PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 18 | Issue 4 Article 3

5-15-1991

The Right to Waive Competent Counsel: Extending the Faretta Waiver

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INTRODUCTION

The right to counsel provided by the Sixth Amendment of the United States Constitution[1] is the "requisite to the very existence of a fair trial."[2] Encompassing criminal prosecutions in all state and federal courts, its purpose is to safeguard a defendant's right to be assisted in the defense of his life or liberty.[3] Embodied within this constitutional amendment, the accused has the right to be represented by competent and effective counsel,[4] as well as the right to counsel of choice.[5] Both of these constitutional rights are well substantiated through case law[6] and may be waived when a defendant chooses to

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1. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend VI.

2. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

3. Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (emphasizing that the fourteenth amendment mandates the right to counsel in state felony proceedings).

4. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) (observing that the right to counsel necessarily embodies the right to effective counsel).

5. Powell v. Alabama, 287 U.S. 45, 53 (1932).

6. Cases that support the right to effective counsel include: Perry v. Leeke, 488 U.S. 272, 280-85 (1989); Wheat v. United States, 486 U.S. 153, 159 (1988); Burger v. Kemp, 483 U.S. 776, 796 (1987); Murray v. Carrier, 477 U.S. 478, 495 (1986); Evitts v. Lucey, 469 U.S. 387, 392 (1985); Strickland v. Washington, 466 U.S. 668, 686 (1984); United States v. Cronic, 466 U.S. 648, 657 (1984); Wood v. Georgia, 450 U.S. 261, 271 (1981); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Geders v. United States, 425 U.S. 80, 86 (1976); McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932).

Cases that support the right to counsel of choice include: Powell v. Alabama, 287 U.S. 45, 53 (1932); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 625-26 (1989) (Court examines right to choice of counsel when criminal defendant has forfeitable assets and rejects defendant's right to use forfeitable assets to pay attorney fees); United States v. Monsanto, 491 U.S. 600, 601 (1989) (examining right to counsel of choice as protected by sixth amendment or fifth amendment when assets are forfeitable under RICO); Wheat v. United States, 486 U.S. 153, 159 (1988) (Although the sixth

represent himself at trial.[7] Few cases, however, have addressed the issue that arises when a criminal defendant endeavors to waive his right to competent counsel in order to be represented by the advocate of his choice. This comment explores whether a criminal defendant has the constitutional prerogative to waive his vested right to competent counsel in order to be represented by the incompetent counsel of his choice.

The highly publicized mass murder trial of "Nightstalker" Richard Ramirez raised this important issue.[8] Despite repeated suggestions by the trial judge that alternative counsel with death penalty experience was readily available,[9] and amidst allegations of counsel incompetence by the press,[10] Ramirez chose to continue with his retained counsel.[11] Although a defendant is constitutionally entitled to competent and effective counsel,[12] he also enjoys the right to continue through trial with an advocate that he believes will best serve his interests.[13] The potential conflict between these rights creates a judicial dilemma: should a defendant be allowed the right to proceed through trial with the incompetent counsel of his choosing?

Part I of this comment provides an overview of the historical background concerning the rights to competent counsel and counsel of choice, including a discussion of the role of the judiciary in handling waivers of the right to counsel. Part II examines the historical back-

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amendment provides a right to choice of counsel, "[a] defendant may not insist upon representation by an attorney he cannot afford").

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

8. Harris, *Stalker Defense Begins Campaign to Spare Killer's Life*, United Press Int'l, Sept. 21, 1989. Defendant Richard Ramirez, also known as the "Nightstalker," was a self-proclaimed devil worshiper who was convicted of 13 murders and 30 felonies. *Id.* After trial, speculation was raised by Ramirez's defense counsel concerning an appeal based upon incompetency of counsel. *Id.*

Speculation also arose before trial as to the competence of the defense attorneys in this high profile case. *See* Chen, *Stalker Trial Defense Lawyer Has History of Calling in Sick*, L.A. Times, Mar. 2, 1989, part 2, at 1, col. 4; Hager & Chen, *Stalker Trial Lawyer Found 'Deficient' in '85 Murder Case*, L.A. Times, Jan. 26, 1989, Part 2, at 3, col. 1.

9. Lecture by Judge Tynan at Pepperdine University School of Law, Fall 1989.

10. Cox, *Nightstalker Sentenced to Death - Did Lawyers Blow It?*, Nat'l Law J., Oct. 23, 1989, at 3, col. 1. The defense counsel for "Nightstalker" Richard Ramirez, in addition to not calling any witnesses during the trial's penalty phase, allowed Ramirez to appear at trial wearing a jacket which matched descriptions given to the police by his victims. *Id.* Judge Tynan, the trial judge, remarked that he was permitting the defense more latitude "to avoid any more issues of incompetence than are necessary." *Id. See also* Gannett News Serv., Sept. 22, 1989, at 4, col. 2 ("During the trial, news reports implied that Ramirez's lawyers, Arturo Hernandez and Daniel Hernandez, not related, were inexperienced and seemed to be in over their heads"). *Slow Road to Justice*, L.A. Times, July 21, 1988, part 2, at 6, col. 1 ("Ramirez retained two lawyers unfamiliar with capital cases, and their inexperience shows in the indiscriminate blizzard of pretrial motions that they filed and in their overt hostility to the prosecutor and the judge").

11. *See supra* note 10.

12. *See supra* note 6.

13. *See* Powell v. Alabama, 287 U.S. 45, 53 (1932); Chandler v. Fretag, 348 U.S. 3, 9 (1954); Glasser v. United States, 315 U.S. 60, 70 (1942); *see also supra* note 6.

ground of waivers of effective counsel. Specifically, this section focuses on the prohibition against the arbitrary removal of counsel. Part III discusses the ramifications of permitting the retention of incompetent counsel and examines the requirements for a waiver of competent counsel. Part IV addresses the roles of the judiciary and the defendant in decisions to proceed with incompetent counsel. Part V looks to the future of a defendant's right to continue with ineffective counsel and examines the possible impact that the Supreme Court's decision in *Wheat v. United States*[14] will have on a defendant's choice of counsel. This comment concludes that courts should allow a defendant to proceed with incompetent counsel if an effective waiver has been knowingly, intelligently and voluntarily made, and has been reflected in the court record. However, there may be an exception to this ability to waive competent counsel where counsel compromises the fair and orderly administration of justice.

