I. INTRODUCTION

I've heard that there's an old saying,... A man who represents himself... has a fool for a client.¹

A defendant attempting to have a narcotics conviction overturned spoke these words.² Perhaps truer words could not be spoken. This defendant based his case on the fact that he should not have been able to represent himself.³ This argument failed.⁴ The Sixth Amendment of the United States Constitution affords every citizen the right to pro se representation.⁵ Whether this right should be limited to those who are free of mental illness or defect is a question that has plagued legal circles for centuries. There have been many high profile cases involving people with questionable mental competency who chose to represent themselves. This Comment will address whether pro se representation should continue, or whether it is merely a legal loophole that has enabled defendants to receive reduced sentences and secure acquittals.

One high profile case concerning pro se representation was that of Theodore Kaczynski, a Harvard graduate with an intellect of a genius. Kaczynski, better known as the “Unabomer,” was “indict[ed] for mailing or placing sixteen bombs that killed three people, and injured nine others.”⁶ The general belief was that Kaczynski must have been insane to commit these atrocities.⁷ His lawyers felt that this public perception would aid him

2. Id. at 433.
3. Id. at 433, 439.
4. Id. at 440.
5. U.S. CONST. amend. VI.
6. United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001).
7. See id. at 1111.
at trial, as he faced the imposition of the death penalty.\textsuperscript{8}

Kaczynski maintained that he was of sound mind and opposed any inference his counsel made regarding his mental condition.\textsuperscript{9} After learning that his counsel wished to portray him as schizophrenic, Kaczynski asked the court to allow him to proceed pro se.\textsuperscript{10} The court had to determine whether Kaczynski, a clearly intelligible man was competent to represent himself at trial.

Nearly ten years after the capture of Kaczynski, the United States Supreme Court faced yet another high profile defendant who wished to proceed pro se. Zacarias Moussaoui, deemed the "20\textsuperscript{th} Hijacker," has been charged with conspiracy in connection with the September 11, 2001 attacks against the United States. Moussaoui is the only person charged by the United States in connection with these attacks.\textsuperscript{11} As of April 22, 2005, he plead guilty to all six counts against him.

As with all indigent criminal defendants in the United States, Moussaoui was appointed counsel to aid in his defense. His counsel spent countless hours developing what they believed to be a strong case before Moussaoui dismissed them, and asked the court to appoint him a Muslim attorney.\textsuperscript{12} Failing to find a willing Muslim attorney, Moussaoui petitioned the court to proceed pro se.\textsuperscript{13} This petition stemmed from his distrust of American lawyers as he felt that his attorneys were part of a larger American conspiracy against him.\textsuperscript{14}

Immediately after Moussaoui filed the petition, the court and attorneys on both sides of the case recommended that Moussaoui be examined by a psychiatrist to determine if he was qualified to proceed pro se under the test laid out in \textit{Faretta v. California}.\textsuperscript{15} Under this test, a court can allow a defendant to represent himself as long as he is able to make a knowing and intelligent waiver of his right to counsel.\textsuperscript{16} Further, \textit{Faretta} provides that the state may not force a lawyer upon the defendant when he insists that he

\textsuperscript{8} See id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{12} Siobhan Roth, \textit{Frank Dunham's Odyssey}: Strange Twists Come with the Territory When You're a Lawyer for the '20\textsuperscript{th} Hijacker', LEGAL TIMES, July 22, 2002, at 1.
\textsuperscript{13} Id.
\textsuperscript{14} See id.
\textsuperscript{16} Faretta, 422 U.S. at 835.
wants to conduct his own defense.\textsuperscript{17}

Moussaoui's defense counsel felt that their client had a psychological condition that gave him delusions about his attorneys and an American conspiracy against him.\textsuperscript{18} They contended that Moussaoui needed to undergo a comprehensive psychiatric exam to determine whether he made a knowing and intelligent waiver under the \textit{Faretta} test.\textsuperscript{19} The government, however, argued that Moussaoui did not need a more comprehensive psychiatric exam.\textsuperscript{20} They stated, "the standard used to determine if [Moussaoui] can defend himself without the benefit of counsel should be no different from that used to determine whether he is competent to stand trial."\textsuperscript{21}

The issue of determining the mental competency of a pro se defendant is an ardent task. When examining the facts of the Moussaoui case, one must wonder if the court was correct to allow Moussaoui to proceed pro se. Concerns may arise within the legal community as to what standards were used during the psychiatric exam of Moussaoui and whether a more comprehensive exam should have been administered. Furthermore, if Moussaoui is convicted, the issue may arise as to whether the failure to honor the defense's request for a more thorough psychological examination will be grounds for an automatic appeal.

This Comment will address the issues of how to determine the mental fitness of a pro se defendant and whether the competency standards that courts apply today need altering. Part II of this Comment addresses the historical approach of the Sixth Amendment right to counsel and the right to waive counsel. Part III addresses the many issues facing the courts in determining whether to allow a defendant to proceed pro se, such as: What is a knowing and intelligent waiver? What is the role of standby counsel? Lastly, what is the appeals process for a pro se defendant? Part IV analyzes these issues against both the Theodore Kaczynski case and the Zacarias Moussaoui case. This section also contains the author's opinion as to whether the courts made the right decision by allowing the defendants' their respective representations. Finally, Part V discusses how the author believes the courts should address the issue of determining competency when a defendant with an unquestionable mental defect wishes to proceed pro se.

\textsuperscript{17} \textit{Id.} at 807.

\textsuperscript{18} See Roth, \textit{supra} note 12, at 1.

\textsuperscript{19} See \textit{id.} at 8.


\textsuperscript{21} \textit{Id.}
II. HISTORY OF THE RIGHT TO PRO SE REPRESENTATION

A. The English Practice of Pro Se Representation

Self-representation is a right deeply rooted in the history of the law dating back to the sixteenth century. This right has long been debated among lawyers, laypersons, and courts. When the American colonies were first inhabited, the new colonists brought their British traditions with them. English common law became the foundation that the colonists used as they tried to assemble a fair system of justice. As a result, the newly created American law became the established system of justice for the new colonies.

In England during the sixteenth century, when an accused went to trial, the common practice was self-representation. Furthermore, "[a]t one time, every litigant was required to 'appear before the court in his own person and conduct his own cause in his own words.'" Court appointed lawyers were assigned neither to the accused nor to people with grievances against one another. Lawyers were presumed to be for the wealthy; the common person was left to defend himself. For that reason, "in the 16th and 17th centuries the accused felon or traitor stood alone, with neither counsel nor the benefit of the other rights — to notice, confrontation, and compulsory process — that we now associate with a genuinely fair adversary proceeding." However, the prisoner was free to argue his case to the best of his ability and to make statements necessary to exonerate himself.

The format of trial during this period was also altered from the British Parliamentary standard. "The trial would begin with the accusations by the counsel for the Crown. The prisoner usually asked, and was granted, the privilege of answering separately each matter alleged against him." This practice often led to a chaotic scene in the courtroom full of excited statements between the accused and his accuser, who, in these cases, was

22. See Faretta, 422 U.S. at 818, 821, 823, 826.
23. See id. at 821, 826.
24. Id. at 827.
25. Id. at 823.
26. Id. (citing F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909)).
27. Id. at 823.
28. Id. at 824 (citing 5 W. Holdsworth et al., A History of English Law 195-96 (Methuen 1972)).
29. Id. at 824 n.21 (quoting 1 Sir James Fitzjames Stephen, A History of the Criminal Law of England 325-26 (1883)).
the Crown. As allegations were read against the accused, the Crown needed evidence to solidify its case. In order to prove these allegations, evidence would be entered into the court proceeding, usually in the form of testimony such as depositions, confessions or letters. Once all of the testimony was entered into evidence, the judge would recapitulate the charges against the accused for the jury. The judge would also speak to the jury about the evidence entered against the defendant as well as the prisoner’s answers to the charges against him. The jury would then render its verdict against the accused.

While some saw this process as a fair way to conduct a trial, the system needed to evolve with society’s changes. The Crown’s attorney was educated in the practice of law while the prisoner was an average citizen of England who was unrepresented and more than likely unknowledgeable in the practice of law. Rights to protect the common person had to be implemented to ensure that trials would be fair and just, and to make certain that the individuals were not prosecuted for crimes they did not commit.

