant. If the defendant acquires control of strategy and tactics by proceeding pro se, the represented defendant must expect those areas to fall within the province of counsel. Thus, even when a defendant proceeds pro se her role is still perceived in relationship to the role of counsel.

II. STRENGTHENING PROTECTION OF DEFENDANT’S RIGHT TO COUNSEL

As the decisions in the four areas discussed above demonstrate, the criminal defendant’s role is consistently defined in relation to counsel. Decisions concerning pro se representation assure that the defendant is

\[150\] Id. at 185 (“[W]e find [counsels’] presence and participation . . . irreproachable. None interfered with Wiggins’ actual control over his defense; none can reasonably be thought to have undermined Wiggins’ appearance before the jury in the status of a pro se defendant.”).

\[151\] Id. at 178. The Court also stated that the right recognized in Faretta “exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.” Id. at 176-77.

\[152\] Id. Provided the defendant has the final say on all decisions, however, standby counsel may express disagreement outside the jury’s presence without violating the defendant’s constitutional rights.

\[153\] Id. at 174.

\[154\] Id. at 179.

\[155\] Id. at 177.
permitted to assume all the responsibility normally allocated to counsel. In determining whether the defendant is competent to stand trial or whether the defendant’s absence violated the defendant’s rights, the courts assume that counsel will advise the defendant and will protect the defendant’s rights. When the defendant and counsel disagree concerning trial strategy, counsel may either disregard or defer to the defendant’s preferences; either way, the defendant is dependent on counsel’s choice.

Recognizing that defense counsel frequently plays a central role in the proceedings and that defendants depend heavily on the lawyers who represent them, the courts should enhance protection of the defendant’s right to counsel in four ways. First, the courts should recognize and accord appropriate weight to the defendant’s right to continuity of representation. Second, courts must address defendants’ complaints concerning representation with an appropriate level of scrutiny. Third, the defendant must be assured the right to be present at all hearings related to the possible removal of counsel and other issues related to representation. Finally, the courts should establish a clear preference for representation by counsel over self-representation; when a defendant seeks to sever the relationship with counsel and proceed pro se, the courts should not accept the defendant’s waiver unless it is unequivocal and should closely scrutinize the defendant’s competence to make that decision.

A. The Right to Continuity of Representation

Given that the defendant’s role and involvement at trial depend heavily on counsel, the courts should recognize that indigent defendants have a constitutionally protected right to have the initially appointed attorney continue to represent them and that this right can be overcome only under limited circumstances. Too often, indigent defendants are subjected to changes in counsel as their cases proceed through the justice system. The courts’ practice of permitting substitution of new counsel when not requested by the defendant undermines the right to assistance of counsel. Recognizing a right to continuity of representation would accordingly strengthen the right to counsel.

156 The proposals relating to the right to continuity of counsel and motions for substitution relate principally to indigent defendants, whose choice of counsel and decisions to change counsel are controlled by the courts. The proposals concerning presence at hearings regarding representation and procedures disfavoring pro se representation relate equally to indigent and non-indigent defendants. However, in specific cases the issues may play out differently when the defendant is indigent, and therefore not regarded as having relevant control over choice or continuity of counsel.
Non-indigent defendants have a right to counsel of choice. In *United States v. Laura*, the Third Circuit emphasized the relationship between the defendant’s ability to choose counsel and the development of an appropriate attorney-client relationship. Summarizing the importance of the defendant’s right to choose counsel, the court stated:

\[\text{[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him. It is from his attorney that he will learn of the particulars of the indictment brought against him, of the infirmities of the government’s case and of the range of alternative approaches to oppose or even cooperate with the government’s efforts.}\]

The court further commented:

\[\text{Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense.}\]

Defense counsel determines the extent to which the defendant controls, or is even involved in questions concerning how to proceed. Counsel’s view of the defendant, as well as the defendant’s trust or mistrust of counsel, plays a role in determining the course of the defendant’s representation. Thus, the relationship between the

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158 607 F.2d 52 (3d Cir. 1979).

159 *Id.* at 57. The court further stated, “[w]e also note that the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured.” *Id.; see also Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (noting that refusal to allow defendant to choose counsel would create risk of undermining “the basic trust between counsel and client, which is a cornerstone of the adversary system”).

160 607 F.2d at 56.

161 *Id.; see also State v. Ehlers*, 631 N.W.2d 471, 479-80 (Neb. 2001) (citing as reasons for presumption in favor of counsel of choice “(1) a historic respect for the defendant’s autonomy in crafting a defense, (2) the strategic importance of choice in ensuring vigorous advocacy, and (3) practical considerations of cost to the defendant and the judicial system if counsel of choice were wrongly denied”).

162 See Uphoff & Wood, *supra* note 88, 36-51 (reporting range of defense attorneys’ views on allocation of decision-making authority between attorney and client and on extent to which attorney must consult with client prior to making decisions in the case); Uphoff, *supra* note 50, at 764 (emphasizing counsel’s latitude concerning allocation of decision making).

163 Two possibly related factors appear to play the largest role in determining the likelihood that defense counsel will reduce the defendant’s participation in decision making: the attorney’s assessment that the defendant has low intelligence and the belief that the client will make poor and harmful decisions. *See Uphoff & Wood, supra* note 88, at 53-54; Uphoff, *supra* note 50, at
right to counsel plays a critical role in ensuring the defendant’s proper involvement in the proceedings and will be enhanced if based on the defendant’s desire to begin or maintain that relationship.

This is the reason courts recognize that non-indigent defendants have a right to counsel of choice. The defendant with financial resources is not merely entitled to receive effective assistance from counsel but has an interest in counsel of choice that the court must consider and accord weight. As a result, a court may not deny the moneyed defendant’s request to proceed with retained counsel of choice absent adequate justification.

In contrast, indigent defendants have no comparable right. The

802 (discussing importance of relationship between defendant and counsel to the viability of shared decision making); State v. Soares, 916 P.2d 1233, 1255 (Haw. Ct. App. 1996) (finding “[d]efendant’s distrust of or disagreement with his attorney resulted in a refusal to communicate with his attorney and a refusal to testify at trial, despite his attorney’s advice that such testimony was crucial to [the defense]” and that trial court should have inquired further into defendant’s competence).


165 See, e.g., United States v. Gonzalez-Lopez, 399 F.3d 924, 932 (8th Cir. 2005), aff’d 126 S. Ct. 2557 (2006) (concluding that trial court did not adequately consider defendant’s right to counsel of choice in denying attorney’s application for admission pro hac vice); United States v. Walters, 309 F.3d 589, 592 (9th Cir. 2002); United States v. Santos, 201 F.3d 953 (7th Cir. 2000) (concluding that trial court improperly denied defendant counsel of choice); United States v. Panzardi Alvarez, 816 F.2d 813, 817-18 (1st Cir. 1987) (holding that application of local rule to preclude defendant from having counsel of choice was not necessary for “the fair, orderly and expeditious administration of justice” and, therefore, violated defendant’s constitutional right to counsel of choice); Diesslin, 868 F.2d at 611 (concluding that refusal to grant motion for counsel pro hac vice violated defendant’s right to counsel of choice); United States v. Laura, 607 F.2d 52, 57-58 (3d Cir. 1979) (concluding that trial court had not identified sufficient justification for dismissing one of defendant’s attorneys); Commonwealth v. Rucker, 761 A.2d 541, 543 (Pa. 2000) (granting new trial where trial court disallowed substitution of counsel without adequate justification); Commonwealth v. McAleer, 748 A.2d 670, 675-76 (Pa. 2000) (holding trial court violated defendant’s rights when it denied continuance to allow counsel of choice, who was on trial elsewhere, to represent defendant and forced defendant to trial with unprepared substitute counsel); see also Wheat, 486 U.S. at 158-59 (discussing government interests that may overcome defendant’s right to counsel of choice and concluding that potential for conflict in case was sufficient to warrant denial of defendant’s right); United States v. Rivera-Hernandez, 332 F. Supp. 2d 423, 430 (D.P.R. 2004) (noting that “disqualification of counsel should be a measure of last resort”); State v. Sanders, 534 S.E.2d 696, 698 (S.C. 2000) (holding that trial court erred when it removed counsel of choice without investigating whether she was disqualified as a potential witness). This marks only one of the respects in which affluent defendants are advantaged in their representation. See generally Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 HARV. L. REV. 670 (1992) (discussing special right to counsel issues faced by non-indigent defendants); Thomas C. Canfield, Note, The Criminal Defendant’s Right to Retain Counsel Pro Hac Vice, 57 FORDHAM L. REV. 785, 787-88 (1989) (discussing interests that will overcome defendant’s right to counsel of choice). Additionally, see infra notes 188-192 and accompanying text.

166 See Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989) (stating that defendants who cannot afford to hire counsel are only guaranteed adequate representation); United States v.
Supreme Court has not held that indigent defendants, dependent on the government for appointed counsel, have the right to choice of counsel or any related interest warranting constitutional protection. Courts consistently hold that an indigent defendant does not have the right to select a particular court-appointed attorney. However, once counsel has been appointed, the Sixth Amendment should protect the defendant’s interest in continued representation by appointed counsel.

The Supreme Court has not directly considered whether an indigent defendant has a constitutionally protected interest in continuity of representation. The thrust of the Court’s opinions suggest that the indigent defendant has no constitutionally protected interest other than to receive effective assistance of counsel. Therefore, the defendant is entitled to relief if the court appoints a new attorney and does not provide sufficient time for the attorney to prepare the case, rendering the representation ineffective. Otherwise, the defendant must point to a specific failing on the part of the attorney and demonstrate that the

Messino, 181 F.3d 826, 831 (7th Cir. 1999) (stating that “impecunious defendants do not have the right to choose their counsel”); State v. Jones, 707 So. 2d 975, 976-78 (La. 1998) (noting that indigent defendant did not have right to select appointed counsel, but had constitutional right to continued service of attorney retained by his father); State v. Gillam, 629 N.W.2d 440, 449 (Minn. 2001) (noting that defendant must generally accept counsel appointed by the court); Allen v. State, 43 P.3d 551, 561 (Wyo. 2002) (noting that indigent defendant “had no right to the appointed attorney of his choice or desired experience”).


See United States v. Saldivar-Trujillo, 380 F.3d 274, 278-79 (6th Cir. 2004) (holding that the lower court appropriately denied indigent defendant’s motion to substitute counsel in light of fact that indigent defendants have no right to attorney of choice); United States v. Espino, 317 F.3d 788, 798-99 (8th Cir. 2003) (stating that “an indigent defendant has no right to demand of a court that a particular attorney, or particular attorneys, be appointed to represent him”); State v. Arguelles, 63 P.3d 731, 751 (Utah 2003) (explaining that defendant is “not entitled to pick and choose” among court-appointed counsel” and the mere fact that defendant did not like the choice of counsel presented to him did not violate Sixth Amendment); Strickland v. State, 94 P.3d 1034, 1047-48 (Wyo. 2004) (explaining that indigent defendants are entitled neither to counsel of their choice nor to counsel that “blindly” follows their instructions); Sergie v. State, 105 P.3d 1150, 1157 (Alaska Ct. App. 2005) (holding that indigent defendants are only entitled to a competent attorney, not the attorney of their choice or an attorney with which they share a meaningful relationship); Davis v. State, 615 S.E.2d 203, 208 (Ga. Ct. App. 2005) (holding that indigent defendant is not entitled to court appointed counsel of choice); Weaver v. State, 894 So. 2d 178, 187 (Fla. 2004).

See, e.g., Commonwealth v. Powell, 590 A.2d 1240, 1243-45 (Pa. 1991) (affirming grant of new trial where trial court forced defendant to proceed with unprepared public defender when assigned public defender was sick on day set for trial). In Powell, the court acknowledged that:

Even the most experienced trial counsel regardless of his competency needs to be familiar with the intricacies of any case. The substitution of one attorney for another attorney from the same office does not lead to an automatic presumption of competency on behalf of substituted counsel.

Id. at 1244 n.6.
defendant was prejudiced as a result.170

*Morris v. Slappy*171 is the leading Supreme Court decision addressing an indigent defendant’s right to a particular attorney. In *Morris*, the Court held that the Constitution did not guarantee the indigent defendant “a meaningful relationship” with counsel.172 However, the decision gives little guidance in determining whether the defendant enjoys a right to continuity of representation; the facts of the case and the Court’s extreme characterization of the Ninth Circuit’s holding limit the utility of the opinion. In *Morris*, the defendant was given a new public defender on the eve of trial but did not complain of the change in representation until the second day of trial. In fact, the defendant initially expressed satisfaction with his new lawyer, and the lawyer repeatedly stated that he was ready for trial.