I. HISTORICAL BACKGROUND

A. The Right to Competent Counsel

Under the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel.[15] This right is fundamental in that it is designed to insure that every defendant will receive a fair trial.[16] As the United States Supreme Court stated in the landmark case of *Powell v. Alabama*[17]:

> 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 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

14. 486 U.S. 153 (1988).

15. Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (right pertains to both appointed and retained counsel); McMann v. Richardson, 397 U.S. 759, 771 (1970) (right to counsel includes right to competent counsel); United States v. Otero, 848 F.2d 835, 837 (7th Cir. 1988) ("[D]efendant is entitled to more than just a warm body standing next to him during the criminal process").

16. *See* Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel includes counsel of choice); Faretta v. California, 422 U.S. 806, 819 & n.15 (1975) (trial must be fair); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts").

17. 287 U.S. 45 (1932).

his innocence.[18]

Due to the vital role that counsel plays in our adversarial criminal system, court-appointed counsel is available to defendants who are financially unable to obtain the counsel of their choice.[19]

The significance of representative counsel has been acknowledged by the right to competent representation.[20] In *McMann v. Richardson*,[21] the United States Supreme Court explicitly held that "the right to counsel is the right to the *effective* assistance of counsel."[22] Viewed as a constitutional minimum,[23] this right attaches whether counsel has been retained or has been appointed by the court[24] and is crucial in affording a defendant "ample opportunity to meet the case of the prosecution."[25] However, in a situation where a defendant chooses to conduct his own defense, the right to receive competent counsel is inapplicable.[26]

B. The Strickland Test For Effective Assistance of Counsel

The standard for effective representation of counsel was delineated in *Strickland v. Washington*.[27] *Strickland* involved a defendant, Washington, who had been indicted on several counts, three of which were for murder in the first degree. Against the advice of his appointed attorney, Washington confessed to several of the counts, including the three murders. He claimed that family stress had contributed to the "criminal spree."[28] Washington also acted against the advice of his attorney by waiving his right to trial by jury. The trial judge, after receiving Washington's guilty pleas, told the defend-

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18. *Id.* at 68-69.

19. *See generally* Argersinger v. Hamlin, 407 U.S. 25, 37-38 (1972) (counsel must be provided before a defendant may be incarcerated); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (indigent defendants must receive appointed counsel in state court); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (indigent defendant in federal court must receive counsel).

20. Strickland v. Washington, 466 U.S. 668, 689 (1984) ("the purpose [of the effective assistance guarantee of the Sixth Amendment] is simply to ensure that criminal defendants receive a fair trial.").

21. 397 U.S. 759 (1970).

22. *Id.* at 771 & n.14 (emphasis added).

23. Fuller v. Diesslin, 868 F.2d 604, 608-09 (3d Cir. 1989). *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (the sixth amendment guarantees effective assistance of counsel: "[T]he essential aim of the [sixth] amendment is to guarantee an effective advocate for each criminal defendant . . .").

24. *Fuller*, 868 F.2d at 608-09.

25. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942). *See* People v. McKenzie, 34 Cal. 3d 616, 668 P.2d 769, 194 Cal. Rptr. 462 (1983) (reversing conviction when defense counsel refused to participate in defendant's trial).

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

27. 466 U.S. 668 (1984).

28. *Id.* at 672. The defendant had no prior record of criminal activity and had claimed that "his inability to support his family" had contributed to the crime that he committed. *Id.*

ant that he had "a great deal of respect for people who are willing to step forward and admit their responsibility,"[29] but declined to comment as to the effect this would have on his pronouncement.[30]

The defense counsel tried to persuade Washington to utilize his right to a jury during the sentencing phase of trial. Washington again refused his counsel's advice and waived this right, opting instead to be sentenced by the trial judge.[31]

Although the defense counsel's preparation for the sentencing hearing included conversations with Washington's relatives, the defense counsel neither made efforts to inquire into the defendant's character by interviewing witnesses nor requested a psychiatric examination to determine the defendant's state of mind. Due to the defendant's prior confessions, the defense counsel had few available options and a "sense of hopelessness."[32] By his actions, however, the defense counsel was attempting to impede the prosecution's ability to inquire into the defendant's mental state and other areas which could be "potentially damaging."[33]

At the sentencing hearing, the defense attorney raised many points in Washington's favor, emphasizing his lack of a criminal record as well as the stress the defendant had been under.[34] The trial judge, however, found that the crimes were "especially heinous, atrocious and cruel,"[35] and sentenced the defendant to death for each of the murders.[36] The defendant subsequently raised a claim of ineffective counsel, which was rejected when he sought relief in the state appeals court.[37]

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Strickland*, 466 U.S. at 673. The defendant's counsel felt frustrated because the defendant had already incriminated himself by admitting to the crimes and was continuing to reject his strategic advice. *Id.* He believed that his chances of meeting the case presented by the prosecution were slim. *Id.*

33. *Id.* Counsel's tactical decision of not calling witnesses or making an inquiry into the defendant's background or mental state was utilized as a "damage control" measure. *Id.* The reasoning behind this decision centered on preventing the prosecution from cross-examining the defendant, from further bolstering its case against the defendant. *Id.*

34. *Id.* at 673-74.

35. *Id.* at 674. All of the murders committed by the defendant had involved repeated stabbings. The judge reasoned that the crimes had exposed the victims to "a grave risk of death" and were knowingly accomplished by the defendant. *Id.*

36. *Id.* at 675.