B. Evolution of English Criminal Procedure

Recognizing that the rights of the accused needed reform, the Treason Act of 1695 “granted to the accused... the rights to a copy of the indictment, to have his witness testify under oath, and ‘to make... full Defence [sic], by Counsel learned in the Law.’” This Act also gave the accused the right to be represented by a court appointed attorney. However, a court appointed attorney could not be forced upon the accused if he did not desire to proceed with representation. The accused had the choice of representing himself at trial or putting his life in the hands of a court appointed attorney. If the accused chose the attorney, the attorney assumed responsibility for the entire trial, not merely the issues of law. The attorney could prepare witnesses on his client’s behalf and could

30. Id. at 823-24.
31. Id. at 824 n.21.
32. Id.
33. Id.
34. Id.
35. See id.
36. See id. at 825.
37. Id. at 824 (citing 7 WILL. 3, c. 3, § 1).
38. Id.
39. Id. at 825-26.
40. See id at 825 n.26.
question those witnesses that the Crown planned to present at trial.\(^{41}\)

This development could have been viewed as a milestone for English jurisprudence, however, some questioned the right to appointed counsel and preferred self-representation.\(^{42}\) Once an accused decided to use a court appointed attorney, he lost all control over his case. The appointed lawyer now asked questions of the witnesses, chose what questions to ask and what evidence to present.\(^{43}\) Given the vast distrust of lawyers at that time, many felt that appointed counsel would not represent them with the zeal and vigor that they deserved.\(^{44}\)

C. The American Colonists’ Approach to Representation

The American colonists, fleeing the oppression of the King of England, believed that all lawyers were like those who represented the Crown.\(^{45}\) They believed that lawyers would do whatever it took to manipulate the law to ensure convictions against the common person.\(^{46}\) Because of this intense distrust of lawyers, the right to self-representation was looked upon more favorably in the colonies than it was in England.\(^{47}\)

Over time, it became apparent that counsel in criminal cases was needed in order to afford the accused a fair trial.\(^{48}\) Although the colonists came to recognize the benefits of representation of an attorney in a criminal proceeding, the right to self-representation remained an available option.\(^{49}\) Similar to English practice, legal representation was not forced upon the accused.\(^{50}\)

Many charters of the newly developed colonies recognized the right to counsel.\(^{51}\) The colonies did not mandate that a lawyer be present, but rather, it was believed that “the right to counsel was clearly thought to supplement the primary right of the accused to defend himself, utilizing his personal rights to notice, confrontation, and compulsory process.”\(^{52}\)

As the country progressed and the American people formulated new

\(^{41}\) Id. (citations omitted).
\(^{42}\) See id. at 825 n.29.
\(^{43}\) Id. at 825 n.26 (citation omitted).
\(^{44}\) See id. at 826-27.
\(^{45}\) Id. at 826.
\(^{46}\) See id.
\(^{47}\) See id.
\(^{48}\) Id. at 827.
\(^{49}\) Id. at 827-28.
\(^{50}\) Id.
\(^{51}\) Id. at 828 (“[T]he ‘right to counsel’ meant to the colonists a right to choose between pleading through a lawyer and representing oneself.”).
\(^{52}\) Id. at 828-30.
rights, the right to self-representation remained a constant. "The Founders believed that self-representation was a basic right of free people." The Judiciary Act of 1789 "guaranteed in the federal courts the right of all parties to 'plead and manage their own causes personally or by the assistance of . . . counsel.'" The right to counsel at a criminal trial to aid in the defense of an accused is a fundamental right afforded to every American. At no point throughout the evolution of the American system of justice has the right to self-representation been abridged. As the Faretta court stated, "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right to self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none." Justice Stewart stated in Faretta v. California:

[t]here is no evidence that the colonists and the Framers ever doubted the right of self representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

During the United States' maturation of the right to self-representation, neither the Founders nor the colonists addressed the issue of competency concerning pro se representation; self-representation was a right that was afforded to all.

III. THE RIGHT TO PRO SE REPRESENTATION

A. The Faretta Test

Anthony Faretta faced charges of grand theft in a California court and asked the court's permission to represent himself at trial. The court warned Faretta of the dangers of proceeding without counsel, stating that it may be a mistake. However, the court permitted Faretta's request after

53. Id. at 830 n.39.
54. Id. at 831.
55. U.S. CONST. amend. VI.
56. Faretta, 422 U.S. at 832.
57. Id.
58. Id. at 830 n.39.
59. Id. at 807.
60. Id. at 807-08.
determining that his strong educational background qualified him to continue pro se. 61

A later pre-trial hearing was conducted to “quiz” Faretta on basic trial procedures, as he had been educating himself on trial and evidentiary procedures in preparation for his trial. 62 The court asked him a series of questions relating to these trial procedures to determine whether to allow his request to proceed pro se. 63 The court, dissatisfied with his answers reversed its previous decision and revoked Faretta’s privilege of self-representation. 64

Prior to Faretta, “self-representation was not an absolute right . . . [it] was a privilege reserved to the discretion of the trial judge.” 65 A judge could deny a defendant’s pro se request for a number of reasons, including: the defendant’s lack of legal knowledge and experience, lack of education, and the potential for disruption in the courtroom as the usual pro se defendant is unaware of basic trial procedures. 66

The United States Supreme Court granted certiorari. Justice Stewart, writing for the majority of the court held that a criminal defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. 67 Further, the state may not force a lawyer upon a criminal defendant when he insists that he wants to conduct his own defense. 68 The case was remanded and Faretta was permitted to advance pro se. 69

i. Sixth Amendment Right to Counsel

The Sixth Amendment of the United States Constitution explicitly grants the accused in a criminal trial the right to counsel to aid in his defense. 70 Further encapsulated in this right is the ability to waive counsel and proceed pro se; “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally

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61. Id.
62. Id.
63. Id. at 808-10 n.3.
64. Id. at 810 & n.4.
66. Faretta, 422 U.S. at 833 & n.43 (quoting Justice Sutherland in Powell v. Alabama, 287 U.S. 45 (1932)).
67. Id. at 807.
68. Id.
69. Id. at 836.
70. See U.S. CONST. amend. VI.
the right to make his defense."\textsuperscript{71} For the defendant to be able to exercise that right, the court must make a determination that the defendant has made a knowing and intelligent waiver of his right to assistance of counsel.\textsuperscript{72}

The court addresses four main elements in determining whether the decision to waive the defendant’s Sixth Amendment right to assistance of counsel were met. These elements include:

(1) whether and to what extent the district judge conducted a formal inquiry; (2) other evidence in the record that establishes whether the defendant in fact understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant’s decision to proceed pro se.\textsuperscript{73}

Once the court determines that the defendant has met these criteria, the defendant may proceed pro se. When doing so, however, the pro se defendant is held to the same standard to which an ordinary lawyer is held.\textsuperscript{74} Therefore, the defendant is expected to know both substantive and procedural law.\textsuperscript{75}

\hspace{1cm} \textbf{ii. Defining “Knowing” under Faretta}

To make a knowing waiver of the right to counsel, a defendant must be made aware of the consequences of proceeding pro se. The “trial court should ensure that the defendant actually understands the significance and consequences of his decision to represent himself and that his decision was not coerced.”\textsuperscript{76} When Faretta requested to represent himself at trial, the trial court judge warned him that he would be held to the same standard as a trial attorney.\textsuperscript{77} As evidenced by the trial court judge’s warning to the defendant in Faretta, it is important for the courts to advise defendants about the dangers involved in representing themselves.\textsuperscript{78}

Some of the dangers a pro se defendant could face include the loss of the “traditional benefits associated with the right to counsel.”\textsuperscript{79} These benefits include the attorney’s knowledge and skill as a litigator to strive towards a

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\textsuperscript{71} Faretta, 422 U.S. at 819.
\textsuperscript{72} Id. at 807.
\textsuperscript{73} United States v. Steele, No. 99-2129, 2000 WL 796191, at *3 (7th Cir. June 23, 2000) (citing United States v. Sandles, 23 F.3d 1121, 1127 (7th Cir. 1994)).
\textsuperscript{74} See State v. Quinn, 565 S.W.2d 665, 668 (Mo. Ct. App. 1978).
\textsuperscript{75} See Faretta, 422 U.S. at 808 n.2 (informing Faretta that he would be subject to the same “ground rules” that any other attorney would be subject to).
\textsuperscript{76} Maranian v. Jackson, 14 Fed. Appx. 310, 314 (6th Cir. 2001) (citations omitted).
\textsuperscript{77} Faretta, 422 U.S. at 807.
\textsuperscript{78} Maranian, 14 Fed. Appx. at 314.
\textsuperscript{79} Faretta, 422 U.S. at 835.
positive outcome for his client.\textsuperscript{80} A defendant wishing to continue pro se sacrifices these important benefits.\textsuperscript{81} The court’s admonition will ensure that defendants make a knowing waiver of their Sixth Amendment Rights.\textsuperscript{82} The court must further warn defendants against proceeding pro se because more often than not, pro se defendants will be convicted.\textsuperscript{83} “[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’”\textsuperscript{84} If a judge believes that a defendant fails this “knowing” prong of the \textit{Faretta} test, the pro se request will be denied.

iii. Defining “Intelligent” under the \textit{Faretta} Test

The trial court in \textit{Faretta} gave a great deal of weight to the issue of Faretta’s legal knowledge, or lack thereof.\textsuperscript{85} The focus of the court in determining Faretta’s right to self-representation, was whether he was able to grasp, in a matter of weeks, the technical legal knowledge needed to be proficient at trial.\textsuperscript{86} During this brief period, Faretta was able to gain a working knowledge of the hearsay rule, voir dire and challenges for cause.\textsuperscript{87} The court determined that Faretta was a knowledgeable man who was capable of self-representation.