The Ninth Circuit held that the trial court had violated the defendant’s right to counsel by denying him a “reasonable continuance” until his original attorney could represent him at trial.173 The court declared:

> The right to counsel includes more than just the right to representation by competent counsel at trial. This right would be without substance if it did not include the right to a meaningful attorney-client relationship.174

The Ninth Circuit then clarified its opinion, stating that it was holding only “that the sixth amendment . . . encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance . . . .”175

The Supreme Court reversed. The Court focused heavily on the facts of the case, but dismissed, with some scorn, the Ninth Circuit’s statement that the Sixth Amendment includes the right to a meaningful attorney-client relationship. In addition to noting that this reading of the Sixth Amendment had no basis in the law, the Court stated:

> No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by

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170 See United States v. Cronic, 466 U.S. 648 (1984); Young v. Runnels, 435 F.3d 1038 (9th Cir. 2006) (concluding that petitioner was not entitled to relief where he failed to show prejudice).


172 *Id.* at 14.


174 *Id.* The court further elaborated:

> [R]epresentation at trial is without substance if the defendant does not have confidence in his attorney’s ability to represent the defendant’s best interests. It is unlikely that a criminal defendant will have a legal education. He, therefore, will have to rely on his attorney’s advice for the most basic decisions in a criminal trial—whether to plead guilty, whether to testify, whether to present a defense, and which witnesses to call. If the defendant does not trust his attorney, he may be unwilling to follow his attorney’s advice in these most important areas.

175 *Id.* at 720-21.
the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel.176

However, the Court did not address the question of whether the defendant had some constitutionally protected interest in continuity of representation.

While the courts cannot assure that each defendant will enjoy a meaningful relationship with counsel, they should recognize that an indigent defendant, like a defendant with financial resources, has an interest in continuity of representation, even though the defendant did not initially select counsel.177 A defendant should not be forced to reestablish an attorney-client relationship with each of a series of attorneys, repeatedly explaining the case and her understanding of it to new counsel. Unfortunately, however, many in the justice system simply assume that indigent defendants can fairly be subjected to substitution of counsel.178

Indeed, the structure of many public defenders offices exposes their clients to serial representation. Public defenders offices are structured in two possible ways providing either vertical or horizontal representation.179 In an office structured for vertical representation, one attorney represents the defendant throughout the process. In a horizontally structured office, the attorneys are assigned to stages or courtrooms, so the defendant will be passed from one attorney to another as the process progresses.180 Although the American Bar

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176 461 U.S. at 14. The Court also referred to the guarantee of a meaningful relationship as a “novel idea.” Id.

177 Weaver v. State, 894 So. 2d 178, 188-89 (Fla. 2004) (concluding that indigent defendant may complain about removal of defense counsel because to hold otherwise would “stratify attorney-client relationships based on defendants’ economic backgrounds).

178 See supra note 1 and accompanying text (recounting author’s experience); see also Commonwealth v. Powell, 590 A.2d 1240, 1241 (Pa. 1991) (reporting that trial court forced defendant to proceed with unprepared substitute counsel when his assigned public defender became ill on day of trial).


180 Wallace & Carroll, supra note 179, at 303 (noting that in the office they studied horizontal representation meant that each defendant would have a series of at least three different defenders); Kim Taylor-Thompson, Individual Actor v. Institutional Player: Alternating Visions of the Public Defender, 84 GEO. L.J. 2419, 2425 n.28 (1996) (describing assignment of case in Cook County’s horizontally structured office); Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 HASTINGS CONST. L.Q. 625, 676-79 (1986) (discussing structure and impact of zone or horizontal representation); David Allan Felice, Comment, Justice Rationed: A Look at Alabama’s Present Indigent Defense System with a Vision Towards Change, 52 ALA. L. REV. 975, 985 (2001) (discussing horizontal representation and noting that defendants experience serial representation);
Association Standards recommend vertical representation, many defenders offices are structured horizontally, subjecting defendants to repeated changes of counsel.

Horizontal representation has been criticized for its negative impact on defense representation. Passing a defendant’s case through multiple attorneys interferes with defense representation and makes it more likely that the defendant will receive inadequate representation. Further, the defendant must present her case to one lawyer after another and is likely to feel that she has received no representation at all.

Although horizontal representation as a pattern of organizing public defenders’ offices appears to be an entrenched aspect of our justice system for economic reasons, its model of serial representation

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Rebecca Marcus, Note, Racism in Our Courts: The Underfunding of Public Defenders and its Disproportionate Impact Upon Racial Minorities, 22 HASTINGS CONST. L.Q. 219, 265 (1994) (noting that defendant in horizontal system will be represented by multiple attorneys during the course of a case); Mounts, supra note 179, at 484 (remarking that defendant in horizontal representation system will be represented by anywhere from two to six or more attorneys).


See Wallace & Carroll, supra note 179, at 263 (summarizing arguments against horizontal representation): it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, and is both cost-ineffective and demoralizing to clients as they are reinterviewed by a parade of staff starting from scratch.

See also Marcus, supra note 179, at 265 (discussing criticism of horizontal representation); Mounts, supra note 180, at 484 (discussing negative impact of horizontal representation). Mirsky also details the history of defense representation in New York City, reporting that stage representation was one issue raised by defenders in their strikes between 1970 and 1982. Mirsky, supra note 179, at 913.

See Taylor-Thompson, supra note 180, at 2425 (commenting that horizontal system favors efficiency over representation); Vivian O. Berger, The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?, 86 COLUM. L. REV. 9, 52-53 (1986) (discussing negative impact of horizontal representation); Mirsky, supra note 179, at 909-10 (noting that “stage representation reinforced the commitment of attorneys [in the public defender’s office] to case movement rather than to individual clients, and directly inhibited their capacity to provide adversarial advocacy in everyday cases.”). In Greenfield v. Gunn, 556 F.2d 935, 938 (9th Cir. 1977), the Ninth Circuit expressed concerns about horizontal representation, stating that “unless each attorney scrupulously acts to insure that all who participate in the case are informed of every aspect of that attorney’s representation, there is some danger that the defendant may be deprived of effective legal assistance.” The court went on to detail the information that each attorney would need to record to assure the defendant of effective assistance:

It is good practice for each attorney who participates in a case to record all material information that he has received pertaining to the case, including relevant evidence that has come to his attention, legal arguments or defenses that he has considered even those he has rejected, and reasons behind any tactical decision he has made in the course of the proceedings.

Id. at 938. The case load and time pressures experienced in many defender’s office make it unlikely that attorneys will generate this detailed record as a case moves from attorney to attorney.

See Klein, supra note 180, at 678 (recounting a defendant’s frustrated response to horizontal defense); Wallace & Carroll, supra note 179, at 263.

Horizontal representation offers fiscal and administrative advantages. A smaller number of
of indigent defendants should not be extended. Whenever possible, substitution of counsel over the defendant’s objection should be avoided. Changing counsel without the defendant’s consent reduces the likelihood that the defendant will receive effective assistance, and will perceive the process as fair. Instead, the courts should recognize the defendant’s interest in continuity of representation and should substitute counsel for an indigent defendant only if the defendant agrees to the change or if the court finds a sufficient countervailing interest.

Furthermore, removal of appointed counsel over defendant’s objection should be viewed as a constitutional violation unless adequately justified. Like the non-indigent defendant’s right to counsel of choice, the indigent defendant’s right to continuity should receive constitutional protection but should not be absolute. Instead, a sufficiently important governmental interest should overcome the right. For example, even a moneyed defendant cannot insist on being represented by an attorney who is unwilling or unable to serve. In Wheat v. United States, the Court explained why the defendant’s right to counsel of choice may be overcome if counsel faces a conflict of defense lawyers can handle a larger volume of cases, and trial courts do not need to adjust their trial calendars based on the availability of defense counsel since counsel is assigned to the particular courtroom. Wallace & Carroll, supra note 179, at 263 (noting that horizontal representation saves money); Mirsky, supra note 179 (setting out the history of appointed representation in New York City, demonstrating the difficulties of vertical representation in a large metropolitan court system); Klein, supra note 180, at 676 (noting fiscal advantage of horizontal representation); Mounts, supra note 179, at 484 (citing horizontal representation as a way in which offices allocate limited resources to increase efficiency); see also Greenfield, 556 F.2d at 938 (noting that horizontal representation “may at times be an inevitable result of workload and budget constraints”).

186 Possible justifications include an extreme negative impact on the court’s trial calendar, as well as incompetence or incapacity of counsel. See Weaver v. State, 894 So. 2d 178, 187-90 (Fla. 2004); Ex parte Tegner, 682 So. 2d 396, 398 (Ala. 1996) (setting aside trial court’s order removing appointed counsel from case); see also Stevenson v. State, 709 A.2d 619, 629-30 (Del. 1998) (discussing administrative concerns that justify denial of continuance to substitute counsel).

187 United States v. Locascio, 6 F.3d 924, 931 (2d Cir. 1993) (holding court had properly disqualified defense counsel for conflict of interest and noting other possible reasons for disqualification); United States v. Corporan-Cuevas, 35 F.3d 953, 957 (4th Cir. 1994) (finding trial court did not abuse its discretion when it refused to permit last-minute substitution of counsel and trial court properly weighed defendant’s request against interest in orderly administration of justice); Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985); United States v. Mendoza-Salgado, 964 F.2d 993, 1015 (10th Cir. 1992). In Wheat v. United States, the Court stated:

While the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.


188 See Wheat, 486 U.S. at 159; State v. Roberts, 14 P.3d 713, 738 (Wash. 2001) (rejecting defendant’s argument that the court violated his Sixth Amendment right to counsel of choice by refusing to appoint attorney who was unable to undertake the representation).

interest and why the defendant did not have an absolute right to waive that conflict:

Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.190

Similarly, administrative concerns may overcome defendant’s right to counsel of choice,191 as might the legitimate concern that defendant might not receive effective representation from counsel of choice.192 Only an interest that would be sufficient to overcome a non-indigent defendant’s constitutional interest in counsel of choice should justify overriding an indigent defendant’s right to continuity and substituting

190 Id. at 160. In Locascio, the Second Circuit further explained that “[t]he question of disqualification therefore implicates . . . the interests of the courts in preserving the integrity of the process and the government’s interests in ensuring a just verdict and a fair trial.” 6 F.3d at 931. The court can disqualify counsel on the basis of a potential conflict of interest even if defendant proffers a waiver of the right to conflict-free representation. Wheat, 486 U.S. at 162 (finding “[w]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented”); United States v. Childress, 58 F.3d 693, 734 (D.C. Cir. 1995); United States v. Kelly, 870 F.2d 854, 856 (2d Cir. 1989) (holding that trial court properly denied counsel of choice due to potential conflict); State v. Vanover, 559 N.W.2d 618 (Iowa 1997) (holding that potential conflict of interest justified disqualification of counsel); State v. Ehlers, 631 N.W.2d 471, 480 (Neb. 2001). The court need not have direct evidence of the conflict to disqualify counsel. United States v. Register, 182 F.3d 820, 829-30 (11th Cir. 1999). However, the court may not apply an irrebuttable presumption of conflict. See Ehlers, 631 N.W.2d at 483. On the other hand, the court need not disqualified counsel if the defendant waives the conflict of interest. See United States v. Perez, 325 F.3d 115, 125 (2d Cir. 2003) (holding that defendant properly waived conflict of interest and remarking that decision whether to proceed with counsel of choice or with conflict-free attorney should be left to defendant).

191 See, e.g., Lewis v. State, 730 N.E.2d 686, 689-90 (Ind. 2000) (holding that need for continuance to accommodate private counsel justified court’s denial of defendant’s motion to substitute counsel); State v. Brown, 757 A.2d 768, 773 (Me. 2000) (holding denial of continuance to obtain new counsel was not abuse of discretion); Commonwealth v. Robinson, 364 A.2d 665, 672-73 (Pa. 1976) (concluding that trial court properly required defendant to proceed to trial with appointed counsel when retained counsel repeatedly failed either to appear or to communicate reasons for absence to court).

192 See, e.g., McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996) (rejecting defendant’s argument that court violated right to counsel of choice by appointing co-counsel to assist retained counsel, who was elderly and unlikely to provide effective representation). In Ex parte McFarland, 163 S.W.3d 743, 759-60 (Tex. Crim. App. 2005), the court rejected the defendant’s habeas petition. Addressing the claim of ineffective assistance of counsel, the court remarked:

The trial judge was caught between Scylla and Charybdis. On the one hand, he could foresee that [retained counsel of choice] might not provide reasonably competent representation, and, under the Sixth Amendment, a criminal defendant is entitled to competent representation. On the other hand, a criminal defendant also has a Sixth Amendment right to the privately retained counsel of his choice, and a trial judge may not unilaterally remove a defendant’s retained attorney without extraordinarily good cause. Thus, the trial judge in this case did his best to satisfy both of these constitutional requirements: he appointed an experienced and competent co-counsel to assist [retained counsel of choice] and take over as necessary.

Id.
counsel over the defendant’s objection.

In sum, the courts should recognize a constitutionally protected interest in continuity of representation. While indigent defendants do not enjoy the constitutional right to counsel of choice afforded moneyed defendants, their relationship with counsel should receive constitutional protection. A defendant’s relationship with counsel may be critical to the quality and effectiveness of the representation the defendant receives. The recognition of a constitutional interest in continuity of representation would reflect that reality.