37. *Strickland*, 466 U.S. at 675-76. The respondent made several claims concerning his counsel's ineffectiveness, many of which included claims for poor trial performance in raising arguments and failure to bring certain motions. The trial court found that

The Florida Supreme Court affirmed, concurring with the trial court that Washington had not made a *prima facie* case of ineffective counsel.[38] The defendant then sought a writ of *habeas corpus* in federal district court, but was denied relief.[39] On appeal, however, the Fifth Circuit, sitting *en banc*, reversed and remanded to the district court, advancing its own standard for determining the effectiveness of counsel.[40]

The State of Florida sought review of the appellate court's decision, and the United States Supreme Court granted *certiorari*[41] "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[42]

The Court began by affirming that the Sixth Amendment guarantees the right to effective counsel.[43] The Court noted that the principle behind this prerogative is the safeguarding of a defendant's right to a fair trial.[44] Claims of ineffective or incompetent representation should therefore be scrutinized to determine "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[45]

The Court promulgated a two step test to determine whether "reasonably effective assistance"[46] was provided by counsel[47]: (1) whether the attorney's level of representation "fell below an objective standard of reasonableness" so as to have been ineffective;[48] and (2) a requirement that the defendant prove that, but for the inadequate representation, the outcome probably would have been different.[49] Both prongs of the test must be satisfied in order to prove inadequate representation and a court may end its inquiry as soon as it becomes apparent that the defendant will be unable to prove one or both prongs.[50]

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the claims were not substantial enough to have prejudiced the defendant and noted that the attorney's actions could be categorized as tactical decisions. *Id.* at 677.

38. *Id.* at 678. The Florida Supreme Court concurred with the trial court, agreeing that "substantial deficiency or possible prejudice" had not been demonstrated.

39. *Id.* at 678-79.

40. *Id.* at 679. The appeals court formulated a test whereby effectiveness was determined by an inquiry into whether counsel rendered reasonable assistance given "the totality of the circumstances." *Id.* at 680.

41. Strickland v. Washington, 462 U.S. 1105 (1983).

42. Strickland v. Washington, 466 U.S. 668, 684 (1984).

43. *Id.* at 684-85.

44. *Id. See supra* notes 15 & 20 and accompanying text.

45. *Strickland*, 466 U.S. at 686.

46. *Id.* at 687.

47. *Id.*

48. *Id.* at 687-88.

49. *Id.* at 687, 694.

50. *Strickland*, 466 U.S. at 697. *See* United States v. Mealy, 851 F.2d 890, 908 (7th Cir. 1988) (holding that the incompetence issue need not be debated if the defendant

The Court expressed that a judge must examine how reasonable an attorney's actions were under the facts and circumstances of the case.[51] To claim ineffective assistance of counsel, a defendant must show that the representation he received was unprofessional and unreasonable.[52] A court's responsibility would be to observe whether, under the circumstances, the counsel's actions were "outside the wide range of professionally competent assistance."[53] A presumption of competence and reasonable judgment in an adversarial situation should be taken into account by the reviewing court.[54]

Courts have defined certain types of cases where prejudice to a defendant is presumed.[55] This is particularly evident in recent conflict of interest cases,[56] where the likelihood of prejudice in some situations is so great that a "case by case inquiry" into prejudice is inefficient and unnecessary.[57] In classifying all but blatant and conspicuous attorney errors as within the limits of competence,[58] the courts are able to protect counsel's tactical decisions and defense strategies.[59] As the Court noted in *Strickland*: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."[60] This allows counsel the opportunity to use "creative"

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did not suffer prejudice at the hands of his counsel's representation); Fink v. Lockhart, 823 F.2d 204, 207 n.1) (8th Cir. 1987) (ending inquiry on finding that the prejudice prong of *Strickland* test was not met).

51. *Strickland*, 466 U.S. at 690 (1984). Such an inquiry requires a presumption that counsel did in fact deliver adequate assistance. *Id.* This factor is necessary to protect the independence of counsel's decisions and strategies which are formed during trial as facts and evidence become known. *Id.*

52. *Id.*

53. *Id.*

54. *Id. See supra* note 49.

55. *Strickland*, 466 U.S. at 692. The Court specifically illustrated cases where the assistance of an attorney was denied, using interference with counsel's representation by the court and conflict of interests between the attorney and the accused as examples. *Id. See* United States v. Cronic, 466 U.S. 648, 658-61 (1984) (citing examples of denial of counsel during trial proceedings); Cuyler v. Sullivan, 446 U.S. 335 (1980) (court may have obligation to prevent conflicts of interest in defendant's representation); *see generally infra* pp. 40-43 (distinguishing the problems that arise when conflict-free counsel is waived and competent counsel is waived). *Cf.* Maxwell v. Superior Court, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982) (holding where defendant's fee contract with his attorney gave the attorney rights to the defendant's life story, the resulting conflict was determined waivable).

56. *See, e.g.*, Wheat v. United States, 486 U.S. 153 (1988).

57. Strickland v. Washington, 466 U.S. 668, 692 (1984).

58. *Id.* at 690-91.

59. *Id.* at 689.

60. *Id.*

defenses which may succeed.[61]

C. *The Right to Waive Counsel*

Under the Sixth Amendment, a criminal defendant is guaranteed the right to counsel.[62] Incorporated within this right is the right to waive counsel[63] and represent oneself in a criminal proceeding.[64] Accordingly, the Supreme Court in *Faretta v. California*[65] held that, under the Sixth Amendment, a criminal defendant has the right to waive the assistance of counsel and to represent himself at trial.[66] Because courts have relied upon *Faretta* in determining the applicable waiver standard where a defendant wishes to proceed with incompetent counsel,[67] an analysis of the Court's decision is necessary.