For a defendant to make an intelligent waiver of counsel, the court must establish that the defendant possesses the requisite mental faculties to make such an important decision. Factors of relevance in determining this issue include, but are not limited to, whether the

\begin{itemize}
\item defendant understands: the nature of the charges; the statutory offenses included within them; the range of allowable punishments; possible defenses to the charges and circumstances in mitigation; all of the facts essential to a broad understanding of the whole matter; and the
\end{itemize}

\begin{footnotes}
\item[80] See id.
\item[81] See id.
\item[82] \textit{Maranian}, 14 Fed. Appx. at 314.
\item[83] See \textit{Callahan v. Indiana}, 719 N.E.2d 430, 439-40 (Ind. Ct. App. 1999) (“[S]elf-representation is almost always unwise ... [the pro se defendant] may conduct a defense which is to his own detriment ...”).
\item[84] \textit{Faretta}, 422 U.S. 834-35 n.46.
\item[85] \textit{Id.} at 835.
\item[86] See id. at 808-09. Specifically in a footnote, the trial judge made an inquiry into Faretta’s ability to understand the law before he would allow Faretta to represent himself at trial. \textit{Id.} at 811 n.3. After only two weeks, the defendant had a working knowledge of the legal system, including the hearsay rules. \textit{Id.} The judge decided that Faretta did not have enough knowledge to adequately represent himself, and denied his request. \textit{Id.} at 811 n.4.
\item[87] \textit{Id.}
\end{footnotes}
requirements of complying with the rules of procedure at trial.88

The most pertinent factors in concluding that the defendant made an intelligent waiver of his rights consists of his educational background and his experience in the legal system.89 In United States v. Steele, the defendant wished to represent himself at trial against the many charges facing him, including kidnapping.90 The court, in conducting its inquiry into Steele's background, paid particular attention to the fact that he was one credit away from receiving his bachelor's degree and had taken classes during his time in the Navy.91 Further, while Steele was previously incarcerated, he took paralegal courses and as a result was able to obtain a favorable verdict against the State of Indiana in a separate proceeding.92 It was clear that in this case Steele made an intelligent waiver of counsel.

When a defendant chooses to proceed pro se, the court will also appoint standby counsel to the defendant to "relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."93 The standby counsel assures that the defendant has the requisite means to intelligently present his case, if he so chooses.

Part of the role of standby counsel is to be available to step in for the pro se defendant if the judge revokes the defendant's right to self-representation.94 A "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."95 Standby counsel is also available to the defendant when and if he has procedural or substantive questions of law or simply needs help

89. Faretta, 422 U.S. at 835 (holding that Faretta was literate, competent, and had the requisite understanding in order to make the decision to represent himself); see also In re Evelyn S, 788 N.E.2d 310 (Ill. App. 5th Dist. 2003) (finding that where respondent was unfit to stand trial on a charge of first degree murder, she was fit to represent herself pro se because she had limited college training as well as the ability to read, write, and understand English).
91. Id. at *3.
92. Id.
94. Id. at 524.
95. Faretta, 422 U.S. at 834 n.46 (1975).
with his trial. The role of standby counsel is seen by many as one of an advisor, or as a quiet observer who is ready and willing to take over if either the court or the defendant requests his assistance.

B. Determining Competency

Although Faretta clearly stated under what circumstances a defendant can waive his right to counsel and proceed pro se, courts have interpreted the Sixth Amendment as requiring that:

A trial court must grant a defendant’s request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. Second, he must make his request unequivocally. Third, he must make his request within a reasonable time before trial.

i. Whether a Person of Less than Average Intelligence can Make a Knowing and Intelligent Waiver

According to a majority of courts, the answer to this question is no. In People v. Salas, the defendant wished to represent himself at trial. The court appointed two psychiatrists to determine whether he was competent to do so. The psychiatrists determined that Salas was unable knowingly and intelligently to waive representation by counsel because of: (1) low intelligence; (2) impaired capacity for abstract thought; (3) lack of insight into his own psychological and intellectual limitations; (4) lack of comprehension of what competent counsel can and cannot do for him; and (5) significant language impediments.

The appellate court affirmed the trial court’s decision denying the defendant’s petition to represent himself on the ground that he did not have the mental capacity to make an intelligent waiver. The Sixth Amendment does not address the defendant’s level of education when determining his or her ability to proceed pro se. However, it has become

96. See Howard, supra note 65, at 865.
100. Id. at 604.
101. Id.
102. Id. at 605.
103. U.S. CONST. amend. VI.
the unwritten rule that those who possess "training, skill or knowledge necessary to render competent assistance to [themselves] at trial," are deemed fit to proceed. Finally, courts focus on whether the defendant "was currently under the influence of drugs and alcohol, and whether he had physical or mental problems that would hinder his self-representation."105

ii. Whether a Person with a Mental Defect of Any Kind can be Deemed Competent

Mental defects can take many forms. In analyzing whether a defendant is free of a mental defect, the court sets out various standards. Education and relevant experience with the judicial system are not the only criteria that courts use to evaluate competency.106 The Court states that the "standard of an intentional relinquishment or abandonment of a known right or privilege is met if the trial court makes the factual determination that the defendant is free of . . . mental disorder and indicates on the record that he is aware of the consequences of his request."107 Clearly, the Court is stating that the characterization of a mental defect would include any diagnosed mental illness.108

In addition, courts have considered the current medications the defendant is consuming in determining his ability to represent himself.109 In State v. Adams, questions of the defendant’s mental competency came to fruition when it became apparent that he had an issue with alcohol and was prescribed medication for that illness.110 Although the defendant held a master’s degree in education, and therefore, is presum[ed] literate, the record did not reflect any attempt by the trial judge to assess the defendant’s competency, understanding and volition. This failure appeared most significant in light of defendant’s later revelation that he was being treated by a therapist and that he was "on Anabuse."111

This treatment for alcoholism raised issues as to the competency of the defendant to represent himself.112 As the Adams case points out, even

106. Faretta v. California, 422 U.S. at 835 (1975) (finding that Faretta was not only literate, competent, and understanding, but also that he was voluntarily exercising his informed free will).
108. See id.
110. Id. at 868.
111. Id.
112. See id.
individuals with a high level of schooling may be denied the choice to proceed pro se where they have other conditions that impair their judgment.\footnote{113}

The issue often arises concerning what to do with those who have or had a mental defect and wish to represent themselves. In \textit{Steele}, Steele was convicted of kidnapping, unlawful possession of a firearm by a convicted felon, and carjacking.\footnote{114} Steele represented himself at trial and appealed his judgment because he later claimed he was not competent to represent himself.\footnote{115} Particularly, Steele argued:

\begin{quote}
the magistrate judge should not have allowed him to proceed pro se, in light of an evaluation conducted by the United States Medical Center in Rochester, Minnesota. That evaluation concluded that Steele suffered from a "personality disorder" and that he "malingered" (faked) signs of serious mental illness but nonetheless found Steele competent to stand trial.\footnote{116}
\end{quote}

Although the court conceded that Steele suffered from a personality disorder, this type of mental defect was not enough to find a determination of incompetency for waiving his Sixth Amendment right to counsel.\footnote{117} Further, Steele admitted that he had taken some legal courses during his incarceration that made him knowledgeable on the subject matter of the law.\footnote{118} From these facts, the court found that Steele was competent and capable of representing himself at trial.\footnote{119} Unfortunately for Steele, the trial court did not find in his favor. Steele then searched for a loophole in the pro se argument that would persuade the appellate court to reverse the decision. What better argument for a former pro se defendant than, "I am unfit to represent myself"? To Steele's disappointment, the court set a standard: a mere personality disorder is not a mental defect which calls into question the issue of mental competency with regards to pro se representation.