B. Defendants’ Requests for Substitution of Counsel

Conversely, the courts should more readily relieve indigent defendants from the representation of appointed counsel when that representation is unsatisfactory. The courts are not sufficiently open to a defendant’s request for substitution of counsel. The courts impose overly-demanding standards on defendants who seek substitute counsel. In addition, notions of judicial economy may deter judges from appointing substitute counsel. However, when a defendant moves to substitute counsel, the court should listen carefully to the basis for the defendant’s request. Further, the court should grant the request if the defendant’s grounds for dissatisfaction are reasonable in light of the factual situation or are so firmly held that that the defendant’s ability to obtain effective assistance from this attorney is compromised. Because the indigent defendant has no initial choice, the court has a greater obligation to ensure that appointed counsel provides appropriate representation, not merely representation that will survive a post-conviction challenge.193

There is ample evidence that a defendant who complains of deficient representation may be presenting an accurate picture.194 The

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193 Once a defendant has been convicted, it may be difficult to persuade any court that counsel’s lackluster representation both fell below the objective standard of reasonableness and prejudiced the defendant. In Strickland v. Washington, 466 U.S. 668, 687 (1984), the Court held that in order to reverse on the basis that counsel’s representation was ineffective, a defendant must show first that counsel’s representation fell below a reasonableness standard, and second that counsel’s deficient performance prejudiced the defendant thereby depriving him or her of an equitable trial. This standard is very difficult to satisfy. See Young v. Runnels, 435 F.3d 1038 (9th Cir. 2006) (rejecting petitioner’s claim of ineffective assistance rendered by counsel who was disbarred shortly after defendant’s conviction); Wilson v. Mintzes, 761 F.2d 275, 283 (6th Cir. 1985) (commenting that the Strickland test “is tailored to limit the availability of intrusive post-trial inquiry into attorney performance”); Uphoff, supra note 50, at 782, 787 (characterizing the holding in Strickland as a “highly deferential standard” given to counsel’s decisions in a criminal proceeding and stating “[i]n providing counsel virtually unchecked power over tactical decisions, courts have significantly undercut the value of the defendant’s right to compulsory process and the defendant’s right to testify”).

194 See, e.g., Braun v. Ward, 190 F.3d 1181 (10th Cir. 1999) (appointed counsel failed to
quality of defense representation has been repeatedly criticized and is unquestionably a major problem facing the criminal justice system. Despite this criticism, the system is sometimes unresponsive to the defendant’s complaint.

Current law places the ruling on a motion to substitute counsel contact defendant or to show up at hearing); United States v. Mullen, 32 F.3d 891, 893 (4th Cir. 1994) (defense attorney had filed motion to withdraw month before trial date and had no contact with defendant after filing motion until day before trial; nevertheless, attorney told court he was prepared for trial); United States v. Silkwood, 893 F.2d 245, 249 n.3 (10th Cir. 1989) (appointed counsel consulted briefly with defendant, gave no opening statement, and failed to question defense witnesses); Howard v. State, 701 So. 2d 274, 278 (Miss. 1997) (in capital case, neither of two attorneys appointed before trial filed motions or conducted investigation on defendant’s behalf; ultimately defendant chose to represent himself rather than have trial date continued at his attorney’s request); see also Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005) (noting that trial judge believed that defendant’s concerns about counsel’s loyalty were reasonable); see generally William F. McDonald, The Defense Counsel (1983) (discussing state of defense representation); Steven B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994) (lamenting that “[a]rbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel”); William W. Schwarzer, Dealing with Incompetent Counsel—The Trial Judge’s Role, 93 Harv. L. Rev. 633 (1980) (discussing problems of defense representation); Chused, supra note 91, at 637-38 (noting increase in instances of disagreement between defendant and counsel and tendency of defense counsel to usurp defendant’s role); Klein, supra note 180, at 656-64 (discussing how underfunding of defenders offices leads to ineffective assistance of counsel); Vanessa Merton, What Do You Do When You Meet a “Walking Violation of The Sixth Amendment” If You’re Trying To Put That Lawyer’s Client In Jail?, 69 Fordham L. Rev. 841 (1998) (emphasizing growing need to scrutinize ineffective assistance during pleading phase of representation); Kimberly Helene Zelnick, In Gideon’s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion, 30 Am. J. Crim. L. 363, 374 (2003) (characterizing modern public defense as “assembly line justice” that often leads to Sixth Amendment violations).

195 See, e.g., Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783 (1997); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 Neb. L. Rev. 425, 440-63 (1996) (discussing examples of poor defense representation including cases where counsel was not present, not admitted to bar, intoxicated, mentally ill or asleep); Uphoff & Wood, supra note 88, at 26 (noting that commentators “question the zeal and the competence of many criminal practitioners”); Berger, supra note 183 (examining problem of poor defense representation); Klein, supra note 180, at 656-664; Schwarzer, supra note 194, at 633-36 (“Inadequate performance of trial lawyers has become a growing concern to the bench, the bar, and the public.”); Mark D. Ridley, The Right to Defend Pro Se: Faretta v. California and Beyond, 40 Alb. L. Rev. 423, 426 (1976).

196 See, e.g., United States v. Peppers, 302 F.3d 120 (3d Cir. 2002); Smith v. Lockhart, 923 F.2d 1314, 1320-21 (8th Cir. 1991) (concluding that trial court did not adequately protect defendant when it forced him to continue with assigned counsel even though defendant was a plaintiff in a lawsuit against counsel). When Peppers sent the trial court a letter complaining about his counsel’s lack of attention to his case, the court forwarded his letter to his counsel and told the defendant to communicate only through counsel. 302 F.3d at 128. When questions concerning the representation were later raised at the beginning of trial in the form of a motion to proceed pro se, the court never inquired concerning the steps taken by counsel or the adequacy of the representation. Id. at 128-29.
within the trial court’s discretion, and the governing legal standards are difficult for defendants to meet—even when presenting the court with serious complaints. Even though the attorney-client relationship is critical to effective representation, the law is clear that the defendant is not entitled to a meaningful relationship with counsel, and that the defendant is not entitled to substitution of counsel merely because the defendant has lost confidence in, or no longer trusts counsel. Different jurisdictions’ standards governing substitution of counsel are phrased in a variety of ways. The trial court may be directed to ask whether the breakdown in the relationship between the defendant and defense counsel would prevent an adequate defense, whether

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197 See United States v. Webster, 84 F.3d 1056, 1062 (8th Cir. 1996). But see State v. Gillam, 629 N.W.2d 440, 449 (Minn. 2001) (noting that public defender’s office did not comply with court’s request for substitute counsel because court had not found exceptional circumstances).

198 Both defendants and attorneys raise concerns when the relationship degenerates. The decisions reflect that defendants often emphasize the importance of their relationship with counsel. See, e.g., Plumlee, 426 F.3d at 1099 (reporting on deterioration of relationship between defendant and defense attorney which precipitated defendant’s motion to represent himself); United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (holding that trial court did not conduct adequate inquiry when defendant repeatedly complained that he and his attorney did not understand each other and that counsel had used abusive and threatening language to him); Frazer v. United States, 18 F.3d 778, 783-84 (9th Cir. 1994) (concluding that defendant’s allegations that his attorney directed racial slurs at him and threatened him with ineffective representation, if true, would entitle defendant to new trial); State v. Voorhees, 596 N.W.2d 241, 255 (Minn. 1999) (rejecting defendant’s request for removal of counsel on the grounds that he had been belittled and yelled at); Commonwealth v. Rucker, 761 A.2d 541, 542 (Pa. 2000) (noting that defendant sought to be represented by substitute counsel because he “felt ‘comfortable’ with him”); State v. Irvine, 547 N.W.2d 177, 179 (S.D. 1996) (reporting that defendant’s request for a new attorney was based on “an alleged breakdown in trust and communication with his counsel” after his counsel persuaded court to revoke defendant’s bond after he threatened suicide). Conversely, in some cases, defense counsel represents that the relationship with the defendant has deteriorated to a point at which counsel cannot function effectively. See, e.g., State v. Loftus, 566 N.W.2d 825, 827 (S.D. 1997) (reporting that counsel asserted that relationship was compromised when defendant sent complaint to State Bar and that court nevertheless denied counsel’s motion to withdraw, requiring him to represent defendant through the trial and appellate process); State v. Carruthers, 35 S.W.3d 516, 538 (Tenn. 2000) (affirming trial court’s finding that defendant forfeited right to counsel and setting out counsel’s statements in support of motion to withdraw alleging that threats from defendant had undermined their relationship).

199 Morris v. Slappy, 461 U.S. 103 (1983); Adelzo-Gonzalez, 268 F.3d at 779 (noting that defendant must show a legitimate reason for the loss of trust); Allen v. State, 43 P.3d 551, 560-61 (Wyo. 2002) (stating general Sixth Amendment principle and noting that loss of confidence or trust does not warrant substitution of counsel).

200 See United States v. Harris, 394 F.3d 543, 552 (7th Cir. 2005) (listing as factors to consider the timeliness of the motion, the adequacy of the court’s inquiry, and “whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense”); Adelzo-Gonzalez, 268 F.3d at 779 (concluding that breakdown in communication had occurred); United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997) (finding trial court did not err in refusing to allow counsel to withdraw because motion was untimely and there was not total breakdown of communications between defendant and counsel); United States v. Hall, 35 F.3d 310, 313-14 (7th Cir. 1994) (concluding district court did not abuse its discretion in denying defendant’s motion for substitute counsel; district court conducted adequate inquiry, motion was untimely and there was not complete breakdown in communication between defendant and
exceptional circumstances exist, whether the defendant can demonstrate counsel’s ineffectiveness or whether there is a “conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” While some courts recognize that disagreement over trial strategy may warrant substitution of counsel, others hold that a dispute over tactical decisions is not sufficient. The mere allegation that counsel has not met frequently enough with defendant to discuss the case may not even call for further inquiry by the court. Applying these extremely demanding standards, courts deny motions for substitution despite serious complaints by the defendant.

In addition to facing these difficult legal standards, a defendant
seeking substitution of counsel must overcome the court’s natural reluctance to bring new counsel into the case and generate delay in the proceedings. The court is entitled to assess the timeliness of the motion and to consider the government interest in taking the case to trial and avoiding the delay that would result from a change in defense counsel.  

Administrative convenience always weighs against granting the motion, and courts are often impatient with defendants who request new counsel on the eve of trial, expressing frustration with the lack of timeliness and threatened disruption of the case. Although some defendants are probably crafty manipulators, others appear to be victims of lawyer incompetence or neglect, raising the issue in the only way they understand. The defendant may realize there is a problem only as the trial date approaches and the defendant discovers defense counsel’s strategy and level of preparation for trial. Moreover, the defendant may see no other opportunity to raise the issue. As a non-lawyer, the defendant may not know how to draw the issue to the court’s attention before the next scheduled court appearance, which is likely to be the date assigned for trial. Some courts require the defendant to

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208 See United States v. Beers, 189 F.3d 1297, 1302-03 (10th Cir. 1999) (explaining that denial of substitution was warranted in light of untimeliness of motion and fact that defendant had already received prior substitution); United States v. George, 85 F.3d 1433, 1439 (9th Cir. 1996) (affirming trial court’s denial of defendant’s motion to drop appointed counsel and proceed pro se on grounds that motion was untimely and defendant and counsel were still communicating); United States v. Corporan-Cuevas, 35 F.3d 953 (4th Cir. 1994) (holding that district court did not abuse discretion in denying request for substitution when defendant would not maintain consistent stance on choice of substitute counsel); United States v. Betancourt-Arrechea, 933 F.2d 89, 95-96 (1st Cir. 1991) (upholding trial court’s denial of defendant’s untimely motion to proceed pro se because jury was already sworn in and defendant had earlier opportunities to waive counsel).

209 See, e.g., United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987) (concluded that the trial court’s finding that the defendant was engaged in “a deliberate, intentional delaying tactic” was clearly erroneous); see Lindsay R. Goldstein, Note, A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform, 73 FORDHAM L. REV. 2665, 2691-93 (2005) (discussing judicial skepticism of defendants’ claims that the attorney-client relationship has broken down).