In *Faretta*, the defendant, Anthony Faretta, was on trial for grand theft. Although he was represented by an appointed public defender, Faretta asked the court for permission to represent himself at trial. This request was made after Faretta became aware of his appointed counsel's heavy caseload. After a thorough inquiry by the judge into Faretta's background and experience, and despite admonitions against self representation, Faretta's waiver of counsel was allowed by the court.[68] The court, however, instructed Faretta that if it appeared he was inadequately representing himself, the waiver would be revoked.[69]

The judge held a hearing to determine Faretta's competency to represent himself, examining Faretta on specific areas of law.[70] Based on this hearing, the judge revoked Faretta's waiver, declaring that Faretta had not made an "intelligent and knowing" waiver of his right to receive counsel and that there was "no constitutional right to

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61. *Id.*

62. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (extending the right to appointed counsel to situations of imprisonment); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (discussing the requirement of appointing counsel to an indigent felon). The Criminal Justice Act also provides a statutory right to appointment of counsel: "The United States magistrate or the court, if satisfied after appropriate inquiry that the [accused] is financially unable to obtain counsel, shall appoint counsel to represent him." 18 U.S.C. § 3006A(b) (1982 & Supp. IV 1987).

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

64. *Id.*

65. 422 U.S. 806 (1975).

66. *Id.* at 819.

67. *See* United States v. Rogers, 471 F. Supp. 847, 855 (E.D.N.Y. 1979), *aff'd*, United States v. Raife, 607 F.2d 1000 (2d Cir. 1979); People v. Johnson, 75 Ill. 2d 180, 387 N.E.2d 688 (1979).

68. *Faretta*, 422 U.S. at 808.

69. *Id.* The judge instructed Faretta that he would receive no special treatment from the court and that he would be expected to follow normal court procedures in representing himself at trial. *Id.*

70. *Id.* at 808 n.3.

conduct his own defense."[71] Faretta subsequently related his desire to act as co-counsel.[72] His request was rejected and the public defender was ordered to carry out the remainder of Faretta's defense. Faretta was found guilty,[73] and on appeal, the California Court of Appeal upheld the conviction, agreeing with the trial court that Faretta was not entitled to represent himself.[74]

The United States Supreme Court reversed, holding that a criminal defendant has the right to represent himself at trial.[75] The Court stated that the right "has been protected by statute since the beginnings of our Nation."[76] In its ruling, the Court set forth the plain meaning of the Sixth Amendment: "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."[77] The Court held that even though the Sixth Amendment does not specifically mention the right of self-representation,[78] this right is firmly within the category of rights which are "essential to due process of law in a fair adversary process."[79]

The Court emphasized that an accused's right to receive assistance of counsel is furnished as an aid,[80] not as an imposition of the government upon an unconsenting defendant. "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."[81]

The Court declared that an accused may waive the assistance of

71. *Id.* at 809, 810 & n.4. The judge found that "the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated." *Id.* at 810 n.4.

72. *Id.* at 810. In addition, Faretta requested several times for appointment of counsel other than a public defender. *Id.* at 810 n.5.

73. *Faretta*, 422 U.S. at 811.

74. *Id.* at 811-12.

75. Faretta v. California, 422 U.S. 806, 836 (1975).

76. *Id.* at 812.

77. *Id.* at 819.

78. *Id.* at 819 & n.15. "The right to self-representation — to make one's own defense personally — is thus necessarily implied by the structure of the Amendment." *See also* Douglas v. United States, 488 A.2d 121, 141 (D.C. Cir. 1985) ("the Sixth Amendment contains an implied constitutional right to waive the assistance of counsel").

79. Faretta v. California, 422 U.S. 806, 819 n.15.

80. *Id.* at 820. "The language and spirit of the Sixth Amendment contemplate 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." *Id.*

81. *Id.* at 821 (emphasis in original).

counsel and proceed *pro se* if a valid waiver is knowingly and intelligently made.[82] This is to ensure that the defendant is "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 his eyes open.' "[83] The trial judge must inquire into and advise the defendant of the dangers and complications associated with the decision to proceed *pro se*.[84] Such inquiry should be reflected on the court record as an explicit dialogue to protect against reversal.[85] Because a defendant has a constitutional right to receive counsel, until that right is validly waived, a court which allows a defendant to proceed without a valid waiver is in essence denying the defendant constitutional protection.[86] Therefore, an implied waiver of a constitutional right is generally not presumed.[87] To be effective, a valid waiver must be received by the court, and reflected on the court record.[88]

In electing to represent himself, an accused abandons his right to competent counsel and loses the opportunity to argue ineffectiveness of counsel upon appeal.[89] However, the right to represent oneself is not absolute and the trial judge may restrict, prevent, or terminate the defendant's *pro se* status if the trial proceedings are seriously disrupted.[90] A trial court's arbitrary disallowance of a valid waiver is grounds for reversal.[91]

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82. *Id.* at 835.

83. *Id.* (*quoting* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

84. *Faretta*, 422 U.S. at 835. *See also* Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (extent of investigation dependant upon circumstances); United States v. Welty, 674 F.2d 185, 188 (3d Cir. 1982) (the facts and circumstances of the case must be evaluated).

85. *See Von Moltke*, 332 U.S. at 708, 724 (1948); United States v. Balough, 820 F.2d 1485, 1490 (9th Cir. 1987); McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) (points to be considered by trial court in accepting a waiver), *cert. denied*, 474 U.S. 852 (1985); *see generally* United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988) (discussing what the record should disclose about the defendant's waiver), *cert. denied*, 487 U.S. 1211 (1988); United States v. Williamson, 806 F.2d 216, 220 (10th Cir. 1986) (where defendant was not uneducated, explanation on record regarding defendant's sixth amendment rights provided sufficient proof of valid waiver).

86. *See* United States v. Balough, 820 F.2d 1485, 1489-90 (9th. Cir. 1987); Moreno v. Estelle, 717 F.2d 171, 174 (5th Cir. 1983) (the defendant's sixth amendment right to receive counsel applies unless properly waived), *cert. denied*, 466 U.S. 975 (1984).