Similar situations to \textit{Steele} exist where a defendant, after having represented himself, did whatever it took to be deemed mentally incompetent in order to reverse a trial court's ruling. In \textit{State v. Bomar}, the defendant was incarcerated and wanted to be placed in the "hole."\footnote{120}

\begin{itemize}
\item \footnote{113} See \textit{id}.
\item \footnote{114} United States v. Steele, No. 99-2129, 2000 WL 796191, at *1 (7th Cir. June 23, 2000).
\item \footnote{115} \textit{id.} at *3.
\item \footnote{116} \textit{id}.
\item \footnote{117} \textit{id}.
\item \footnote{118} \textit{id}.
\item \footnote{119} \textit{id}.
\item \footnote{120} State v. Bomar, No. 00 CA 2703, 2000 WL 1617934 (Ohio App. 4th Dist., Oct.)
\end{itemize}
Officers repeatedly told him that being placed there was a corrective measure and only those who violated the prison rules would be placed there.\textsuperscript{121} The defendant waited until the prison nurse was making her rounds to distribute medication and exposed himself, masturbating in front of her, hoping his conduct would be enough to place him in the “hole.”\textsuperscript{122} This lewd act worked in the prisoner’s favor; the behavior was reported by the nurse and Bomar was placed in the “hole.”\textsuperscript{123} Bomar seemed pleased, but when they subjected him to a frisk and attempted to handcuff him, he objected and struck an officer.\textsuperscript{124} As a result, Bomar was charged with two counts of assault for his attack on the guards to which he plead not guilty.\textsuperscript{125}

Bomar was appointed counsel, but he was not satisfied with his representation.\textsuperscript{126} He asked the court for permission to continue the case pro se, giving no other reason for dismissing his attorney other than “he did not fit [my] criteria.”\textsuperscript{127} The court allowed Bomar to represent himself with standby counsel appointed to aid him at trial.\textsuperscript{128} During the trial, Bomar revealed to his standby counsel that he had “an allegedly lengthy psychiatric history.”\textsuperscript{129} The trial court declined the request to freeze the trial on this evidence and instead stated that if his counsel could show proof of this defect in terms of medical records, Bomar’s request would be entertained.\textsuperscript{130} The trial continued and Bomar was found guilty on both counts.\textsuperscript{131} Bomar timely filed motions for a new trial; however, his motions were overruled and he subsequently appealed the decision.\textsuperscript{132}

Bomar cites as error the fact that the trial court failed to test his mental competency pursuant to an Ohio statute.\textsuperscript{133} The court cited Ohio statute R.C. 2945.37(B) which states that:

In a criminal action in a court of common pleas... the court, prosecutor, or defense may raise the issue of the defendant’s

\begin{footnotes}
\item 121. \textit{Id.}
\item 122. \textit{Id.}
\item 123. \textit{Id.}
\item 124. \textit{Id.} at *2.
\item 125. \textit{Id.}
\item 126. \textit{Id.}
\item 127. \textit{Id.}
\item 128. \textit{Id.}
\item 129. \textit{Id.}
\item 130. \textit{Id.}
\item 131. \textit{Id.} at *1.
\item 132. \textit{Id.} at *2.
\item 133. \textit{Id.}
\end{footnotes}
competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court’s own motion.134

Because his mental defect was addressed after the beginning of the trial, Bomar was not entitled to a hearing to determine his mental status unless the court found cause for such a hearing.135 The appellate court further stated, “the only evidence of appellant’s mental condition that was ever introduced below was the testimony by the prison nurse he offended. She testified that the appellant was carried on the prison’s ‘out-patient mental health caseload.’”136 Her testimony, however, was contradicted not only by the guard, who testified that the defendant was held in the general population of the prison at the time of the attacks, but also by the fact that “[n]o records were introduced below to address appellant’s mental status and no physician or psychologist gave expert testimony.”137 These inconsistencies and lack of evidence prompted the court’s holding that there was nothing in the record to support a conclusion that the defendant was mentally incompetent, nor was requisite good cause shown to necessitate a competency hearing.138

The holding in Bomar suggests that a defendant needs to show clear evidence to justify a finding of incompetency.139 Mere treatment in a prison’s outpatient facility alone was not sufficient to establish mental incompetence.140 Bomar was provided an opportunity to obtain his medical records for the court to evaluate, but he failed to make such medical records available.141 The court may have suspected that Bomar was raising the issue of mental incompetency only to reduce his sentence. The court reiterated that “some of the bizarre behavior which occurs in a prison setting is borne more from the desire to be disruptive than from mental illness.”142

134.  Id. at *3.
135.  Id.
136.  Id. at *3-4.
137.  Id.
138.  Id.
139.  See generally id. (stating that treatment at an out-patient facility was not enough to show that defendant was mentally incompetent and lacked the capability to represent himself).
140.  See id.
141.  Id.
142.  Id. at *4 n.8.
As the courts have shown through their various decisions, once they establish the defendants’ competency to represent themselves and their capability to understand the proceedings against them, defendants will be deemed competent to proceed pro se. In order to be found incompetent due to a mental defect, defendants must show either through medical records or through expert testimony, that they have been diagnosed with a mental illness and are being treated for such illness. Self-diagnosis is not sufficient to establish a mental defect.

iii. Pro Se Representation by those with a History of Mental Defects

Many courts hold that if a defendant with a diagnosed mental illness is capable of understanding his or her surroundings, the nature of the proceeding against them, and can function as a “normal” person in society, then he or she is capable of representing himself or herself. The adequacy of the established test to determine mental competency exhibits obvious flaws and, as such, further detailed inquiry may be made into the mental history of those before the court wishing to proceed pro se.

In the case of In re Evelyn S., the defendant challenged a state petition seeking to order the forced medication of the defendant to make her competent to stand trial. At the hearing, the defendant was allowed to waive her Sixth Amendment right and proceed pro se. In her trial for the first-degree murder of her husband, Evelyn was found unfit to stand trial. In order to make her fit to stand trial, the State wished to forcibly medicate her because she:

143. United States v. Steele, No. 99-2129, 2000 WL 796191 (7th Cir. June 23, 2000) (stating that a mere personality disorder was not enough to render the defendant incompetent to represent himself. Further, the defendant had previously taken law courses which made him knowledgeable in the subject matter). See generally Faretta v. California, 422 U.S. 806 (1975) (allowing a defendant to represent himself as long as he is able to make a knowing and intelligent waiver of his right to counsel).

144. See generally Bomar, 2000 WL 1617934 (finding that treatment at an out-patient facility was not enough to show that defendant was mentally incompetent and lacked the capability to represent himself. The court stated that if Bomar were to show proof of his “defect” through medical records they would entertain his request to freeze the trial. Bomar failed to submit any records showing proof of his mental defect).

145. See id. at *3.

146. See Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992) (stating that the competency to represent oneself mandated meeting a higher degree of reasoned choice; whereas, in contrast, competency to stand trial only requires awareness of the proceedings and ability to assist counsel).


148. Id. at 319.

149. Id. at 312.
suffered from a psychotic disorder, not otherwise specified, and had been exhibiting symptoms including paranoia and aggression since her arrest in 1999. The petition further alleged that Evelyn S. was incapable of making an informed decision regarding psychotropic medication and that the benefits of such medication would outweigh the potential harm.\textsuperscript{150}

Evelyn wished to speak to her attorney with regard to this matter.\textsuperscript{151} The court granted continuances for her to meet with her attorney, be independently evaluated, and locate witnesses.\textsuperscript{152} However, Evelyn’s attorney failed to make an appearance, and the court “informed her that her choices would be to accept her appointed attorney’s continued representation or represent herself. Evelyn S. chose the latter option.”\textsuperscript{153}

At the hearing, the State presented an expert to testify to her mental fitness.\textsuperscript{154} Evelyn called only her brother to testify on her behalf.\textsuperscript{155} At the end of the hearing, the court concluded that Evelyn could be forcibly medicated and ordered the state to authorize the mental facility’s staff to “administer Risperdal, Haldol, lorazepam, Cogentin, Benadryl, and Haldol decanoate to Evelyn S.”\textsuperscript{156}

Evelyn filed an appeal to this order arguing that the court erred in allowing her to represent herself and failing to test her mental competency.\textsuperscript{157} The appeals court held that “the trial court abused its discretion in failing to conduct an adequate inquiry into Evelyn S.’s capacity to knowingly waive her right to counsel and completely failing to inquire into her capacity to retain representation of her choice.”\textsuperscript{158}

In this case, the lower court failed to make a detailed inquiry into Evelyn’s mental competency.\textsuperscript{159} “The right to counsel is a central feature in the procedural safeguards enacted to protect people in Evelyn S.’s position from being improperly subjected to involuntary mental health services.”\textsuperscript{160} An abuse of discretion like this is not to be tolerated. Clearly, the courts owe a duty, not only to the defendant, but also to all people protected by the judicial system of the United States. This duty ensures that the

\textsuperscript{150} Id. at 312.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 312-13.

\textsuperscript{153} Id. at 313.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 313-14.

\textsuperscript{156} Id. at 314.

\textsuperscript{157} Id.

\textsuperscript{158} Id. at 319.

\textsuperscript{159} Id.