210 Some defendants take the initiative to write the court a letter complaining about counsel. See, e.g., United States v. Calderon, 127 F.3d 1314, 1342-43 (11th Cir. 1997) (stating that after conviction but before sentencing defendant sent letters to judge complaining that counsel was “derelict in filing proper motions, biased, inexperienced, and generally unenthusiastic about representing him”); United States v. Hall, 35 F.3d 310, 312 (7th Cir. 1994) (discussing detailed letter that defendant sent to district court complaining about his attorney after defendant entered guilty plea). Even that initiative may be unavailing. See, e.g., United States v. Peppers, 302 F.3d 120 (3d Cir. 2002) (reporting that when defendant sent a letter to court complaining of his counsel’s representation, the court forwarded the letter to counsel and informed defendant to communicate with the court only through counsel); United States v. Graham, 91 F.3d 213, 221 (D.C. Cir. 1996) (reporting that defendant sent three letters to trial court complaining of counsel’s performance and asking for a new lawyer, and that trial court’s only response was to hold a hearing after receiving the third letter, at which the court denied defendant’s request without hearing); United States v. Zillges, 978 F.2d 369, 371 (7th Cir. 1992) (noting that defendant sent letter detailing problems with counsel to court a month before trial date but court took no action other than a pro forma inquiry on the date set for trial).
communicate only through counsel, placing the defendant entirely at the mercy of the very lawyer the defendant finds objectionable.211

When the relationship between the defendant and counsel has deteriorated, the court’s ability to assess the request for substitution may suffer correspondingly. The relationship problems may impair the court’s ability to obtain reliable information about the representation.212 If the defendant’s allegations of inadequate representation have merit, assigned counsel may not be candid with the court but may actually attempt to portray the problems in the representation as exaggerated or entirely attributable to the defendant.213

Recognizing these challenges, the courts should adopt an approach that is more protective of the defendant’s right to counsel. The test for assessing motions to substitute should acknowledge the importance of the defendant’s role in the relationship with counsel as a factor in determining whether the defendant receives adequate representation. The court should not merely assure itself that the assigned lawyer could do the job. Instead, the court should also determine whether the defendant’s confidence in counsel or ability to work with counsel has deteriorated to the point that it will impair the representation. To do so, the court must understand the defendant’s concerns and complaints.

In order to properly understand the defendant’s concerns the court must conduct an appropriate inquiry to determine the source and seriousness of the defendant’s dissatisfaction.214 The court must not

211 See, e.g., Peppers, 302 F.3d at 124.
212 Even when defense counsel is providing appropriate representation, the court may not have access to all the pertinent facts. If defense counsel has investigated the defendant’s claimed defense and been unable to substantiate it, counsel may not want to compromise the defendant’s position by disclosing the investigation to the court; indeed, the attorney may be constrained by the attorney-client privilege and the obligation to maintain client confidentiality.
213 Even if the defense attorney has been working on the case and providing appropriate representation, the court may have difficulty getting at the information it needs. If counsel has been unable to substantiate the defendant’s claims about the offense, she may not want to compromise the client’s position by disclosing the investigation to the court. Indeed, the attorney may be constrained by the attorney-client privilege and the obligation to maintain client confidentiality.
214 See Graham, 91 F.3d at 221; Zillges, 978 F.2d at 372 (holding inquiry inadequate where trial court “sought to elicit a general expression of satisfaction . . . with his trial counsel rather than [the] reasons for his dissatisfaction”); United States v. Morrison, 946 F.2d 484, 499 (7th Cir. 1991) (recognizing that court must hold hearing to inquire into defendant’s motion for substitution); Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991) (acknowledging trial court’s obligation to inquire concerning factual basis for defendant’s dissatisfaction); McMahon v. Fulcomer, 821 F.2d 934, 943 (3d Cir. 1987) (concluding that trial court was obligated to inquire concerning reasons for discharge of counsel even though the record suggested that the fault might lie with the defendant); State v. Kane, 479 P.2d 207, 209 (Haw. 1971) (holding that trial court’s obligation to hold a hearing when defendant objects to assigned counsel is a necessary corollary to defendant’s right to effective representation); Allen v. State, 43 P.3d 551, 562 (Wyo. 2002); see also Schwarzer, supra note 194, at 652 (suggesting inquiry if defendant presents “a seemingly substantial complaint”). But see State v. Smith, 123 P.3d 261, 263 (Or. 2005) (holding that inquiry into defendant’s complaint concerning counsel was not required).
merely assure the defendant of the court’s own confidence in the lawyer. Indeed, a defendant who questions the competence and commitment of counsel to provide a strong partisan defense is unlikely to be reassured by the comments of the court, which the defendant may view as one of the arms of the government marshaled against the defendant in the prosecution of the case. Furthermore, the court should not reject the defendant’s request for substitution based either on the court’s confidence in counsel or counsel’s assurances to the court.216 Instead the court should discuss the concerns or complaints with the defendant, ideally in camera.217 Not only does this inquiry protect the defendant’s right to effective assistance, but it may also serve to “ease the defendant’s dissatisfaction, distrust, or concern.”218 In making its inquiry, the court should not merely assess whether the defendant’s complaints are factually true; instead, the court should determine whether the defendant’s concerns are objectively reasonable219 or are so firmly held that the defendant’s ability to obtain effective assistance is compromised.

If the problem flows entirely from the defendant’s lack of cooperation or obstinacy, the court may properly deny the defendant’s motion for substitution.220 However, the court must reach that

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215 See, e.g., Allen, 43 P.3d at 562-63. In Allen, the court never asked the defendant why he was dissatisfied with his representation but merely assured the defendant that counsel had appeared in several trials before the court and that counsel may be making informed tactical decisions based on his training and experience. Id. Such assurance is inappropriate where the trial judge’s knowledge of the facts is limited, as it necessarily is. See Schwarzer, supra note 194, at 650.

216 Some courts accept counsel’s assurances. See, e.g., McMahon, 821 F.2d at 942 (holding that defendant’s rights were violated when the trial court accepted counsel’s assertion that defendant had no reasonable basis for discharging him and forced defendant to represent himself); State v. Brown, 757 A.2d 768, 770 (Me. 2000). In Graham, the Court of Appeals reported that the trial court had informed the defendant that it was up to counsel to determine whether substitution was necessary. 91 F.3d at 221. Courts also seek to reassure defendants by expressing confidence in counsel. See, e.g., Smith, 123 P.3d at 263.

217 See, e.g., United States v. Anderson, 189 F.3d 1201, 1210 (10th Cir. 1999) (reporting that trial court fully discussed defendant’s complaints with him in camera). But see Smith, 123 P.3d at 269 (Or. 2005) (raising questions concerning the propriety of an in camera interview of the defendant under Oregon law).

218 Lockhart, 923 F.2d at 1320.

219 See Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005) (granting relief on ground that defendant’s concerns had been reasonable although the facts on which the defendant based his concerns turned out not to be true).

220 See, e.g., State v. Loftus, 566 N.W.2d 825, 827 (S.D. 1997); State v. Irvine, 547 N.W.2d 177, 181-82 (S.D. 1996) (ascribing to defendant failure of communication after attorney persuaded court to revoke defendant’s bail). In some cases, the court has surmised that the defendant’s objections to counsel flowed from the defendant’s own peculiar view of that law rather than any shortcoming on the part of counsel and have not viewed that as a basis for substitution. See, e.g., United States v. Wilson, No. 92-3234, 1993 WL 523195, at *2 (10th Cir. Dec. 16, 1993). Wilson complained that his attorney had not followed his advice on trial preparation and strategy. Id. He also stated that he did not want to be represented by any attorney who was a member of the American Bar Association, a group he viewed as set on the
conclusion only after careful inquiry, bearing in mind that the defendant who seeks substitution of counsel is essentially self-represented on that question. Moreover, the court must recognize that counsel may be operating counter to the defendant’s interest and, therefore, should not hold the defendant accountable for counsel’s choices.\textsuperscript{221}

In sum, courts should be more receptive to motions for substitution. If a defendant moves for substitution of counsel, the court should explore the factual basis of the defendant’s motion carefully, asking the defendant for information and not relying on the court’s own confidence in counsel or the representations of counsel. Having conducted a thorough inquiry, the court should grant the defendant’s motion if the defendant’s concerns underlying the motion for substitution are objectively reasonable or are so firmly held that the defendant’s ability to obtain effective assistance is compromised.

C. Defendant’s Presence at Hearings Concerning Defense Counsel

In a number of cases, courts have excluded defendants from discussions with the judge concerning the defendant’s own representation.\textsuperscript{222} Given the importance of counsel’s role, the courts...
should recognize that the defendant’s right to counsel of choice or continuity of representation mandates the defendant’s presence at all such hearings or discussions. The defendant may be a crucial source of information for questions about counsel. Moreover, the court cannot rely on counsel to present the defendant’s case for substitution of counsel effectively. Counsel’s desire to stay in the case and to appear competent and prepared may put counsel at odds with the defendant who prefers different representation.

In some cases, courts have addressed questions concerning counsel’s continued representation in the defendant’s absence and concluded that counsel should continue in the case. In *Campbell v. Rice*, for example, the possibility of conflict arose because, unknown to the defendant, the District Attorney’s Office had filed felony charges against defense counsel, and she had been arraigned on those charges two days before the commencement of defendant’s trial. At the request of the Deputy District Attorney, the trial court held a brief hearing addressing the question of whether defense counsel faced a conflict of interest; the defendant was not present. Defense counsel made no statements during the hearing. Based on the Deputy District Attorney’s representations concerning the nature of the case and assurances that counsel was being treated neither more leniently, nor more severely than any other defendant, the court concluded that no

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223 See *Bradley v. Henry*, 413 F.3d 961, 967 (9th Cir. 2005) (“[T]he conference in camera was a critical stage in the prosecution of Bradley. Her exclusion from it, apparently deliberate and without notice, deprived her of the opportunity to speak to the choice of counsel.”) (italics omitted); *State v. Lopez*, 859 A.2d 898, 902 (Conn. 2004) (holding the “in-chambers inquiry regarding the potential conflict of interest was a critical stage of the defendant’s prosecution at which the defendant had a constitutional right to be present”); see also *Hughes v. State*, 421 A.2d 69, 76 (Md. Ct. App. 1980) (holding defendant’s rights were violated by exclusion from hearing in which administrative judge considered and denied the defendant’s request for continuance to allow substitution of counsel); *State v. Dann*, 74 P.3d 231, 247 (Ariz. 2003) (holding that telephone hearing without defendant concerning conflict of interest and permitting defendant’s counsel of choice to withdraw jeopardized defendant’s rights). In *Dann*, the court recognized the importance of giving the defendant an opportunity to have “some input on his Attorney” and invited the defendant to request reconsideration. *Id.* at 247.

224 United States v. Adelzo-Gonzalez, 268 F.3d 772, 779-80 (9th Cir. 2001) (noting that counsel “virtually abandoned” representation of the defendant concerning his motions to substitute counsel).

225 See, e.g., *United States v. Wadsworth*, 830 F.2d 1500, 1506 (9th Cir. 1987) (noting that counsel “became an adverse ‘witness’ against” defendant’s motions for substitution of counsel and for a continuance).

226 See 408 F.3d 1166 (9th Cir. 2005).

227 *Id.* at 1168-69.

228 *Id.* at 1173-74. (Ferguson, J., dissenting).

229 *Id.*
conflict existed and allowed the case to proceed without informing the absent defendant of the issue or the relevant facts. Indeed, as the dissenting judges pointed out, the Deputy District Attorney withheld relevant facts from the judge, by neglecting to mention that defense counsel had lied when first apprehended with a quantity of drugs, had a prior record, had violated probation, and had an outstanding bench warrant. Further, the Deputy District Attorney also told the court that counsel had been offered diversion, even though her prior record made her ineligible for diversion. The Ninth Circuit, sitting en banc, upheld the denial of defendant’s petition for habeas corpus.

Similarly, in *Hale v. Gibson*, defense counsel submitted a written application to withdraw noting his “personal dislike, distrust and animosity toward the Defendant” and explaining his belief that the defendant had attempted to burglarize the attorney’s office earlier that year. The trial court met with defense counsel to discuss the application and then entered a handwritten denial of the application. The defendant was not present at the unrecorded meeting. The appellate court stated that the defendant had neither demonstrated what he would have done to affect the ruling, nor shown any impact on the fairness of the trial. Consequently, the court concluded that his rights were not violated.

In *United States v. Jones*, the trial court granted the prosecution’s motion to disqualify defense counsel on grounds of actual and potential conflicts of interest. Before granting the motion, the court held a hearing in chambers at which the prosecutor and defense counsel, but not the defendant, were present. The trial court removed counsel in light of the conflicts of interest raised by the prosecution. Upholding the defendant’s conviction, the Second Circuit emphasized that counsel did not object to the defendant’s absence and that the issue

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231 Id.
232 Id.
233 Id.
234 Id. at 1171-73.
235 227 F.3d 1298, 1310 (10th Cir. 2000).
236 Id.
237 Id.
238 Id. at 1312.
239 Id. The court also rejected the defendant’s argument that a conflict of interest existed in the case. Id. at 1312-13. The court “scrutinize[d] counsel’s performance with a somewhat more critical eye” and held that the state court had not been unreasonable when it concluded counsel’s total failure to present mitigating evidence or give an opening statement at the penalty phase did not prejudice the defendant. Id. at 1314-17.
240 381 F.3d 114 (2d Cir. 2004).
241 Id. at 117.
242 Id. at 117-18.
243 The prosecution represented that counsel’s firm was the target of a grand jury investigation and that they might call counsel as a witness.
was therefore waived. The court overlooked the fact that the compromised defense counsel could not be expected to raise the objection for the defendant; facing the prospect of his own prosecution, counsel had a strong incentive not to rock the boat. Correspondingly, counsel’s later assurance to the court that he had explained the government’s claims and his options to the defendant should be viewed with the understanding that an attorney who faces a conflict may not provide his client with accurate and complete information concerning that conflict. Guided only by compromised counsel, the defendant may not have understood the implication of the court’s after-the-fact report that it held an in camera conference on the motion to disqualify. The court did not give sufficient weight to the defendant’s interest in being present in order to hear the questions being raised, to take a position on whether he wanted to waive the conflicts of interest cited by the prosecution and, ultimately, to understand the reason for his attorney’s disqualification.