87. Faretta v. California, 422 U.S. 806, 835 (1975). *See supra* note 86.

88. *See* United States v. Kelm, 827 F.2d 1319, 1321 & n.1 (9th Cir. 1987); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065-67 (11th Cir. 1986).

89. *Faretta*, 422 U.S. at 834 & n.46. *See* United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980); United States v. Weninger, 624 F.2d 163, 167-68 (10th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980).

90. *Faretta*, 422 U.S. at 834 & n.46. *See* Davis v. Morris, 719 F.2d 324, 325-26 (9th Cir. 1983) (denying defendant the right to proceed *pro se* due to disruption and the objective lack of competence that defendant displayed).

91. United States v. Romano, 849 F.2d 812, 820 (3d Cir. 1988).

D. The Right to Counsel of Choice

Labelled "the most important decision a defendant makes in shaping his defense,"[92] a significant body of case law supports the constitutional right to choose one's counsel.[93] In *Powell v. Alabama*,[94] the Supreme Court observed that a criminal defendant has the right to obtain the counsel of his choice.[95] The United States Supreme Court has restated this prerogative on numerous occasions.[96] This right is viewed as an implied right, "part and parcel of the [constitutionally guaranteed] right to the assistance of counsel."[97] However, there is generally no constitutional right for an indigent defendant to demand the appointment of a particular attorney.[98]

The principle involved in these cases centers around the protection of an individual's right to present his own defense.[99] The ability to choose an attorney whom a defendant feels will best represent his interests is paramount. The accused's right to select his personal means of defense shows that "respect for the individual which is the

92. United States V. Laura, 607 F.2d 52, 56 (3d Cir. 1979), *aff'd*, 667 F.2d 365 (3d Cir. 1981).

93. *Id.* at 53. *See* United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982); Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1104 (1977); Harling v. United States, 387 A.2d 1101, 1104 (D.C. 1978).

For an overview of the recent positions taken by federal courts concerning the right to counsel of choice, see United States v. Monsanto, 491 U.S. 600 (2d Cir. 1991); United States v. Stuckey, 917 F.2d 1537 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 972 (1991); United States v. Collins, 920 F.2d 619 (10th Cir. 1990), *petition for cert. filed*, Feb. 4, 1991; United States v. Richardson, 894 F.2d 492 (1st Cir. 1990); Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990); United States v. Rewald, 889 F.2d 836 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 64 (1990); Neal v. Texas, 870 F.2d 312 (5th Cir. 1989); Fuller v. Diesslin, 868 F.2d 604 (3d Cir. 1989), *cert. denied*, Perretti v. Fuller, 110 S. Ct. 203 (1989); United States v. Gallop, 838 F.2d 105 (4th Cir. 1988).

94. 287 U.S. 45 (1932).

95. *Id.* at 53.

96. *See, e.g.*, Reynolds v. Cochran, 365 U.S. 525 (1961); Chandler v. Fretag, 348 U.S. 3 (1954) (reaffirming that the accused's choice of defense counsel must be given deference).

97. United States v. Curcio, 694 F.2d 14, 26 (2d Cir. 1982). *See* Powell v. Alabama, 287 U.S. 45, 53 (1932); Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956); Douglas v. United States, 488 A.2d 121, 141 (D.C. 1985); Harling v. United States, 387 A.2d 1101 (D.C. 1978).

98. *See* Carey v. Minnesota, 767 F.2d 440 (8th Cir. 1985), *cert. denied*, 474 U.S. 1010 (1985); Ford v. Israel, 701 F.2d 689 (7th Cir. 1983), *cert. denied*, 464 U.S. 832 (1983); United States v. Hampton, 757 F.2d 299 (7th Cir. 1972), *cert. denied*, 409 U.S. 856 (1972); Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) (no right for an indigent defendant to demand particular appointed attorney); Burgos v. Murphy, 692 F. Supp 1571 (S.D.N.Y. 1988); Irvin v. State, 584 P.2d 1068, 1070 (Wyo. 1978).

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

lifeblood of the law."[100] Furthermore, the right to counsel of choice has been held to directly affect the overall ability of an accused to assist with his own defense.[101] Moreover, some cases have defined this right to be a component of the due process right of a defendant "to decide, within limits, the type of defense he wishes to mount."[102]

Courts have held that the right to counsel of choice includes the protection against unreasonable interference by a court after counsel has been appointed or retained by the accused.[103] The overriding policy consideration governs the judiciary's reluctance to interfere with an established attorney-client relationship.[104] For this reason, a court may not arbitrarily deprive an accused of his choice of counsel if the accused and his counsel object.[105] As the court of appeals noted in *Linton v. Perini*,[106] the "[b]asic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."[107]

E. The Right to Counsel of Choice is not a Constitutional Minimum

Although the right to competent and effective counsel is viewed as a constitutional minimum,[108] the right to counsel of choice is not.[109] A trial judge, in the "interests of justice," may remove appointed or

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100. *Id.* at 834 (citing Illinois v. Allen, 397 U.S. 337, 350-51 (Brennan, J., concurring)).

101. *Id.*

102. United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979).

103. *See* United States v. Rankin, 779 F.2d 956 (3d Cir. 1986) (court stating that constitutional rights are at issue when a court interferes with a defendant's actions in obtaining counsel); Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956); Stearnes v. Clinton, 780 S.W.2d 216 (Tex. Ct. App. 1989) (en banc); Harling v. United States, 387 A.2d 1101 (D.C. 1978).

104. *See Faretta*, 422 U.S. at 820 & n.16, 834; Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *Douglas*, 488 A.2d at 141; *Harling*, 387 A.2d at 1105; Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc).