\textsuperscript{160} Id. (citing In re Barbara H., 702 N.E.2d 555, 561-62 (Ill. 1998)).
defendant has made a knowing waiver of counsel, understands the charges against her, and realizes the adverse effects of representing herself.

Although the Faretta test sets out a firm rule regarding a court’s obligation to determine whether a defendant may proceed pro se, some courts abuse their discretion when applying this test. For example, the trial court in In re Click permitted a mentally incompetent defendant to represent himself, despite the fact that he did not fully understand the charges against him or the role of representing himself.  

In In re Click, the Macon County Sheriff’s department filed a petition seeking Click’s involuntary commitment to an Illinois mental health facility. Click asserted that “he did not understand the trial court’s explanation of what representing himself would entail, and . . . asked the court to clarify it for him, which the court refused to do.” The appellate court “found that the very nature of a hearing for . . . involuntary commitment[], coupled with . . . [Click’s] demonstrated confusion regarding the process, should lead a trial court to ‘question whether respondent ha[ ] the capacity to make an informed waiver of counsel.’”

Similarly, the Supreme Court has considered the important issue of pro se representation of a mentally ill person. In O’Dell v. Thompson, the Court allowed an accused with a history of mental illness to continue pro se. O’Dell was charged with the murder of a woman in Virginia. The court appointed standby counsel to oversee O’Dell’s case when they granted his pro se request. During the trial, however, the judge noted that O’Dell was unable to keep his emotions under control. The court even stated that “his outbursts ‘concern [the court] as to whether [O’Dell is] in fact in need of reevaluation.’” O’Dell’s standby counsel welcomed the suggestion and asked the court to reevaluate O’Dell’s mental competency. However, despite previously recognizing need for reevaluation, the Court disregarded the request and declined to reevaluate O’Dell. Subsequently, O’Dell was found guilty and faced a sentence of death.

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162. Id. at 495.
163. In re Evelyn S., 788 N.E.2d at 322 (citing In re Click, 554 N.E.2d at 495-96).
164. Id. (quoting In re Click, 554 N.E.2d at 495-96).
166. Id. at 995.
167. Id. at 996.
168. Id.
169. Id.
170. Id.
171. Id. at 995.
172. Id. at 996.
Appealing the conviction O'Dell argued, "that the trial court erred in allowing him to represent himself, given his history of mental illness and his behavior at trial."173 O'Dell "previously had been diagnosed as a paranoid schizophrenic and had engaged in erratic behavior prior to trial."174 O'Dell was denied relief at every stage of the appellate process and sought habeas relief with the Virginia Circuit Court, who deemed O'Dell competent for self-representation.175 The case progressed to the United States Supreme Court where Justice Blackmun delivered the opinion of the court.

[T]here are serious questions as to whether O'Dell committed the crime or was capable of representing himself — questions rendered all the more serious by the fact that O'Dell's life depends upon their answers. Because of the gross injustice that would result if an innocent man were sentenced to death, O'Dell's substantial federal claims can, and should, receive careful consideration from the federal court with habeas corpus jurisdiction over the case.176

The Supreme Court based its decision to allow O'Dell further federal review on the events that occurred during trial.177 O'Dell's standby counsel took issue with the prosecution's closing argument. His standby counsel alleged that "the argument was made in such a way as to convince the jury that it had only two options: either to sentence the petitioner to death or turn him loose on the streets to kill again."178 This in fact was not true; in Virginia, O'Dell would either face a sentence of death or life imprisonment.179 The Court appointed standby counsel to protect O'Dell from the consequential harms of pro se representation.180 The trial court in O'Dell did not give much weight to the appointment of standby counsel; the appointment was illusory at best. The court did not heed counsel's request for reevaluation even after the court made comments on the record questioning O'Dell's self-representation.181 nor did the court cure the prosecutor's error in his closing argument.182 It was a clear abuse of power when the court did not afford the accused the same rights and safeguards that a mentally competent defendant would have otherwise received. With

173. Id.
174. Id. at 996 n.1.
175. Id.
176. Id. at 998-99.
177. Id. at 999.
178. Id. at 996 n.3.
179. Id.
180. Id. at 996.
181. See id.
182. See id. at 996 n.3.
regard to O'Dell's mental competency, the court should have extensively
evaluated his capacity to represent himself prior to granting his request.
Thus, the Supreme Court decided the federal court had jurisdiction over the
case because of the "gross injustice that would result if an innocent man
was sentenced to death." \(^{183}\)

When an accused with a history of mental illness comes before the court
and wishes to proceed pro se, the court owes a special duty to the accused
to make sure that he or she fully understands the nature of the charges
against him or her and understands the court's expectations regarding his or
her self-representation. If the court has any question as to the accused's
mental condition, then it must administer a competency hearing to
determine the status of the accused's mental condition before proceeding
with the trial. \(^{184}\) When an accused before the court has a questionable
mental state, the court should take extra precautions to ensure that the
accused's constitutional rights are not violated. The court turns a blind eye
to the Constitution when allowing persons with mental illnesses to appear
before the court on their own behalf without ascertaining their mental
competency. There is a duty owed to all persons, mentally competent or
not, to make certain that they understand the charges against them and that
they are able to make a *knowing* and *intelligent* waiver of their Sixth
Amendment right to counsel. \(^{185}\)

iv. Competency to Stand Trial vs. Competency to Proceed Pro
Se

The issue of one's competency to stand trial is often confused with one's
competency to proceed pro se. Pursuant to *Faretta*, in order to be deemed
competent for self-representation at trial, the accused need only show a
voluntary and intelligent election to do so. \(^{186}\) In contrast, in order to be
deemed competent to stand trial, a defendant must show that "(1) the
defendant has 'sufficient present ability to consult with his lawyer with a
reasonable degree of rational understanding'; and (2) the defendant has a
'理性[, ] as well as factual[, ] understanding of the proceedings against
him.'" \(^{187}\) The standard for determining whether the accused is competent to
stand trial is less strict than that used to determine whether the accused is
competent to proceed pro se. The case of *Godinez v. Moran* best illustrates
the differing competency standards. \(^{188}\)

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183. *Id.* at 998-99.
184. *See id.* at 996.
185. *See infra* Part III.A.i-iii, for a discussion of the *Faretta* Test. (emphasis added).
In *Godinez v. Moran*, Godinez was charged with three counts of first-degree murder. Because there was a question as to the defendant's mental competency, Godinez was examined by two court-appointed psychiatrists who deemed him competent to stand trial. During the trial, Godinez decided that he no longer wished to be represented by counsel, requested permission from the court to discharge his attorneys, and entered a guilty plea. As required by law, the court told Godinez that he had both the right to counsel and the right to proceed pro se; additionally, the court highlighted the perils of proceeding pro se. The court followed the procedures required to determine whether he was competent to represent himself. These procedures included "inquir[ing] into the defendant's understanding of the proceedings, his awareness of his rights, and inquir[ing] as to why he chose to represent himself." Satisfied that his waiver of counsel was both knowing and voluntary, the trial court accepted the defendant's waiver of counsel and his guilty pleas, and sentenced the defendant to death.

The defendant appealed to the Ninth Circuit of the United States Court of Appeals. The court overturned the conviction, stating, "while the defendant may have been competent to stand trial, competency to waive a constitutional right, such as the right to assistance of counsel, required a 'higher level of mental functioning' than was necessary to stand trial." The court, with respect to competency to stand trial, held that "a defendant is competent... if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel." Moreover, the appeals court set out an additional test for determining the competency of a pro se defendant. The court established that the accused "would only be competent to represent himself if he had the 'capacity for reasoned choice among the alternatives available to him.'" The appeals court found grave error in the failure of the trial court to utilize this "reasoned choice" test. The court of appeals ultimately ordered the district court to issue a writ of

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* (citing Moran v. Godinez, 972 F.2d 263, 268 (9th Cir. 1992)).
196. *Id.*
197. *Id.* (quoting *Moran*, 972 F.2d at 265-67).
198. *Id.* (alteration in original) (quoting *Moran*, 972 F.2d at 266).
199. *Id.* (internal quotations omitted) (quoting *Moran*, 972 F.2d at 266).
200. *Id.* at 518 n.193.
habeas corpus on behalf of the defendant.\textsuperscript{201}

There is a distinct difference between an accused's ability to understand the charges brought against him versus his ability to understand complex laws and courtroom procedures. Psychotropic drugs can help enable a person to be adjudicated competent to stand trial, however the drugs should not be relied on to enable a person to represent himself at trial. The risk is too great, for example that the accused may neglect to take his medication while continuing to represent himself, only to be defeated in court. After conviction, the accused would have valid grounds for an appeal because during that time when he was not medicated, he was not competent to represent himself. Courts could be flooded with requests from defendants who are believed to be mentally unfit and were therefore unable to represent themselves adequately at trial. Appeals from these convictions can also result from such "inadequate" representation. Therefore, it is possible that a defendant who is medicated in order to understand charges brought against him is capable of feigning a knowing and intelligent waiver of his right to counsel as required by \textit{Faretta}.\textsuperscript{202} The Ninth Circuit Court of Appeals correctly addressed this issue in \textit{Godinez}, stating that although the defendant was competent to stand trial, he lacked the capacity of reasoned choice to evaluate the options available to him.\textsuperscript{203} Courts need to recognize that medication can mask many mental defects when determining if \textit{Faretta} is met. Moreover, extra steps should be taken in order to determine whether the accused is fully capable of making a "reasoned choice."