In each of these cases, the trial court deprived the defendant of his voice in a critical decision concerning counsel. The court could not properly rely on counsel to protect the defendant’s interest because of counsel’s compromised position. Furthermore, the defendant had an essential role to play in the decision. The defendant may have had pertinent factual information about his dealings with counsel. Moreover, in determining its course of action, the court should consider the defendant’s preference to proceed with counsel or be given new counsel. Finally, given the court’s decision to keep counsel in the case, the defendant was entitled to know the burden under which counsel labored so defendant could decide whether to seek substituted counsel or at least to maintain a self-protective awareness of counsel’s problems. Thus, it is critical that defendants be heard prior to any judicial determination regarding the continuity of counsel’s representation.

244 381 F.3d at 118, 122.
245 Id. at 123.
246 See also United States v. Treadway, 328 F.3d 878 (6th Cir. 2003) (holding that permitting withdrawal of counsel on basis of a potential conflict without affording defendant a hearing violated defendant’s right to due process). Some courts provide independent counsel to consult with and advise the defendant concerning defense counsel’s possible withdrawal or removal from the case. See, e.g., United States v. Armaza, 280 F. Supp. 2d 174 (S.D.N.Y. 2003); see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 780 (9th Cir. 2001) (remarking that court should have appointed attorney to advise and represent defendant on his motions for substitution of counsel); United States v. Wadsworth, 830 F.2d 1500, 1511 (9th Cir. 1987) (concluding that trial court should have appointed new attorney to represent defendant at hearing on his motion for substitution of counsel). See generally Goldstein, supra note 209 (advocating for this approach).
247 See United States v. Perez, 325 F.3d 115, 125 (2d Cir. 2003) (noting that “[w]here the right to counsel of choice conflicts with the right to an attorney of undivided loyalty, the choice as to which right is to take precedence must generally be left to the defendant”).
In *State v. Lopez*, the Connecticut Supreme Court recognized the importance of the defendant’s presence and reached a more appropriate result. In *Lopez*, a potential conflict arose because of the possibility that counsel could become a witness for the defense in the case. The court concluded that the trial court’s inquiry into counsel’s possible conflict was a critical stage of the case at which the defendant had a right to be present. Had the defendant been present, he might have expressed a preference for using the attorney as a witness. Excluding the defendant from the inquiry invested the potentially conflicted attorney with primary responsibility for guarding the defendant’s interest. Given the attorney’s possible concern about being forced to withdraw from representation, appearing as a witness, and facing the embarrassment of having placed himself in the position of being a necessary witness in the case, it was unreasonable to assume that the attorney would act in the defendant’s best interest.

The Ninth Circuit has also reversed a trial court’s removal of counsel from the case without appropriate participation by the defendant. In *Bradley v. Henry*, the trial court excluded the defendant from an in camera hearing during which the court removed the defendant’s retained counsel and appointed new counsel. Contrary to the Second Circuit in *Jones*, however, the Ninth Circuit held that the trial court committed reversible error. The court noted:

> [The defendant] had no absolute right to choose her counsel. Absence of an absolute right does not reduce a defendant in a capital case to a zero in the delicate decision as to who will represent her as she stands trial for her life.

The court thus recognized that the defendant has a constitutionally

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248 859 A.2d 898, 902 (Conn. 2004). Defense counsel had interviewed the alleged victim of the crime with which the defendant was charged. *Id.* at 901. When a question arose as to whether counsel would testify in the trial and should therefore be replaced, the trial court held a hearing and concluded there was no problem because counsel assured the court he did not intend to testify. *Id.* The defendant was not present at the hearing, which was not recorded. *Id.*

249 See also *Hughes v. State*, 421 A.2d 69, 76 (Md. Ct. App. 1980) (acknowledging it might be incongruous to expect “[t]hat an attorney being discharged would be adequate counsel to advocate his own dismissal out of client’s presence and to ask for a postponement to allow his successor to prepare”) (quoting *Hughes v. State*, 407 A.2d 330, 334 (Md. Ct. Spec. App. 1979); see also *Uphoff*, supra note 50, at 816 (arguing criminal defense lawyers are often motivated by a desire to promote their reputation and good standing in their community, and their decision making during trial is correspondingly affected); *Id.* at 799 (proposing attorneys contemplate four factors before overriding their client’s tactical decisions when lawyer and client come to a “strategic impasse . . . the client’s capacity for making an informed choice, the reasons for the client’s proposed choice, the degree of harm facing the client, and the likelihood of that harm occurring”).

250 413 F.3d 961 (9th Cir. 2005).

251 *Id.* at 964. Not only did the court exclude the defendant from the in camera conference, but it did not tell her of the meeting and did not include the attorney she had retained to oppose her attorney’s motion to withdraw, and the court sealed the proceeding. *Id.*

252 *Id.* at 967.
protected right to have a voice in decisions concerning counsel, here, as an aspect of the defendant’s right to continuity of representation.

At the very least, the defendant’s constitutional rights should guarantee that the court will involve the defendant in evaluating any request to withdraw or motion to disqualify counsel. If the court addresses the question in the defendant’s absence, the ruling should be constitutionally unacceptable and a violation of the defendant’s rights. To rule reasonably, the court must be informed as to the defendant’s position on the representation as well as any factual information the defendant wants to present, including the defendant in the process by which the court determines the merits of the motion.

D. Defendant’s Decision to Proceed Pro Se

A defendant who invokes the right to self-representation loses many of the traditional benefits associated with being represented by counsel.253 Moreover, unlike the right to assistance of counsel, the right to self-representation does not enhance the fairness of the proceeding.254 To the contrary, pro se representation unquestionably threatens the actual and apparent fairness of the proceeding.255 Because the defendant who elects to proceed pro se gives up the right to assistance of counsel, the defendant must be competent to make the decision and must provide a valid waiver.256 The courts should establish an approach

254 See United States v. Martin, 25 F.3d 293, 295 (6th Cir. 1994) (holding that trial court does not have an obligation to inform defendant of right to represent self and commenting that right to self-representation is not related to fair trial concerns).
255 See Faretta, 422 U.S. at 852 (Blackmun, J., dissenting) (remarking 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”); United States v. Farhad, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J., concurring) (opining that defendants who proceed pro se implicitly waive their right to a fair trial); 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) (complaining that Faretta right to proceed pro se is “dangerous and disadvantageous to a fair trial” and “clearly at odds” with Sixth Amendment policy of protecting trial interests of defendant); Kenneth S. Sogabe, Note, Exercising the Right to Self Representation in United States v. Farhad: Issues in Waiving A Criminal Defendant’s Sixth Amendment Right to Counsel, 30 GOLDEN GATE U. L. REV. 129, 158 (2000) (explaining that importance of right to fair trial mandates that courts minimize detrimental effects of defendant’s waiver of counsel); Pearson, supra note 141 (recognizing that defendant’s choice to proceed pro se clashes with society’s countervailing interest in fair trial); Coco, supra note 141 (noting that without counsel, there is little chance for a criminal defendant to receive the fair trial guaranteed by due process); Teetor, supra note 141 (opining that the Faretta court recognized that “a pro se defendant may not always get a fair trial”).
256 Faretta, 422 U.S. at 835 (noting that because of added difficulties for pro se defendants the Court requires waiver of counsel to be knowing and intelligent).
to waivers of assistance of counsel that disfavors pro se representation and implements a preference for representation by counsel. They should do so by evaluating defendants’ waivers of assistance of counsel with particular care. Such care should include the requirement that the waiver be unequivocal as well as knowing, intelligent, and voluntary, and also, the enforcement of a higher standard when determining whether the defendant is competent to waive the right to assistance of counsel.257

1. Requiring an Unequivocal Waiver

Courts should not accept a waiver of the right to assistance of counsel unless the defendant unequivocally expresses the desire to proceed pro se.258 Courts face the challenge of protecting both the right to self-representation and the right to assistance of counsel. Requiring an unequivocal waiver establishes a procedural approach that favors the right to assistance of counsel over the right to waive appropriately tempering the impact of Faretta. In addition, this requirement establishes a clearer procedure for the trial court, makes the court’s job easier, and reduces the likelihood of a later challenge.259

The courts agree on the basics of a Faretta waiver. It is clear that to be effective, a waiver of assistance of counsel must be made

257 In addition to defining the minimum constitutional protection, the Court has also suggested that the states may determine additional means of protecting against an inappropriate waiver of the right to assistance of counsel. In Iowa v. Tovar, 541 U.S. 77, 94 (2004), the Court stated that “[s]tates are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful.”

258 See, e.g., United States v. Hernandez, 203 F.3d 614, 621-22 (9th Cir. 2000) (noting that defendant’s pro se request could be properly considered “emotional outburst” and thusly equivocal); Hamilton v. Groose, 28 F.3d 859, 862-63 (8th Cir. 1994) (rejecting defendant’s argument that trial court violated his Sixth Amendment right by failing to act on defendant’s equivocal request to represent himself); United States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991) (finding that trial court properly denied defendant serving as own standby counsel right to cross-examine witnesses and defendant accepted new representation); Burton v. Collins, 937 F.2d 131, 133 (5th Cir. 1991) (explaining that trial court properly considered defendant’s spontaneous request to represent himself to be equivocal); United States v. Tarantino, 846 F.2d 1384, 1419-22 (D.C. Cir. 1988) (defendant was not denied right to represent self when court denied equivocal request for some form of hybrid representation); Tuitt v. Fair, 822 F.2d 166, 178-79 (1st Cir. 1987) (holding that trial court properly denied defendant’s equivocal request to represent himself if his only other alternative was to be represented by an unsatisfactory attorney); Raulerson v. Wainwright, 732 F.2d 803, 808-09 (11th Cir. 1984) (finding that defendant did not equivocally waive counsel when he left courtroom during Faretta inquiry).

259 See, e.g., Tuitt, 822 F.2d at 175. In Tuitt, the trial court rejected the defendant’s equivocal waiver of assistance of counsel and the defendant then challenged the conviction on the basis that his right to self-representation had been violated. Id. at 173. Given the defendant’s expressed reluctance to represent himself, if the court had allowed him to represent himself, he would undoubtedly have challenged his waiver of assistance of counsel as inadequate.
knowingly, voluntarily, and intelligently\textsuperscript{260} and that the trial court has a duty to ensure the defendant is fully aware of the nature of the charges.\textsuperscript{261} The onus is on the court to inform the defendant of the consequences and disadvantages of the waiver, the nature of the charges, the possible penalties, and the hazards of self-representation.\textsuperscript{262} If the defendant appears to misunderstand aspects of the process or makes statements that reflect confusion, the court should inquire further, seeking to correct any misunderstanding and dispel confusion.\textsuperscript{263} However, the validity of the defendant’s waiver of assistance of counsel does not turn on the defendant’s capability as a defense attorney; rejecting the waiver because the defendant would not function as an able attorney violates the defendant’s constitutional rights.\textsuperscript{264}

Under current law, a court deciding whether to accept a defendant’s waiver of the right to assistance of counsel must walk a fine line. On one hand, if the court permits the defendant to proceed pro se without a valid waiver, the court violates the defendant’s right to

\textsuperscript{260} See Godinez v. Moran, 509 U.S. 389, 400 (1993); Faretta, 422 U.S. at 835; see also Shafer v. Bowersox, 329 F.3d 637, 647-48 (8th Cir. 2003) (holding that trial court’s colloquy did not provide adequate basis for concluding defendant’s waiver was knowing, intelligent, and voluntary).

\textsuperscript{261} See Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (explaining that “[t]o be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments there-under, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter”); see also United States v. Wadsworth, 830 F.2d 1500, 1504 (9th Cir. 1987) (noting that valid waiver is possible only if defendant is “aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation”); United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982) (mandating that “a defendant’s waiver of counsel can be deemed effective only where the district court judge has made a searching inquiry”).

\textsuperscript{262} See Shafer, 329 F.3d at 648; Hernandez, 203 F.3d at 624 (explaining that it is the responsibility of lower court to inform defendant of dangers of proceeding pro se); Wise v. Bowersox, 136 F.3d 1197, 1203 (8th Cir. 1998) (noting that court engaged in thorough colloquy).