105. *See* Morris v. Slappy, 421 U.S. 1, 22-26 (1983) (recognizing the interest of the defendant in continuing with present attorney); *Linton*, 656 F.2d at 209-11; Gandy v. Alabama, 569 F.2d 1318, 1327 (5th Cir. 1978) (unfair to remove defendant's attorney); *Harling*, 387 A.2d at 1105; *Smith*, 68 Cal. 2d at 547, 440 P.2d at 65, 68 Cal. Rptr. at 1; State *ex rel.* Eidson v. Edwards, 793 S.W.2d 1, 5 & n.3 (Tex. Ct. App. 1990) (en banc) (constitutional considerations associated with arbitrary removal); *Stearnes*, 780 S.W.2d at 220-22.

106. 656 F.2d 207 (6th Cir. 1981).

107. *Id.* at 212.

108. Strickland v. Washington, 466 U.S. 668, 686 (1984). *See also supra* note 23.

109. *Morris*, 461 U.S. at 11-13 (holding no denial of right to choice of counsel when defendant's motion for continuance to obtain attorney was denied); United States v. DiTommaso, 817 F.2d 201, 219-20 (2d Cir. 1987) (defendant's choice of counsel not denied when court prohibited defendant from continuing with counsel who was simultaneously representing other defendants).

retained counsel.[110] Therefore, in some instances, a defendant may be prohibited from exercising this right.[111]

A balancing test has been employed to determine an accused's right to counsel of choice.[112] The right of an individual to personally choose his defense is weighed against the governmental interests of a fair trial and judicial efficiency.[113] A court may deny a defendant the right to counsel of his choice if that right seriously compromises the integrity of the trial process.[114] However, in such a situation the scales tip in the defendant's favor when one considers that an arbitrary denial of choice of counsel may be *per se* reversible.[115] A trial court must give due weight to the defendant's need to choose his defense counsel.[116] In this respect, the right to counsel of choice is analogous to the defendant's right to self-representation.[117]

II. WAIVERS OF EFFECTIVE COUNSEL: THE BEGINNINGS

Courts have recognized the right to waive effective assistance of counsel as a component of the right to counsel of choice.[118] A pioneering case which has been influential in many later decisions is *Smith v. Superior Court*.[119] In *Smith*, the defendant was prosecuted for murder. The trial judge concluded that the defendant's counsel was "incompetent," noting the counsel's inability to handle a capital

110. Harling v. United States, 387 A.2d 1101, 1105 (D.C. 1978).

111. *Id.* The court gave an attorney's severe incompetence, physical inability to try a case, and disruptive conduct as examples. *See also* United States v. Rogers, 471 F. Supp. 847 (E.D.N.Y. 1979) (attorney's old age and hearing problem presented difficulty for court resulting in the court mandating his removal).

112. Morris v. Slappy, 461 U.S. 1, 22-23 (1983); Sampley v. Attorney General, 786 F.2d 610, 613 (4th Cir. 1986), *cert. denied*, 478 U.S. 1008 (1986).

113. *Morris*, 461 U.S. at 23 n.5; *Sampley*, 786 F.2d at 613.

114. *Sampley*, 786 F.2d at 613.

115. *See* Fuller v. Diesslin, 868 F.2d 604, 607-08 (3d Cir. 1989); Linton v. Perini, 656 F.2d 207, 211-12 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982). When compared to the standard of proof required for an ineffective assistance of counsel claim, this standard appears to be easier for a defendant to meet because, under *Strickland*, a defendant claiming ineffective assistance of counsel must show actual prejudice to obtain a reversal. *See supra* notes 46-49 and accompanying text.

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

117. *See* Flanagan v. United States, 465 U.S. 259, 267-68 (1984) (proposing this analogy); *Faretta*, 422 U.S. at 820-21, 833 (1975).

118. *See* Smith v. Superior Court, 68 Cal. 2d 547, 559, 440 P.2d 65, 72, 68 Cal. Rptr. 1, 8 (1968) (en banc); McKinnon v. State, 526 P.2d 18, 22-23 (Alaska 1974); Douglas v. United States, 488 A.2d 121, 140-43 (D.C. 1985); People v. Escarcega, 186 Cal. App. 3d 379, 397, 230 Cal. Rptr. 638, 647 (1986).

119. 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc).

trial and his poor courtroom demeanor.[120] Despite the defendant's repeated objections, the trial judge removed the defendant's appointed counsel.[121]

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120. *Smith*, 68 Cal. 2d at 549, 440 P.2d at 68, 68 Cal. Rptr. at 4-5.

121. *Id.* The trial judge appointed Mr. Kanarek to represent the defendant Smith at his trial. During the proceedings, Kanarek requested a continuance to enable him to further research his case. The pertinent sections of the colloquy between the parties is reproduced:

> The court: "Mr. Kanarek, have you ever tried a death penalty matter before as a trial lawyer?"
> Mr. Kanarek: (replied that he did not think that he had).
> The court: "There is a question that has come up in the Court's mind which I must resolve as to whether I feel Mr. Kanarek has the experience and the ability to represent Mr. Smith in a charge as serious as this. And I want to do some research as to that problem and confer with the presiding judge and then hear from Mr. Kanarek, if he wishes to be heard, and indicate my own opinion, whether my doubt has been resolved or not. If I find that Mr. Kanarek is not, by experience of training or knowledge, capable of representing Mr. Smith, he will be relieved and a new attorney will be appointed by the Court."
> Mr. Kanarek: (objecting) "Well, your Honor, I might state that your Honor's statements are denying a right to counsel to Mr. Smith. Mr. Smith has asked me to prepare an affidavit of prejudice against your Honor . . . ."
> The court: "Mr. Kanarek has indicated to this Court that he has never appeared as the attorney of record in the trial of a death penalty case. . . . I feel Mr. Kanarek is not capable of representing Defendant Smith. In view of the very serious nature of the charge in this case, in view of the fact that a previous jury has found this defendant guilty of murder in the first degree and recommended the death penalty, this Court has a special duty to see that Mr. Smith gets the finest representation possible. . . . [T]he Court at this time will vacate the order . . . appointing Mr. Kanarek . . . ."
> Mr. Kanarek: "May I be heard, Judge?"
> The court: "No, Mr. Kanarek, you may not. . . . You are relieved, Mr. Kanarek." (The judge then appointed substitute counsel to represent the defendant).
> Defendant Smith: "I object to this attorney being appointed and I'd like to have the record reflect that, your Honor. I have some say so, I think. . . . After nearly four and one-half years of intimate contact with my case . . . Mr. I. A. Kanarek is indispensable to me, and I want Mr. Kanarek, and no other attorney, to represent me. Mr. Kanarek has had more than four years studying these transcripts. He's had many, many conferences with me and we have discussed this case in detail. We are agreeable — I agree with the defenses that he is going to take in the upcoming trial and I have all the faith in the world in him as an attorney."
> The court: "You have made the point with the Court and it is in the record that you want Mr. Kanarek as your lawyer; that you don't want [the substituted counsel]; that you will not cooperate with him. I can't make you cooperate with [him]. . . . If you decide that you will not cooperate with [him], that's your responsibility, not the Court's. . . ."
> The defendant: "[Y]ou are forcing me to proceed with this trial with an attorney who I really violently object to, really violently, and that I will not cooperate, your Honor, but rather give up my life, because I know my cooperation is important to this attorney. . . . I will not disclose these witnesses to this [substitute counsel] because I don't have any confidence in him, your Honor."
> The court: "I think you are very foolish, very childish, but it is your life, Mr. Smith, and if you don't want to divulge to [him] the witnesses you say you have, and the evidence you say you have, and you wish to sit by and let a jury find you guilty and sentence you to the death penalty, there is nothing I can do about it."

Id. at 551-57, 440 P.2d at 61-71, 68 Cal. Rptr. at 3-7.

The California Supreme Court, sitting *en banc*, faced the "unprecedented" situation of determining whether a trial judge had the authority to remove counsel over the objections of both the defendant and his attorney.[122] The court disapproved of the trial court's actions and declared that a trial judge does not have the authority to remove counsel, thereby depriving a defendant of his attorney because the trial judge subjectively feels the attorney is incompetent.[123]

The court rejected the concept that this would leave a trial judge helpless when faced with incompetent counsel.[124] The court listed the many options available to a trial judge to protect the court proceedings.[125] Foremost among these choices is the "judge's ultimate weapon . . . the summary contempt power."[126] The court, however, cautioned trial judges that the contempt power is to be used only with "great caution."[127] The court expressed that replacing incompetent counsel would expose the independence of the legal profession to greater jeopardy than even an unjustified use of contempt:

> [I]t is the duty of the trial judge to protect the defendant's right to a counsel who is *effective*. But in discharging that duty the judge must be on his guard neither to infringe upon the defendant's right to counsel of his choice, nor to compromise the independence of the bar . . .
>
> All will agree that if the defendant's attorney exhibits objective evidence of *physical incapacity* to proceed with a meaningful defense of his client, such as illness, intoxication, or a nervous breakdown, the court need not sit idly by; it should inquire into the matter on its own motion, and if necessary relieve the affected counsel and order a substitution. Yet even that action should be taken with great circumspection and only after all reasonable alternatives, such as the granting of a continuance, have been exhausted. Failure to observe these standards, although in a case of undisputed physical incapacity of counsel, will compel a reversal of the ensuing judgment; and this result will follow regardless of whether the defendant's substituted counsel was competent or whether the defendant received a 'fair trial' with respect to the guilt-determining process . . . *'[T]he state's duty [is] to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.'*[128]

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122. *Id.* at 559, 440 P.2d at 72, 68 Cal. Rptr. at 8.
123. *Id.* at 559, 440 P.2d at 73, 68 Cal. Rptr. at 9.
124. *Id.* at 560, 440 P.2d at 73, 68 Cal. Rptr. at 9.
125. The court stated:

> [T]he judge may intervene . . . by disallowing pleas or motions to withdraw pleas, controlling the scope of examination, questioning witnesses himself, making appropriate suggestions as to the items or order of proof, commenting on the evidence, admonishing or instructing the jury on his own motion, or exercising any of his other inherent powers over the conduct of the proceedings to insure that the defendant receives a fair trial.

Smith, 68 Cal. 2d at 560, 440 P.2d at 73, 68 Cal. Rptr. at 9.
126. *Id.*
127. *Id.*
128. *Id.* at 559, 440 P.2d at 72-73, 68 Cal. Rptr. at 8-9 (citations omitted) (quoting

The *Smith* court began its analysis by stating that an attorney is pronounced competent to practice law in being admitted to the bar.[129] An attorney would not be able to effectively represent his client if he worked under the insecurity that a judge could remove him at any time for being incompetent.[130] The court thus agreed with the defense counsel's argument, which stated:

> [I]f the advocate must labor under threat that, at any moment . . . he may be summarily relieved as counsel on a subjective charge of incompetency by the very trial judge he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect.[131]

The court concluded that a trial judge does not have the authority to dismiss a counsel on the grounds of potential or suspected incompetency.[132] If another rule were adopted by the court, the result would compromise the attorney's ability to effectively advocate for the accused and would potentially interfere with the fairness of the proceedings.[133] By protecting the defendant's right to continue with his present counsel, the attorney-client relationship is protected from arbitrary disruption by the trial judge.[134]

A. Arbitrary Removal of Counsel is Unjustified

A court may not arbitrarily remove and substitute the defendant's counsel over the objections of the defendant or his attorney.[135] The District of Columbia Court of Appeals analyzed the reasons why the right to counsel of choice must not be unreasonably interfered with in *Harling v. United States*.[136]

In *Harling*, the defendant was charged with murder in the first degree. An attorney, Shellie Bowers, was appointed to represent the defendant at trial. During the defendant's pretrial status hearing, an exchange occurred between the trial judge and Bowers.[137] The trial

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People v. Crovedi, 65 Cal. 2d 199, 206, 417 P.2d 868, 873, 53 Cal. Rptr. 284, 289 (1966)) (emphasis added).