\textbf{v. Who Should Determine the Competency of an Accused?}

Lawyers may often face resistance from their clients when deciding on a defense strategy. While some may welcome insanity defenses as an opportunity to have their sentence reduced, others see it as a stigmatism that offends their pride.\textsuperscript{204} One such case concerning this issue was the Unabomber, Theodore Kaczynski.\textsuperscript{205} Upon learning that his lawyers were planning to use the insanity defense at his trial, Kaczynski attempted to discharge them and advance \textit{pro se}.\textsuperscript{206} To an intellectual such as Kaczynski, there could be nothing worse than being portrayed at trial as a madman.\textsuperscript{207} Kaczynski preferred to face the death penalty rather than listen

\begin{itemize}
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{See Moran}, 972 F.2d at 268.
\item \textsuperscript{203} \textit{Id.} at 266-67.
\item \textsuperscript{204} \textit{Compare infra} Part III.B.v.
\item \textsuperscript{205} United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001).
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} Marcia Coyle, \textit{Unabomber May Seek to Nullify Guilty Plea}, \textit{THE RECORDER}, Feb. 10, 1999, at 3.
\end{itemize}
to characterizations concerning his mental fitness, or lack thereof, during the proceedings against him.\textsuperscript{208}

Like Kaczynski, many defendants who oppose the insanity defense probably know what society will think of them if that plea is entered on their behalf. The legal community generally knows that an insanity plea allows both sides the opportunity to evaluate the accused in order to determine the requisite mental fitness. The questions become: Who determines the competency of a pro se defendant — a judge or a trained psychiatrist with a better understanding of mental illness? Moreover, what determines competency? Some believe that an accused wishing to proceed pro se lacks the mental capacity to appreciate the risks inherent in that choice. The question remains whether pro se defendants must be evaluated by a psychiatrist as a condition to ensure their competency.

The Second Circuit Court of Appeals has ruled, "judges are not required to inquire without prompting into a pro se plaintiff's mental competence, even where there is evidence of bizarre behavior."\textsuperscript{209} The Second Circuit seems to be stating that they would rather leave the mental competency issue to trained professionals who deal with these questions regularly. Conversely, many in society feel that judges are omnipotent and should be the final decision-makers with regard to mental competency. The Second Circuit recognized that judges are not the most qualified to determine the mental competency of a pro se defendant.

Additionally, the Federal Rules of Civil Procedure do not "require a court to attempt to distinguish between the truly incompetent and those who — because of a personality disorder or other cause — behave in a foolish or bizarre way, hold irrational beliefs, or are simply inept."\textsuperscript{210} An accused with a mental defect may be able to mask the defect with medication, or in the alternative may have enough experience to conceal his defect to the public. For this reason, psychiatrists are trained to understand drug side effects that the accused may take in order to render him or her competent. They also understand the ramifications of a missed dose of medication. Judges are not trained in this area and are not expected to be. Requiring judges to determine mental competency would place a "potential burden on court administration associated with conducting frequent inquiries into pro se litigants' mental capacity."\textsuperscript{211} Judges would be responsible for learning the effects of various medications on the accused. They would also be responsible for weighing various factors such

\textsuperscript{208} Id.


\textsuperscript{210} Id.

\textsuperscript{211} Id. at 5.
as the stress that the trial may inflict on the accused and whether they reasonably believe the potential pro se defendant can handle the pressure and stress of the trial and maintain his medication.\textsuperscript{212} This tremendous burden should not be placed on judges. The issues of mental competency, the effects of medication, and the stress of trial on defendants with a mental illness are specialized areas that should be left to psychiatrists.

\section*{vi. Should Pro Se Representation be Permitted for Individuals Suffering from Mental Defects?}

Once a determination of competency is made, a judge either will allow the defendant to proceed pro se or will appoint counsel to the defendant.\textsuperscript{213} Only when there is “a bona fide doubt . . . as to the competence of a mentally ill defendant to proceed pro se [should] counsel . . . be appointed to represent the defendant.”\textsuperscript{214} Many courts are unclear as to what the term “bona fide doubt” means regarding the defendant’s competency.

\subsection*{a. Theodore Kaczynski}

A high profile case that dealt with the issue of determining whether there was a true bona fide doubt of the mental competency of the accused was that of the Unabomber, Theodore Kaczynski. The wide array of media coverage of Kaczynski’s bizarre lifestyle led to the public’s belief that he suffered from paranoid schizophrenia.\textsuperscript{215} Schizophrenia is an “incurable, disabling disease associated with delusions and feelings of persecution.”\textsuperscript{216} However, there are many who feel that because Kaczynski was able to evade the authorities for a number of years he does not have a mental defect; rather he has a personality defect.\textsuperscript{217} This issue is still debated today.

Kaczynski targeted his victims without prejudice.\textsuperscript{218} Once he found a “target” to receive his rage and hatred, he plotted vengeful and elaborate plans against him or her.\textsuperscript{219} Kaczynski had no set standard in choosing his victims.\textsuperscript{220} His wrath could be against anyone, regardless of how long he

\begin{itemize}
  \item \textsuperscript{212} See id.
  \item \textsuperscript{213} Faretta v. California, 422 U.S. 806, 834 n.46 (1975).
  \item \textsuperscript{214} State v. Ehrenberg, Municipal Appeal No. 94-0008, N.Y. L.J., Sept. 18, 1995, at 48.
  \item \textsuperscript{215} Michael Mello, The Non-Trial of the Century: Representations of the Unabomber, 24 VT. L. REV. 417, 447 (Winter 2000).
  \item \textsuperscript{216} Id.
  \item \textsuperscript{217} Id. at 476.
  \item \textsuperscript{218} Id. at 482.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Id.
\end{itemize}
knew them.\textsuperscript{221} His goal was revenge, but he welcomed media attention to perpetuate his cause in preventing the spread of technology.\textsuperscript{222}

He wrote in his journal:

\begin{quote}
My motive for doing what I am going to do is simply personal revenge. I do not expect to accomplish anything but it. Of course if my crime (and my reasons for committing it) gets any public attention, it may help to stimulate public interest in the technology question \ldots \textsuperscript{223}
\end{quote}

These are writings of a man with no remorse for maiming and killing people because he disagrees with them or dislikes their stance regarding technology.

Since Kaczynski pled guilty, the court denied his request to withdraw his guilty plea and represent himself at trial.\textsuperscript{224} Kaczynski asserted that his plea was not a voluntary plea, but rather, his defense counsel insisted on presenting evidence of his mental condition to his detriment.\textsuperscript{225} In addition, he argued that his counsel used that evidence "as a threat to pressure him into an unconditional plea bargain as a means of saving him from the risk of a death sentence."\textsuperscript{226} In another section of the plea agreement, however, Kaczynski affirmed that he reviewed the agreement with his attorneys, that he understood it, and he freely admitted that he was guilty of the charges.\textsuperscript{227} Accordingly, the court held that Kaczynski "freely and voluntarily consented to the waiver; and agreed to waive all rights to appeal the plea and sentence including legal rulings made by the district court."\textsuperscript{228}

On appeal, the Ninth Circuit noted, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."\textsuperscript{229} Kaczynski ultimately had control over these aspects of the trial, not his attorneys.\textsuperscript{230} The court found his contention that his defense counsel forced him to take the plea ludicrous.\textsuperscript{231} Kaczynski's control over the various procedural aspects of the trial proved his competency.