\textsuperscript{263} See Shafer, 329 F.3d at 652 (explaining that court’s failure to address defendant’s understanding of charges in colloquy prevented defendant’s waiver of counsel from being knowing and voluntary).

\textsuperscript{264} In Faretta, 422 U.S. at 835, the Court stated:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”

See also Iowa v. Tovar, 541 U.S. 77 (2004) (discussing colloquy required for valid waiver of Sixth Amendment right to counsel); Godinez, 509 U.S. at 399 (rejecting contention that defendant who represents himself “must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney”); Van Lynn v. Farmon, 347 F.3d 735, 740 (9th Cir. 2003) (finding that trial court erred in denying defendant’s Faretta request in light of judge’s express concern that defendant’s choice of trial tactics would be to her detriment); Hernandez, 203 F.3d at 621-26 (explaining that defendant’s knowledge of legal issues in his case did not bar him from making an unequivocal, voluntary and intelligent Faretta waiver, and holding that trial judge erred in denying defendant’s Faretta request upon finding that defendant did not have knowledge of elements of self-representation).
assistance of counsel. On the other, if the court rejects a valid waiver of the right to assistance of counsel and does not permit the defendant to proceed pro se, the court violates the defendant’s right to self-representation. If the trial court takes a misstep in either direction, the decision may be reversed on appeal.\textsuperscript{265} If an equivocal or reluctant waiver of the right to counsel may be valid, the court may fail to distinguish between a defendant who intends to waive the right to counsel and one who does not, perhaps unfairly forcing a reluctant defendant to represent herself.

Although the Supreme Court has not held that a waiver of the right to assistance of counsel must be unequivocal, the circuits that have addressed the question have concluded that it must.\textsuperscript{266} Nevertheless, courts continue to enforce equivocal invocations of the right. For example, in \textit{Jones v. Jamrog},\textsuperscript{267} the Sixth Circuit held that the state

\begin{footnotesize}
\textsuperscript{265} See \textit{Jones v. Jamrog}, 414 F.3d 585 (6th Cir. 2005) (concluding that trial court improperly rejected defendant’s highly equivocal proffered waiver); Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005) (holding that state trial court committed error when it accepted waiver of Sixth Amendment right to counsel from defendant who stated he was proceeding pro se because the court had left him no other choice); United States v. Peppers, 302 F.3d 120 (3d Cir. 2002) (vacating conviction where trial court did not adequately colloquy defendant who asserted right to proceed pro se but was required to continue with counsel); see also \textit{Tuit v. Fair}, 822 F.2d 166, 174 (1st Cir. 1987) (remarking that “[t]he clash of these two mutually exclusive constitutional rights can create a difficult situation for a trial court”). Similarly, in \textit{Wheat v. United States}, 486 U.S. 153, 162 (1988), the Court remarked that a judge addressing a defendant’s request to be represented by conflicted counsel was subject to “being ‘whip-sawed’ by assertions of error no matter which way they rule.”

\textsuperscript{266} See \textit{United States v. Woodard}, 291 F.3d 95, 109 (1st Cir. 2002) (noting that “a defendant who seeks to relinquish her right to counsel must so state in unequivocal language”); \textit{Buhl v. Cooksey}, 233 F.3d 783, 792 (3d Cir. 2000) (stating that a request for self-representation must be clear and unequivocal); \textit{United States v. Frazier-El}, 204 F.3d 553, 558 (4th Cir. 2000) (stating that a request for self-representation must be clear and unequivocal); \textit{United States v. Callwood}, 66 F.3d 1110, 1114 (10th Cir. 1995) (requiring that pro se defendant clearly and unequivocally assert right to represent themselves); \textit{Hamilton v. Groose}, 28 F.3d 859, 861-62 (8th Cir. 1994) (requiring that request to proceed pro se be unequivocal and that presumption be against waiver); \textit{Williams v. Bartlett}, 44 F.3d 95, 100 (2d Cir. 1994) (remarking that request to proceed pro se must be timely and unequivocal to ensure administration of justice); \textit{United States v. Arlt}, 41 F.3d 516, 519 (9th Cir. 1994) (stating that request must be “timely, not for the purposes of delay, unequivocal, and knowing and intelligent”); \textit{United States v. Martin}, 25 F.3d 293, 295 (6th Cir. 1994) (distinguishing between right to self-representation and rights essential to fair trial and noting that assertion of right to self-representation must be unequivocal); \textit{Cross v. United States}, 893 F.2d 1287, 1290 (11th Cir. 1990) (stating that waiver requires clear and unequivocal assertion); \textit{United States v. Oakey}, 853 F.2d 551, 553 (7th Cir. 1988) (finding that request to proceed pro se must be unequivocal so court can be clear as to what right is being asserted); \textit{United States v. Martin}, 790 F.2d 1215, 1218 (5th Cir. 1986) (explaining that “[f]or self-representation, a defendant must ‘knowingly and intelligently’ forego counsel, and the request to proceed pro se must be ‘clear and unequivocal’”). \textit{But see \textit{Weaver v. State}}, 894 So. 2d 178, 193 (Fla. 2004) (concluding that defendant was presumed to have unequivocally exercised his right under \textit{Faretta} because he “persist[ed] in discharging competent counsel after being informed that he [was] not entitled to substitute counsel”).

\textsuperscript{267} 414 F.3d 585 (6th Cir. 2005); see also \textit{State v. Sandor}, 624 S.E.2d 906 (W. Va. 2005) (sustaining conviction based on pro se representation even though trial court had not engaged in colloquy with defendant or obtained an unequivocal waiver of the right to assistance of counsel).
court unreasonably applied existing constitutional law when it refused to accept the defendant’s proffered waiver of assistance of counsel. The defendant repeatedly stated that he would prefer to be represented by counsel but that he felt compelled to waive the right in order to gain better access to discovery materials.\textsuperscript{268} In these circumstances, the Sixth Circuit characterized the defendant’s decision as a voluntary strategic choice.\textsuperscript{269} In reaching its decision, the court emphasized that \textit{Faretta} provides that the court must accept a waiver even though it appears improvident or does not flow from an unequivocal desire for self-representation. The court pointed out that Faretta himself had made a strategic decision pressured by external circumstances, choosing self-representation over representation by an over-burdened public defender when the trial court denied his request for appointed private counsel.\textsuperscript{270}

If a court accepts an equivocal invocation of the right to self-representation, it may precipitate a reluctant defendant into self-representation. In many cases, the way in which the defendant ends up proceeding pro se is problematic. These cases start with a defendant whose principal interest is in substitution of counsel and end with that defendant proceeding pro se, never having unequivocally asked to do so. In a typical scenario, the defendant complains to the court that counsel is unsatisfactory and is not providing the assistance to which the defendant is entitled. The trial court, with an eye on the court calendar and viewing the defendant’s complaint as an effort to forestall the trial,\textsuperscript{271} declines to bring a new attorney into the case. Instead, the court offers the defendant a choice: continue with the unsatisfactory attorney or proceed pro se.\textsuperscript{272} Perhaps the court is playing chicken with the defendant, hoping that the defendant will view self-representation as so

\textsuperscript{268} The prosecutor’s office gave copies of discovery materials only to defense counsel. The defendant was incarcerated, so he could review the materials only when his attorney visited him at the jail. While defense counsel provided generally satisfactory representation, he could not visit the jail often or long enough to satisfy the defendant’s desire to review the discovery materials. 414 F.3d at 587-89.

\textsuperscript{269} \textit{id.} at 593.

\textsuperscript{270} \textit{id.} at 592.

\textsuperscript{271} See \textit{generally} Chused, \textit{supra} note 91, at 647 (claiming that courts limit substitution of counsel to prevent disruption in trial schedules). The problem of reluctant pro se defendants could largely be avoided if trial courts considered defendants’ motions for substitution of counsel more seriously. See \textit{supra} Part III.B.

\textsuperscript{272} See State v. Soares, 916 P.2d 1233, 1257 (Haw. Ct. App. 1996) (summarizing Hawaiian law as providing that “[i]f no valid reason for discharge appears, or the defendant does not state a reason, the trial court should advise the defendant that the court is not required to appoint substitute counsel to represent the defendant if the defendant’s original counsel is discharged;” and “[i]f, after being so advised, the defendant continues to demand substitution of his or her court-appointed counsel, the trial court may, in its discretion, discharge counsel and require the defendant to proceed to trial without representation”); McCravy, \textit{supra} note 202, at 44 (commenting on difficulty of distinguishing ineffective assistance from mere “personality differences between the defendant and attorney” and encouraging trial judges to respond to every complaint about court-appointed attorney with advice about right to self-representation).
unpalatable that she will stop complaining and continue with the original attorney.\textsuperscript{273} Typically, the defendant invokes the right to self-representation with such equivocal language that the court could rule either way.\textsuperscript{274} After hemming and hawing, the defendant Elects to proceed pro se, and the court creates a record of the required waiver of the constitutional right to assistance of counsel. Thus a defendant who merely sought to have the trial court provide substitute counsel is maneuvered into self-representation.\textsuperscript{275}

Only rarely, however, will the reluctant pro se defendant successfully challenge a conviction. More often than not, the trial

\textsuperscript{273} See United States v. Mullen, 32 F.3d 891, 895 (4th Cir. 1994) (noting trial judge stated that he did not want defendant to proceed to trial by herself). In \textit{Johnstone v. Kelly}, 808 F.2d 214, 216 (2d Cir. 1986), the State of New York argued that the defendant had asserted his Faretta rights merely to obtain a new attorney and that this ploy was a common practice of criminal defendants. In some cases, the defendant foregoes the right to self-representation and proceeds with counsel but then complains that the trial court improperly forced the defendant to make that choice. \textit{See, e.g.}, United States v. Webster, 84 F.3d 1056, 1061 (8th Cir. 1996) (stating trial court told defendant that if he represented himself court would appoint trial counsel, with whom defendant was dissatisfied, as standby counsel, and defendant elected not to proceed pro se); Barham v. Powell, 895 F.2d 19, 21-24 (1st Cir. 1990) (upholding trial court's action giving defendant choice between immediate pro se trial or continuance if defendant accepted representation).

\textsuperscript{274} See, \textit{e.g.}, Hamilton v. Groose, 28 F.3d 859, 862-63 (8th Cir. 1994) (noting that defendant’s request to proceed pro se was so equivocal that he could have raised a Sixth Amendment claim no matter how the trial court ruled); \textit{see also Jones}, 414 F.3d 585 (holding that trial court committed error by denying defendant’s highly equivocal request to proceed pro se in order to gain greater access to discovery material).

\textsuperscript{275} See Rouse v. Lampert, 43 Fed. Appx. 162 (9th Cir. 2002) (rejecting defendant’s claims, but reporting that defendant elected to proceed pro se only after court declined to appoint new counsel, that defendant continued to ask for a new lawyer, and that defendant ultimately left the courtroom during the trial out of frustration with the court’s refusal to provide new counsel); United States v. Hoskins, 243 F.3d 407, 408-09 (7th Cir. 2001) (holding defendant’s rights were not violated where defendant complained that counsel had not contacted him between trial and the sentencing date, and had not challenged aspects of the pre-sentence report); judge told defendant that he would not decide whether he would appoint substitute counsel until defendant chose whether to continue with counsel or proceed pro se, and then declined to appoint counsel, leaving defendant to proceed pro se); Vargas v. State, 963 P.2d 984, 988 (Wyo. 1998) (reporting that defendant who represented himself after court denied his request for new counsel repeatedly stated he was not capable of representing himself); \textit{see also Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005) (finding error where trial court accepted defendant’s waiver of assistance of counsel made after repeated unsuccessful requests for substitution of counsel}); United States v. Oreye, 263 F.3d 669, 670-71 (7th Cir. 2001) (finding no error where defendant who had only been in United States for a few years and spoke poor English proceeded pro se and court refused appointment of new counsel even though appointed counsel stated that he and defendant had irreconcilable difference over how to conduct defense). In some cases, the choice of self-representation is followed by a drift to hybrid representation. This drift signals the defendant’s discomfort with pro se representation. Pro se defendants, confronting the difficulty of self-representation, often attempt to transfer some responsibility to standby counsel. Poulin, \textit{supra} note 147. If the defendant is forced to choose between incompetent counsel and self-representation, the resulting waiver is involuntary. \textit{See United States v. Taylor}, 113 F.3d 1136, 1140 (10th Cir. 1997) (concluding waiver was voluntary, but not knowing and intelligent); United States v. Silkwood, 893 F.2d 245, 249-50 (10th Cir. 1989) (concluding waiver was neither voluntary nor knowing and intelligent); \textit{Vargas}, 963 P.2d at 990.
court’s actions withstand appellate review. Defendants who proceeded pro se after unsuccessfully moving for substitution of counsel have argued that they were unconstitutionally forced to choose between an unprepared attorney and pro se representation, a “Hobson’s choice.” In most cases, however, these arguments fail. Reluctant pro se defendants have rarely persuaded the courts that their waivers of the Sixth Amendment right to counsel were involuntary because they were forced to make a choice between proceeding with ineffective counsel and representing themselves. Instead, the courts have concluded that the waivers were voluntary unless the defendant’s objections to assigned counsel would have entitled the defendant to substituted counsel.