Rather than living with the stigmatism of being a paranoid

\begin{itemize}
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 483.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} See United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001).
\item \textsuperscript{225} Id. at 1118.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 1115.
\item \textsuperscript{228} Id. at 1114-15.
\item \textsuperscript{229} Id. at 1118 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\end{itemize}
After all, "[t]he reason Kaczynski plead guilty . . . was not . . . because he was afraid of the death penalty, but rather solely because it was the only avenue left to him to avoid . . . [being portrayed] as a madman. That was simply unacceptable to him." The fact that Kaczynski would rather face the death penalty than be known as a paranoid schizophrenic raises serious questions as to his mental fitness. Fortunately, for the Justices of the Ninth Circuit, most of the competency issues were avoided because of the voluntary plea.

b. Zacarias Moussaoui

The case of Zacarias Moussaoui is a contemporary example of a case where there is incredible doubt as to the competency of the accused who wishes to proceed pro se. On April 22, 2002, Moussaoui, who believed that his lawyers were part of a conspiracy to kill him, petitioned the court to allow him to represent himself at trial. From the beginning, Moussaoui's mental fitness seemed questionable. These questions became enlarged when he started filing motions to the court; some of which read: "Motion for the immediate eradication of the United States imposed appointed lawyer: Megaloman Dunham, Jewish Zealot ZerkinRight [sic] Wing Racist McMahon," all of which were nicknames for his lawyers. Moussaoui continued to file such inane motions that included such statements as: "With the help of her devoted crony standby lawyer She is TAKING CARE OF ME by 'continuing to evaluate the defendant's mental competency,'" and "LEONIE BRINKEMA YOUR [sic] MENTALLY SICK."

Immediately, his attorneys believed that there needed to be a competency evaluation. However, "Moussaoui wouldn't go for it. In a July pleading, he termed psychotherapy 'an obscene jewish [sic] science.'" Regardless of his bizarre behavior, on June 13, 2003, Judge

232. Coyle, supra note 207.
234. Roth, supra note 12, at 8.
235. See id.
236. Id.
237. Id. (quoting Motion of Zacarias Moussaoui entitled "DO YOU THINK THAT I AM CRAZY TO SEE YOUR DOCTOR FRANKENSTEIN," July 11, 2003).
238. Id. (quoting Motion of Zacarias Moussaoui entitled "DO YOU THINK THAT I AM CRAZY TO SEE YOUR DOCTOR FRANKENSTEIN," July 11, 2003).
239. See id.
240. Id.
Brinkema determined that Moussaoui was competent to represent himself at trial, allowing him to proceed pro se.\textsuperscript{241} However, Brinkema did admonish Moussaoui by stating, "if he filed additional repetitive motions, she could conclude he is incompetent to represent himself."\textsuperscript{242} His attorneys were appointed as standby counsel for the trial, despite all of their objections.\textsuperscript{243} Dunham, Moussaoui's court-appointed attorney, and his defense team believed that because of Moussaoui's distrust of them, it is "almost an Eighth Amendment violation to require us to stay in this case as standby counsel."\textsuperscript{244} They believe that without Moussaoui’s full cooperation they would be unable to represent him effectively.\textsuperscript{245} Further, the team believed that Moussaoui was mentally ill and did not see any behavior from him to dissuade that belief.\textsuperscript{246}

Undoubtedly, the type of behavior and thinking that Moussaoui expressed was not reasonable. Moussaoui is a case where there is a bona fide doubt as to the competency of the mentally ill defendant. The fact that Moussaoui wrote such motions to the court raises the question of his mental competency, and whether a more comprehensive mental exam should be given to him to ensure that he understands the nature of proceeding pro se with all of the risks and pitfalls entailed. The prosecutors in the case, however, said, "the standard used to determine whether Moussaoui... can defend himself without the benefit of legal counsel should be no different from that used to determine whether he is competent to stand trial."\textsuperscript{247} The government wanted the test for competency to apply to this case despite questions as to Moussaoui's mental fitness, and Moussaoui's attorney was requesting a more comprehensive mental exam.\textsuperscript{248} Further, the prosecutors in this case believed that the review of Moussaoui's conduct should be limited to "whether he currently suffers from a mental disease or defect," and ignore any and all references to his past behavior.\textsuperscript{249} As previously discussed, this type of limitation goes against the very spirit of the Sixth Amendment.

\textsuperscript{241} Id.
\textsuperscript{242} Mike Madden, \textit{Hearing Will Test Moussaoui's Plans to Enter Guilty Plea}, \textit{Gannett News Serv.}, July 24, 2002, \textit{available at} 2002 WL 525192.
\textsuperscript{243} Roth, \textit{supra} note 12, at 8 (explaining that counsel specifically objected that continuing on as defense counsel against their clients' vehement wishes constituted a violation under the Eighth Amendment).
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
Dr. Raymond Patterson was appointed by Judge Brinkema to evaluate Moussaoui to determine his competency. In the span of a mere two-hour period, Dr. Patterson determined that Moussaoui was competent to waive counsel. This determination was because Dr. Patterson deemed Moussaoui’s writings rational. Further proof of his sanity included the fact that “h[e] attend[ended] . . . two American flight schools last year — including 50 hours of flight training in a single-engine plane.”

It is often the case that some people with mental defects tend to possess an extraordinary IQ. A prime example is the well known physicist, Dr. John Nash. Dr. Nash suffered from paranoid schizophrenia which was difficult to recognize as he held up the appearance to the world that he was “normal” while struggling with his own inner demons that the schizophrenia brought about. Defense counsel continues to assert that when people possess such high intellect, such as Nash and Moussaoui, the diagnosis is hard to recognize. After examining Moussaoui, a defense psychiatrist contended that his writings were not rational, as Dr. Patterson had stated, but rather “disorganized with multiple digressions and conspicuous logical inconsistencies.” Further, the fact that Moussaoui has a family history of mental disease and defect seemed to be of no interest to the court in making its competency determination.

Although the defense and prosecution psychiatrists weigh into the decision of competency, it is ultimately up to the judge after evaluating a number of factors, such as the credibility of the psychiatrist and the amount of time spent with the accused. Based on Moussaoui’s various characteristics, demeanor, and writings, Judge Brinkema decided to allow him to proceed pro se. Whether this was a sound legal decision will remain to be seen as the trial unfolds.

251. Id.
252. Id.
254. Id.
255. Id.
256. Hirschkom, supra note 253.
257. Id.
258. See generally id. (finding that Moussaoui, after Judge Brinkema reviewed sealed reports from a court-appointed psychiatrist, was a “very smart man” and competent to represent himself).
259. Id.
C. Standby Counsel

The issue of standby counsel has been a tenuous topic throughout the years. While the Faretta court emphasized that the right to standby counsel was not a constitutional guarantee under the Sixth Amendment, it did attempt to formulate a standard that "a State may — even over objection by the accused — appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." The issue still remains: What is the role of standby counsel and when do they get actively involved in the trial?

i. Standby Counsel’s Role

Contrary to popular belief, standby counsel does not actually represent the pro se defendant. Rather, standby counsel acts as a spectator patiently waiting for guidance from the court to determine their role in the trial. Standby counsel provides advice to the defendant on the procedural and evidentiary aspects of the case, and is there to take over for the pro se defendant if he or the court decides that he cannot further represent himself. Attorneys who are appointed by the court as standby counsel should not passively sit on the sidelines in the court waiting for their client to "tag" them in; rather they need to prepare their own case on behalf of the defendant so they can be ready to present it zealously. "Involvement as standby counsel does not relieve the attorney of the obligation of zealous representation, but merely redirects the attorney's efforts and forces much of her work to remain behind the scenes at trial." Standby attorneys need to remember that the word "standby" does not completely restrict their role. They still have a job to do on behalf of their client and therefore, expect to prepare the best defense possible for their client. Although standby counsel may feel that their time is not well spent waiting for the defendant to ask for help, they must remember that they also play a big part in the trial. Standby counsel has a duty to the client to prepare the case properly, as if they themselves are presenting the case to the court. Being appointed standby counsel does not give them the right to become deficient in their representation.

262. See Howard, supra note 65, at 865.
263. Id.
264. Id.
265. Id. at 865.
266. Anne Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, 75 N.Y.U. L. REV. 676, 679 (June 2000).
duties.

Despite this deferential role, standby counsel must be as diligent as defense attorneys should be, investigating the case and exploring the legal issues as if in preparation for trial. Furthermore, standby counsel must assume an educative role beyond that normally expected of counsel. She should evaluate pretrial and trial strategies thoroughly enough to help the defendant understand the choices to be made; she must stand ready to offer a guiding hand to the pro se defendant, even one she believes to be embarking on the wrong course. Thus, the obligation of standby counsel is substantial and far from the “not quite a lawyer in the case” concept reflected in the reported decisions.267

Ultimately, courts appoint standby counsel to not only help the trial run smoothly, but also to aid the judge overseeing the case. By doing so, this will not waste the court’s time by having to stop the trial and explain to the pro se defendant the various intricacies of the judicial system.268 This will also safeguard the defendant’s Sixth Amendment guarantee to a fair trial.