The courts should be concerned about the risk of unfairness when

276 See, e.g., United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997) (concluding that trial court’s inquiry was adequate); United States v. Brown, 79 F.3d 1499, 1506-07 (7th Cir. 1996) (finding trial court’s inquiry adequate); United States v. Hall, 35 F.3d 310, 313-14 (7th Cir. 1994) (finding district court’s inquiry adequate); United States v. Welty, 674 F.2d 185, 192 (3d Cir. 1982) (reversing due to insufficient inquiry); United States v. Zilges, 978 F.2d 369, 372-73 (7th Cir. 1992) (holding inquiry insufficient, but error harmless); State v. Bruch, 565 N.W.2d 789, 791-793 (S.D. 1997) (concluding trial court’s inquiry was inadequate).

277 The term is sometimes used when describing the choice to proceed pro se. See, e.g., Commonwealth v. Johnson, 676 N.E.2d 1123, 1126 (Mass. 1997); Byrtus, supra note 141, at 228. Gilbert v. Lockhart, 930 F.2d 1356 (8th Cir. 1991), is a rare case in which the argument succeeded. Appointed counsel had not been able to confer with the defendant until the morning of trial. Id. at 1357. Denying requests for a continuance and for substitution of counsel, the trial court forced the defendant to elect either to represent himself or to proceed to trial with his unprepared attorney. Id. In addition to finding the waiver of the right to counsel inadequate, the appellate court concluded that the trial court violated the defendant’s Sixth Amendment right by putting him to this choice. Id. at 1360; see also Howard v. State, 701 So. 2d 274 (Miss. 1997) (holding waiver invalid where trial court forced defendant to choose between prompt trial at which he represented himself and continued trial date at which he would be represented by counsel; court characterized this as choice between two rights—speedy trial and assistance of counsel); United States v. Silkwood, 893 F.2d 245, 249-50 (10th Cir. 1989) (concluding waiver was not valid); Johnson, 676 N.E.2d at 1126 (stating that court is “wary of putting any defendant in the Hobson’s choice of being forced to proceed with an unprepared lawyer or representing oneself”); Chused, supra note 91, at 651 (questioning validity of waiver).

278 See United States v. Wilson, No. 92-3234, 1993 WL 523195, at *2 (10th Cir. Dec. 16, 1993) (rejecting defendant’s argument that waiver was not voluntary); United States v. Tribble, No. 92-3532, 1993 WL 306110, at *2 (7th Cir. Aug. 6, 1993) (rejecting defendant’s argument that he was forced to represent himself because his attorney was unprepared; court concluded that counsel’s lack of preparation resulted from defendant’s frequent changes of position on whether to represent himself); United States v. Burson, 952 F.2d 1196, 1199 (10th Cir. 1991) (same); State v. Day, 661 A.2d 539, 550-51 (Conn. 1995) (same); State v. Harmon, 575 N.W.2d 635, 640-42 (N.D. 1997) (same). But see Gilbert v. Lockhart, 930 F.2d 1356 (8th Cir. 1991). In Gilbert, appointed counsel had not conferred with the defendant until the morning of the trial. Id. at 1357. The trial court denied defendant’s request for either a continuance or substitution of counsel and forced the defendant to elect either to represent himself or to proceed to trial with the unprepared attorney. Id. The appellate court concluded that this process had resulted in an invalid waiver of the right to counsel and violated the defendant’s Sixth Amendment rights. Id.; see also Johnson, 676 N.E.2d at 1126 (stating that court is “wary of putting any defendant in the Hobson’s choice of being forced to proceed with an unprepared lawyer or representing oneself”).

279 See supra Part III.B.
the court enforces an equivocal waiver. The reported cases reveal foundering pro se defendants who never truly wanted to represent themselves. The practice of denying substitute counsel and accepting an equivocal waiver of the right to assistance of counsel is a bad practice. Unless the defendant’s pattern of behavior clearly indicates inability or unwillingness to work with any defense attorney, the court should resist accepting a waiver of counsel as the alternative to proceeding with an unsatisfactory lawyer. By requiring an unequivocal waiver of the right to assistance of counsel, as well as entertaining defendants’ motions for substitution of counsel more seriously, courts will reduce the likelihood that an unwilling defendant will be maneuvered into pro se representation.

2. Enforcing a Strict Standard of Competence

The court must also carefully assess the defendant’s competence before accepting the defendant’s waiver of assistance of counsel. The “competence” required to waive assistance of counsel does not entail competence to function as an attorney. Few defendants could satisfy

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280 There may be extreme cases where the court can only conclude that the defendant is manipulating the system in an attempt to delay the trial or has in some other way forfeited the right to assistance of counsel. In those cases, if the court follows procedures designed to protect the defendant, the court may simply require the defendant to proceed pro se. See, e.g., United States v. Irorere, 228 F.3d 816 (7th Cir. 2000) (holding that defendant effectively waived right to assistance of counsel through his lack of cooperation with the four different lawyers assigned to represent him). For example, in State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000), the trial court assiduously sought to protect the rights of the defendant facing capital charges. The court approved several changes of counsel, but, as the trial date approached and defense counsel sought to withdraw because the defendant was terrorizing counsel and others close to him, the court warned the defendant that he would forfeit his right to counsel if he did not start cooperating with his lawyer. Id. at 541. When the defendant did not improve his behavior, counsel was permitted to withdraw, and the defendant went to trial pro se. Id. at 542. The Tennessee Supreme Court held that the defendant could be required to represent himself even though he had not provided an explicit waiver of his right to counsel. Id. at 547. The opinion in Carruthers paints a portrait of a defendant who was either so disturbed or so manipulative that he threatened the court’s very ability to conduct his trial. See also id. at 547-48 (listing cases in which defendants’ conduct resulted in a forfeiture of the right to counsel).

281 See United States v. Klat, 156 F.3d 1258 (D.C. Cir. 1998) (holding trial court erred when it allowed defendant to represent herself at hearing on competency).

282 See, e.g., Van Lynn v. Farmon, 347 F.3d 735, 740-41 (9th Cir. 2003) (recognizing that Godinez Court “specifically rejected” notion that defendant’s ability to act as capable attorney effects competency to waive counsel); United States v. Manjarrez, 306 F.3d 1175, 1180 (1st Cir. 2002) (upholding validity of defendant’s waiver of counsel despite the fact that defendant intended to present “a frivolous . . . theory with no basis in statutory or case law”); United States v. Colbert, 55 Fed. Appx. 225, 230-231 (6th Cir. 2002) (recognizing that defendant was competent to waive counsel despite efforts to pursue insanity defense after psychological examination proved defendant was rational); United States v. Kimball, 291 F.3d 726, 731 (11th Cir. 2002) (explaining that in order to waive counsel defendant need only understand “that rules do exist to govern the procedure of a trial, the introduction of evidence and the behavior of
that standard. Instead, the Court has held that the competence inquiry addresses the same concerns as competency to stand trial—a rational understanding of the proceedings and the ability to assist counsel. Nevertheless, because of the tremendous difference between the defendant’s role when assisted by counsel and the defendant’s role when proceeding pro se, the states should adopt a more rigorous test for determining competence.

In *Godinez v. Moran*, the Supreme Court addressed the question of whether the standard for competency to waive constitutional rights—specifically, to waive the right to counsel and to plead guilty—is higher than the standard for competency to stand trial. The Court held that the standard is not higher. Moran, who suffered from mental illness, had gone on a killing spree, which ended in his attempted suicide. He was charged with capital homicide. The trial court found him competent to stand trial. In an early court appearance, three months after his suicide attempt, while under the influence of a powerful cocktail of psychotropic drugs, Moran asserted his right to self-representation. He did so to preclude the counsel from presenting mitigating evidence that might avoid imposition of the death penalty. The court accepted his waiver of assistance of counsel and then accepted his guilty plea. After a sentencing hearing in which he presented no mitigating evidence, Moran was sentenced to death. The Ninth Circuit held that competence to plead guilty or waive counsel required a capacity for reasoned choice among the available alternatives. The Court rejected this approach, holding instead that the *Dusky* standard for competence to stand trial also governs waiver of rights, stating “there is no reason

advocates and . . . that he would be bound by those rules”); United States v. Avery, 208 F.3d 597, 601-02 (7th Cir. 2000) (finding that defendant was competent to proceed pro se even though defendant admitted lack of familiarity with Federal Rules of Evidence and Federal Rules of Criminal Procedure); Wise v. Bowersox, 136 F.3d 1197, 1202 (8th Cir. 1998) (rejecting argument that defendant was not competent to waive counsel because of defendant’s plan to assert “patently incredible” defense theory involving elaborate frame-up conspiracy); Buhl v. Cooksey, 233 F.3d 783, 791 (3d Cir. 2000) (stressing that the defendant’s legal skill and likelihood of mounting successful defense are irrelevant in determining whether defendant can proffer valid waiver of counsel); United States v. McKinley, 58 F.3d 1475, 1481-82 (10th Cir. 1995) (explaining that defendant’s lack of legal prowess demonstrated in prior court appearances is not relevant to the issue of whether defendant may invoke self-representation).

284 *Id.* at 391.
285 *Id.* at 392. The two psychiatrists who examined him both recognized his tenuous psychological state, but concluded that Moran understood the charges and could assist counsel in his own defense. *Id.* at 409 (Blackmun, J., dissenting) (noting that one stated that Moran might not be inclined to exert effort toward his defense and that the other stated that Moran was very depressed).
286 *Id.* at 410. The defendant was receiving phenobarbital, dilantin, inderal, and vistaril. *Id.*
287 *Id.* at 392, 410.
288 *See supra* Part II.A.
to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.”

The Court went on to state that the trial court must engage in a two-part inquiry. First, a court must address the competency question by asking whether the defendant has the mental capacity to understand the proceedings. Second, a court must also address the requirement that the waiver be knowing and voluntary by asking whether the defendant “actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.”

Godinez was criticized for failing to recognize that the defendant’s role differs depending on whether the defendant will be represented by counsel or will proceed pro se. However, Godinez appears to provide two opportunities for scrutinizing the defendant’s waiver of the right to counsel—when assessing the validity of the waiver and when implementing state rather than federal law. Although the Court held that the federal constitution did not “impose these additional requirements,” the Court noted that “[s]tates are free to adopt

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289 509 U.S. at 399.
290 Id. at 401 n.12; see also Shafer v. Bowersox, 329 F.3d 637, 650 (8th Cir. 2003) (proclaiming that “the Court made clear in Godinez that a finding that a defendant is competent does not mean that a defendant has made a knowing and voluntary waiver”); United States v. Hernandez, 203 F.3d 614, 620 n.8, 624-25 (9th Cir. 2000) (distinguishing competence to waive assistance of counsel from the validity of the waiver and detailing requirements for valid waiver); Wilkins v. Bowersox, 145 F.3d 1006, 1013-14 (8th Cir. 1998) (explaining that defendant’s competency hearing raised separate concerns regarding defendant’s ability to rationally and validly waive counsel).
291 See, e.g., Virgin Islands v. Charles, 72 F.3d 401, 412 (3d Cir. 1995) (Lewis, J., concurring) (opining that competency to stand trial and competency for self-representation are “two distinct issues which must be separately evaluated”); see also William E. Hellerstein, Sotto Voce: The Supreme Court’s Low Key But Not Insignificant Criminal Law Rulings During the 1992 Term, 10 Touro L. Rev. 355, 398-401 (1994) (suggesting that Godinez ruling is based on unwarranted skepticism regarding practical differences in degrees of legal competency); 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, 171-85 (2000) (highlighting problems created by conflation of competency standards in Godinez); David L. Shapiro, Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions, 34 Cal. W. L. Rev. 177, 178-82 (1997) (addressing ethical dilemmas created by Godinez standard); Christopher Slobogin & Amy Mashburn, The Criminal Defense Lawyer’s Fiduciary Duty to Clients with Mental Disability, 68 FORDHAM L. REV. 1581 (2000); Winick, supra note 6, at 590-96 (arguing that Godinez is open to “serious criticism” for its uniform competency standards). Slobogin and Mashburn argue:

[When the issue is whether a client is competent to waive a mental state defense, plead guilty or waive the right to an attorney, the correct competency test should focus on “basic rationality and self-regard.” This proposed test requires the client to have an understanding of the rudiments of the criminal process, the ability to give non-delusional reasons for the decision in question, and enough self-regard to consider alternative reasons.

Slobogin & Mashburn supra at 1584. The authors concede that this test is more demanding that that set forth in Godinez. Id.
competency standards that are more elaborate than the Dusky formulation.”

Thus the Supreme Court’s decisions appear to allow the states to formulate more rigorous competency tests. State courts should accept this invitation and apply a more rigorous test of competence. The courts should ask not merely whether the defendant is able to consult with counsel and has a basic understanding of the proceedings. Instead, the court should determine whether the defendant has sufficient decision-making capability to be able to make trial decisions without assistance of counsel and whether the defendant suffers from any disability that would substantially impair the defendant’s presentation of the case. These questions are particularly important when a defendant who suffers from mental illness or mental retardation proffers a waiver of counsel. Self-representation places on the defendant responsibility for functions and decisions that a represented defendant either avoids altogether or shares with counsel. Allowing a defendant, especially a mentally impaired defendant, to choose whether to proceed pro se threatens the fairness of the proceeding.

Unlike the represented defendant the pro se defendant must make tactical and strategic choices generally within counsel’s province and, on the questions reserved to the defendant, must reach decisions without the advice of counsel.

In addition, once the defendant embarks on self-representation, the court cannot easily monitor the defendant’s ongoing competence. When the defendant is represented, counsel helps the court assess the defendant’s ability to participate appropriately. That source of insight into the defendant’s functioning is removed when

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292 Godinez. 509 U.S. at 402.
293 See supra Part II.C.
294 See United States v. Quintieri, 306 F.3d 1217, 1233-34 (2d Cir. 2002) (finding that trial court was not required to hold a competency hearing when defense attorney repeatedly assured court that his client was “lucid and able to understand the proceedings”); McGregor v. Gibson, 248 F.3d 946, 959-62 (10th Cir. 2001) (finding that lower court should have held competency hearing in light of defense counsel’s concerns regarding his client’s competency); Torres v. Prunty, 223 F.3d 1103, 1109 (9th Cir. 2000) (explaining that trial court should have given lawyer’s competency determination serious consideration); Reynolds v. Norris, 86 F.3d 796, 802 (8th Cir. 1996) (explaining that counsel’s assertions that defendant was incompetent to stand trial should have raised reasonable doubt as to defendant’s competency); Chichakly v. United States, 926 F.2d 624, 632 (7th Cir. 1991) (holding that competency hearing was not required, despite defendant’s claim that psychiatric medication affected his mental and emotional state, when counsel did not request a hearing and assured court that medication did not affect defendant’s ability to understand the charges); Acosta v. Turner, 666 F.2d 949, 955 (5th Cir. 1982) (explaining that trial court failed to hold a competency hearing because defense counsel stipulated defendant’s competence); United States v. Dworshak, 514 F.2d 716, 719 (8th Cir. 1975) (indicating that it was not error for court to hold competency hearing without suggestion from defendant’s counsel); see also Bonnie, supra note 10, at 546, 563 (noting that doubt about defendant’s competence requires attorney to request inquiry into competence, that counsel is uniquely positioned to assess competence, and that defendant may play key role in raising competency questions).
pro se representation is approved. Thus, the demands placed on a defendant proceeding pro se are far greater than those placed on a represented defendant.

Furthermore, any defendant’s choice to proceed pro se threatens the fairness of the proceeding, but a mentally impaired defendant’s even more so. When a serious question of competence has been raised and the defendant later waives assistance of counsel, the cases often reflect a self-destructive impulse on the part of the defendant. Defendants forgo mental health defenses or mitigating evidence at trial and in capital sentencing hearings. The courts accept this self-destructive behavior as the prerogative of the pro se defendant.

In Virgin Islands v. Charles, for example, the defendant was held competent despite his self-injurious conduct. The defendant rejected the agreement that his attorney had reached with the prosecution under which the defendant would accept a bench trial on stipulated facts, including the stipulation that the homicide was the result of the defendant’s mental illness. Instead, the defendant decided to proceed pro se so that he could make the police and government “pay” for their past mistreatment of the defendant and his family. The defendant also asserted that he wanted to get out of St. Thomas and was willing to spend his life in a prison in the United States.

295 See supra note 141.

296 See, e.g., Shafer v. Bowersox, 329 F.3d 637, 640 (8th Cir. 2003) (reporting that defendant with serious mental illness waived assistance of counsel, pleaded guilty, and requested the death penalty); Welsh S. White, Defendant’s Who Elect Execution, 48 U. Pitt. L. Rev. 853, 873-75 (1986-1987) (explaining that criminal defendants are often motivated by desire to be executed); see also Newman, supra note 88, at 70-80 (detailing the facts of United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2000), where trial court rejected defendant’s request to represent himself in order to avoid presentation of mental health defense and increase the likelihood that he would be sentenced to death).

297 Silagy v. Peters, 905 F.2d 986, 1007-08 (7th Cir. 1990) (rejecting defendant’s arguments that Faretta should not apply at all in capital sentencing hearings and, alternatively, that the Faretta right should depend on the defense the defendant intends to present). The Seventh Circuit concluded that, since a represented defendant can choose to prevent the presentation of mitigating evidence, a defendant may exercise the right to proceed pro se even though the defendant will present no mitigating evidence. Id. at 1008. The Silagy court pointed to Blystone v. Pennsylvania. Id. In Blystone v. Pennsylvania, 494 U.S. 299, 306 n.4 (1990), the Court noted that the defendant decided not to present any mitigating evidence at sentencing despite warnings from the court and over the advice of counsel.

298 72 F.3d 401 (3d Cir. 1995).

299 Id. at 406 n.2. The following exchange occurred in the trial court’s colloquy of the defendant concerning the waiver of assistance of counsel:

THE COURT: [F]rom what I . . . understand you are saying, was that he [the attorney], in the course of representing you, made the observation to you that the procedure you are willing to follow, in his opinion, could not be in your best interest. Isn’t that what you are telling me?

CHARLES: Yes . . . . It might be, it might hurt—it might hamper me, it might hurt me in the long run, but it’s in the best of my interest, what I want to present.

Id. at 406.

300 Id. at 406 n.2., 409.
In order to avoid results such as this, to the extent permitted under Godinez, courts should scrutinize the defendant’s competence to proceed pro se. They should recognize the peculiar demands of self-representation and the singular risk to fairness posed by a mentally impaired defendant’s self-representation. Some states have already departed from the federal standard and apply a more demanding test of competence when the defendant seeks to proceed pro se. In State v. Klessig, the Wisconsin Supreme Court held that Godinez permits the state to enforce a higher standard of competence when a defendant seeks to proceed pro se. The court explained that “[i]n making a determination on a defendant’s competency to represent himself, the circuit court should consider factors such as ‘the defendant’s education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.’” The court emphasized that the standard should not preclude self-representation unless “a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.”

Although it has been argued that this course is not open to the states under Godinez, the decision expressly invites the states to

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301 See United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000) (holding that district court was justified in denying schizophrenic defendant’s pro se requests in light of government’s interest in preserving integrity of judicial process and illegitimacy of arguments defendant intended to present); United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998) (explaining that under Godinez it is “contradictory to conclude that a defendant whose competency is reasonably in question” can make a valid Faretta waiver prior to determination of trial competency); United States v. Boigegrain, 155 F.3d 1181, 1185-86 (10th Cir. 1998) (noting that Godinez mandates that a court determine that a defendant is competent to stand trial before defendant can make a valid Faretta waiver); see also Bonnie, supra note 10, at 557-59 (discussing differences between types of competence).

302 See, e.g., Commonwealth v. Simpson, 704 N.E.2d 1131, 1135 n.5 (Mass. 1999) (noting that competence to waive assistance of counsel may require greater showing than competence to stand trial); Coleman v. State, 914 So. 2d 1254, 1255 (Miss. Ct. App. 2005) (noting two exceptions to rule that competent defendant could waive counsel: “(1) where the defendant is so unable or unwilling to abide by rules and courtroom procedure that his representation of himself would result in disruption of the trial; and (2) where the defendant is so physically or mentally incompetent to speak to the jury that his right to a fair trial is endangered”). Wisconsin law, for example, provides that the trial court can deny a defendant’s request to proceed pro se because the defendant suffers from a specific disability that would prevent him from presenting a valid defense as well as the two grounds clearly recognized under federal law—that the defendant does not understandingly and knowingly waive his right to counsel and that the defendant does not understand the disadvantages of self-representation. Gomez v. Berge, No. 04-C-17-C, 2004 WL 1852978, at *4-6 (W.D. Wis. Aug. 18, 2004).

303 564 N.W.2d 716, 724 (Wis. 1997).

304 Id. (citation omitted).

305 Id.

306 See, e.g., Gallant v. Corrections, No. 96-1005, 1996 WL 374971, at *1 (1st Cir. July 5, 1996) (stating that state court determination that defendant who is competent to stand trial is not competent to proceed pro se “runs afoul of Godinez”); State v. Day, 661 A.2d 539, 548 (Conn. 1995) (“Under Godinez, we are bound to rule that a defendant who has been found competent to
establish their own standards. In *Brooks v. McCaughtry*,\(^{307}\) the Seventh Circuit considered the argument that a Wisconsin court had unconstitutionally deprived the defendant of the right to represent himself by enforcing a requirement that is not part of federal law. The court rejected the defendant’s arguments, first, that he was competent to waive the right to counsel simply because he was competent to stand trial and, second, that *Godinez* mandates that the federal standard of competence to stand trial govern all determinations of competence to proceed pro se.\(^{308}\) The court emphasized the difference between “sufficient mentation to be able to follow the trial proceedings with the aid of a lawyer” and competence to act as his own lawyer, concluding that Brooks had the former and not the latter.\(^{309}\) Quoting the Court’s statement in *Godinez* that “‘states are free to adopt competency standards that are more elaborate than’ the standard laid down for competence to stand trial in Dusky,’” the Seventh Circuit upheld Wisconsin’s application of its higher standard and refusal to allow Brooks to represent himself.\(^{310}\)

In sum, since a defendant’s exercise of the right to self-representation can threaten the fairness of the criminal process, the courts should disfavor this right. In addition, the courts should guard against the risk that a defendant will reluctantly proceed pro se rather than proceeding with counsel whom the defendant perceives as unsatisfactory. In addition to treating requests for substitution of counsel seriously,\(^{311}\) the courts should take two steps to reduce the risk of unfairness flowing from the exercise of the right to self-representation; the courts should require an unequivocal waiver of the right to assistance of counsel and should apply a rigorous standard of competency before accepting a waiver and permitting a defendant to proceed pro se. Doing so will strengthen the defendant’s right to counsel and temper the impact of *Faretta*.  

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\(^{307}\) 380 F.3d 1009 (7th Cir. 2004).

\(^{308}\) Id. at 1013 (noting that competency to stand trial does not necessarily imply competency to make an effective *Faretta* waiver).

\(^{309}\) Id. at 1011 (theorizing that “[a] waiver of counsel would make no sense from the defendant’s standpoint if he knew he was incompetent to defend himself . . . and so senseless a waiver could only with difficulty be regarded as knowing and intelligent”).

\(^{310}\) Id. at 1012.

\(^{311}\) See supra Part III.B.
CONCLUSION

Courts discussing the role of the defendant emphasize the role of counsel as defendant’s intermediary in the process and as the means of enforcing the defendant’s rights. Decisions considering standards for competency, the defendant’s absence from stages of the criminal process, and the allocation of decision making between the defendant and counsel highlight the defendant’s dependence on counsel in the criminal justice process. Conversely, decisions defining the right to self-representation emphasize the unusual responsibility assumed by the defendant who proceeds without counsel.

Despite this clear emphasis on the importance of counsel, our criminal justice system suffers from a pervasive disregard of the defendant’s right to counsel. This disregard falls most heavily on indigent defendants, who rely on the courts to select and appoint counsel and must appeal to the court for relief if appointed counsel is unsatisfactory. The courts must address this problem.

The courts should take three steps to strengthen the defendant’s right to counsel. First, the courts should recognize that indigent defendant’s have a constitutional right to continuity of representation. That right should bar a court from substituting counsel unless the defendant requests that substitution or the court identifies a countervailing interest sufficiently strong to outweigh the defendant’s right. Second, the courts should fully explore any defense request for substitution of counsel and should grant the request if the defendant’s grounds for dissatisfaction are reasonable in light of the factual situation or are so firmly held that that the defendant’s ability to obtain effective assistance from this attorney is compromised. Third, the courts should ensure that the defendant is fully included in any discussion concerning the defendant’s representation. Taken together, these three steps will substantially strengthen the defendant’s right to counsel.

In addition, the courts should establish procedures to favor representation by counsel over self-representation in criminal cases. First, the courts should strictly enforce the requirement that the defendant’s waiver be unequivocal, refusing to allow hesitant defendants proceed pro se. Second, to the extent permitted, the courts should scrutinize the competence of a defendant who proffers a waiver of the right to counsel and should not accept that waiver if the defendant merely satisfies the minimal requirements for competency to stand trial. Instead, the court should not permit the defendant to proceed pro se unless the defendant has sufficient decision-making capability to be able to make trial decisions without assistance of counsel and whether the defendant suffers from any disability that would substantially impair the defendant’s presentation of the case. Taken together, these changes will
strengthen the defendant’s right to counsel and help fulfill the promise of the Sixth Amendment.