However, many attorneys and pro se defendants look upon standby as a nuisance. While defendants see this as being an issue of confusion for the jury,269 many judges and attorneys see the request for pro se representation and the appointment of standby counsel as a dilatory tactic used by “clever manipulators of the justice system.”270 The case involving Theodore Kaczynski was one particular instance where the judge believed that the pro se request was simply another ruse to interrupt his trial.271 Kaczynski wanted to exhibit total control over the trial but the judge denied his request, as the request was not timely.272 On appeal, the Ninth Circuit upheld the decision stating that Kaczynski’s “avowed purpose of invoking the right in order to avoid a defense he could not endure was not ‘consistent with a good faith assertion of the Faretta right,’ and . . . not for any good faith reason other than delay.”273

Unlike Kaczynski, Zacarias Moussaoui believed that he could better

267. Id.
268. Howard, supra note 65, at 854 (citing Howard v. State, 701 So. 2d 274, 285 (Miss. 1997)).
269. See Poulin, supra note 266, at 677 n.9 (“Thirteen years after the charged offense, a federal court granted . . . a new trial because of the confusion concerning the role of standby counsel.” (citing Appel v. Horn, No. CIV. A. 97-2809, 1999 WL 323805 (E.D. Pa. May 21, 1999))).
270. Id. at 677 (citing Berry v. Lockhart, 873 F. 2d 1168, 1171 (8th Cir. 1989)).
272. United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001).
273. Id. at 1118 (citation omitted).
represent himself at trial than “a ‘wicked’ agent of the government ‘plotting’ to kill him.”

When Moussaoui announced to the court that he wanted to proceed pro se, his attorneys were not shocked. Dunham, the lead attorney on the case, knew for some time that Moussaoui wished to be represented by a Muslim attorney because he did not trust his appointed attorneys. In turn, his other attorneys also wanted to be taken off the case because without Moussaoui’s cooperation, they could do nothing to aid him in the trial. Judge Brinkema ordered that Dunham and his team stay on the case despite the hostility between Moussaoui and his attorneys. These lawyers have been working vigorously on a defense that they hope to present on behalf of their client. However, their efforts will more than likely not come to fruition and “as a result [they will] . . . find themselves working full tilt on behalf of a client who hates them and with full knowledge that their thousands of hours of labor may never be used in his defense.”

ii. Setting Limits - Determining How Far Pro Se Defendants Can Go Before Ordering Standby Counsel to Step in.

While standby counsel can actively participate in the case when directed to do so by the defendant, he cannot interfere with the defendant’s control of the case. This issue of control, or lack thereof, is often difficult for attorneys. As Moussaoui entered his guilty plea to charges that carry the death penalty, his defense team looked on helplessly, wishing that they could do more. As time went on and Moussaoui’s pleadings became more and more inept, his defense team petitioned the court to allow them to take over, as they believed that Moussaoui “was unfit to represent himself,” and therefore, not competent to proceed as his own attorney. Judge Brinkema felt otherwise and believed that Moussaoui was indeed mentally competent to represent himself, and as a result, Dunham and his team were again forced to the sidelines to watch their client’s case continue to plummet.

Dunham and his team petitioned the court to allow them to step-in and

274. Roth, supra note 12, at 1.
275. Id.
276. Id.
277. Id.
278. Id.
279. Id. at 6.
280. See Poulin, supra note 266, at 683.
281. Roth, supra note 12, at 6.
282. Id. at 8.
283. Id.
take his place – an action that they thought was the right thing to do in order to save their client. Unfortunately, without a court order, there is little that standby counsel can do for a client when he does not request their help. Until Moussaoui crosses one procedural line too many, and the court revokes his right to proceed pro se, there is little that Dunham can do but sit idly by. That day may come soon, however for the time being, Moussaoui continues to test the patience of the court by filing erroneous pleadings. We may see that Judge Brinkema’s patience will run thin and Dunham and his team will in fact have to step in and take over for their client.

While there have been instances when defendants have requested standby counsel to take over certain portions of the case, courts have identified some limits to protect their pro se status. A common test that is utilized by a number of courts to protect the pro se status of defendants comes from the McKaskle case. In McKaskle, the court annunciated a two-pronged test: “a pro se defendant can control the case he presents to the jury.... [and] participation by standby counsel unsolicited by the accused cannot destroy the jury’s perception of the latter’s self-representation.” Simply stated, this rule dictates to overzealous attorneys desiring to take over a defendant’s case that their out of turn disruptions will not be tolerated. When a defendant chooses to proceed pro se, he or she alone is responsible for maintaining the control over the decisions to be made; not the appointed standby counsel. So long as the pro se defendant observes the correct procedural and substantive policies of the court, the pro se defendant can proceed as he sees fit.

D. Appeals

The trial court was correct in using its discretion to appoint standby counsel when faced with the issue of mental competency as present in the Moussaoui case. Standby counsel can only protect the safeguards that Faretta set out in its decision. The issue of mental competency and pro se representation has not been extensively discussed. Courts have not concerned themselves with whether the use of pro se representation by those with mental defects is just a manipulative means of attempting to alter or lessen a sentence on appeal.

Faretta’s message is clear. Courts will not review appeals based on errors made by the pro se defendant. The basis for this strict rule is to prevent the court from being inundated with appeals based upon mere
technicalities at trial. By appointing standby counsel, the court protects itself from such reversible error. There are instances, however, when defendants who do represent themselves at trial are allowed to appeal the trial court’s decision. This occurs when the defendant detrimentally relies on the advice or strategy of the standby attorney. When the defendant asks the standby counsel for advice or help during the trial and proceeds as directed by the appointed attorney, the defendant may be able to appeal based on that advice, if erroneous. In such a case, the defendant is entitled to the same review he would have been entitled had the attorney argued the entire case from start to finish.

Another issue that is often raised on appeal is when a mentally incompetent person appeals the decision of a lower court based on the fact that they were not mentally fit to represent themselves at trial. In these instances, courts need to adhere fully to the Faretta guidelines if there is even the slightest doubt that the defendant is mentally incompetent. In O’Dell v. Thompson, despite an objection to standby counsel’s repeated request to reevaluate the competency of the defendant, a clearly mentally disturbed defendant was allowed to continue representing himself. On review, the court stated that they had serious questions as to whether O’Dell not only committed the crimes, but also whether he was capable of representing himself at trial.

IV. CONCLUSION

There is a great burden on the court in determining whether to allow a defendant with a questionable mental history to proceed pro se. The Declaration of Independence states that “All Men are Created Equal,” but it makes no reference to those with a mental defect having a lesser right to equality than those without any defect. There are those who have mental defects who are able to live in society without anyone knowing that they possess such a flaw. Theodore Kaczynski is a perfect example. He led the Federal Bureau of Investigation on a nation-wide manhunt for nearly eighteen years before being caught. Kaczynski is a learned man who earned a degree from Harvard University and who was once a professor at the University of California at Berkeley. Clearly, he successfully kept his

287. Id.
288. Id.
289. Id.
292. Id. at 997.
293. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
294. Howard, supra note 65, at 1.
schizophrenia from his family and colleagues for many years.

There is nothing to suggest throughout the annals of history that the right to pro se representation should only be afforded to a specific class of persons. Rather, the right to proceed pro se should be afforded to everyone who meets the Faretta test. If a borderline mentally incompetent individual wishes to proceed pro se, the court owes a duty to give him a detailed and comprehensive mental evaluation. In the Moussaoui case, for example, it is shocking that the government was willing to suggest that a detailed competency exam was not necessary. Not only does Moussaoui come from a family with a history of mental problems, but his behavior, statements, and claim that his lawyers are part of a government conspiracy to kill him are all compelling evidence that a competency exam is warranted under Faretta.295

Like Moussaoui, many individuals in his position harbor a great distrust in Americans. Distrust leads to both parties being unsatisfied with the outcome of the situation. As more and more detainees are being brought to justice, the issue of mental competency with regards to pro se representation may increase. Many of these detainees believe that they are at war with the United States and this may lead to an assumption that they are not mentally stable to represent themselves. Moussaoui is a prime example. When this is the case, how can they in turn rely upon an American court-appointed attorney to save their lives? In the United States, every person is entitled to have his or her rights protected. So long as the courts fully follow the spirit of Faretta, the rights of the detainees’ and all others who follow in their footsteps who wish to proceed pro se, will be protected.

The safeguards that the courts create through the various tests, standards, and norms are there for a good reason. The opponents of pro se representation by a defendant with questionable mental fitness may argue that there could be a higher appeal rate if we let such people proceed pro se. Faretta and McKaskle have set out straightforward standards for courts to adhere to when there is a question as to whether an accused is mentally competent to represent himself. Further, the use of standby counsel ensures that pro se defendants are afforded every opportunity to present their case with clarity, efficiency and effectiveness so as not to waste the court’s time or violate their due process rights. As long as the courts adhere to the rules set out in Faretta, and its progeny regarding competency, each person who wishes to proceed pro se at trial will not only be afforded their constitutional right, but those rights will also be protected against judicial abuse of discretion. Fairness will not be an issue as long as the courts afford every defendant with a questionable mental health background a

295. See Roth, supra note 12, at 1.
comprehensive mental exam to determine whether they are fit to proceed pro se.

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