129. *Id.* at 559, 440 P.2d at 73, 68 Cal. Rptr. at 9.

130. *Smith*, 68 Cal. 2d at 561, 440 P.2d at 74, 68 Cal. Rptr. at 10.

131. *Id.* (quoting Mr. Kanarek, counsel for the defense).

132. *Id.* at 562, 440 P.2d at 75, 68 Cal. Rptr. at 11.

133. *See id.*

134. *See id.*

135. Chandler v. Fretag, 348 U.S. 3 (1954) (deference must be given to accused's choice of counsel).

136. 387 A.2d 1101 (D.C. 1978).

137. When attorney Bowers motioned the court for the names of government witnesses, the court denied the motion and the following colloquy occurred:

> Bowers: "I would have to state to Your Honor, now, this man will receive ineffective assistance of counsel if I walk into the courtroom."
> The court: "Are you retained or appointed?"
> Bowers: "I was Court appointed."
> The court: "Then I'll strike you and appoint somebody else. Strike Mr. Bowers and have another attorney appointed."
> Bowers: "May I complete the statement for Your Honor?"

judge, apparently in reaction to Bowers' discovery motion, and without permitting Bowers to explain his reasoning, removed Bowers and ordered a substitution of the defendant's counsel.[138] Both Bowers and the defendant objected to the removal. The defendant expressed that such actions by the court would prejudice him, noting the existence of an attorney-client relationship between himself and Bowers.[139]

The trial judge refused the request to reinstate Bowers, stating: "Denied — The Court is paying for counsel, not the deft."[140] After the defendant was convicted, he appealed, claiming that he was deprived of his Sixth Amendment right to counsel.[141]

The District of Columbia Court of Appeals reversed the sentence, and remanded the case with instructions to reinstate Bowers as the defendant's attorney.[142] Generally, trial courts have the power to remove an appointed attorney,[143] and indigent defendants usually do not have the right to demand the appointment of any particular attorney.[144] However, once an attorney has been properly appointed to a defendant, the court may not violate or otherwise unreasonably interfere with the attorney-client relationship that already has formed.[145]

The court of appeals held that a trial judge must possess a "justifiable basis" for removing an attorney and ordering a substitution of

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The court: "You're suggesting if you don't get these names now, the claim will be ineffective assistance of counsel."
Bowers: "No, I'm not saying that. If Your Honor will hear me out."
The court: "You're not getting them, sir."
Bowers: "I'm saying that if I can't find out some kind of way."
The court: "I'm satisfied you're not going to represent him. Strike Mr. Bowers. . . . Well, I'm satisfied he needs another lawyer. Thank you very much. Mr. Bowers that terminates the colloquy, believe me. Thank you very much."

Id. at 1103-04.

138. *Id.* at 1104.

139. *Id.*

140. *Id.*

141. *Harling*, 387 A.2d at 1104.

142. *Id.* at 1106.

143. *See* Harling v. United States, 387 A.2d 1101, 1104 (D.C. 1978); *see generally* United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1979) (an attorney's contumacious conduct may be grounds for removal); United States v. Padilla-Martinez, 762 F.2d 942, 949 (11th Cir. 1985) (disallowing defendant to continue with counsel when counsel refused to inform court of identity of retaining party).

144. *See* Ford v. Israel, 701 F.2d 689 (7th Cir. 1983), *cert. denied*, 464 U.S. 832 (1983); Carey v. Minnesota, 767 F.2d 440 (8th Cir. 1985), *cert. denied*, 474 U.S. 1010 (1985); United States v. Hampton, 457 F.2d 299 (7th Cir. 1972), *cert denied*, 409 U.S. 856 (1972).

145. *Harling*, 387 A.2d at 1105; Lee v. United States, 235 F.2d 219 (D.C. Cir. 1956).

counsel.[146] The court found that Bowers' actions were reasonable in that they were motivated by his duty to advocate his client's cause and were part of his investigation.[147] Thus, a trial judge does not have the judicial authority to remove counsel merely because the judge disagrees with an attorney's actions.[148] The court's decision to substitute counsel must also further "the interests of justice."[149] This leads to the following question: To what extent is a defendant's right to continue with counsel of choice qualified by the interests of the judiciary?

B. Counsel May Be Removed in the "Interests of Justice"

Generally, a judge has the duty and ability to protect the integrity of the judicial system from disruption, prejudice, and inefficiency.[150] This duty may legitimately warrant the removal and substitution of a defendant's attorney in the interest of justice.[151]

An example of a warranted removal of counsel was illustrated in *United States v. Rogers*,[152] where the defendant's right to counsel collided with the judge's duty to administer justice. In *Rogers*, the defendant, Raife, was charged with armed bank robbery. Attorney Israel Davidson was retained by Raife to represent him at trial. Early in the proceedings, Davidson failed to object to certain statements made by the defendant[153] and delayed in pursuing other timely motions. Davidson, then eighty-three years old and suffering from severe hearing impairment, needed to be much closer to the jury and the judge's bench so he had the court furniture rearranged. In addition, Davidson's hearing impairment required the repetition of many statements, which interfered with the other attorney's presentation.[154]

The court inquired whether the defendant wished to continue with Davidson as his attorney, stating that all efforts were being made to accommodate his difficulties.[155] The defendant notified the court

146. *Harling*, 387 A.2d at 1105.
147. *Id.*
148. *Id.*
149. *Id.* (citing D.C. CODE ANN. § 11-2603 (1981)) ("The court may, 'in the interest of justice,' substitute one appointed counsel for another at any stage of the proceedings").
150. Morris v. Slappy, 461 U.S. 1, 11-13 (1983); United States v. Mitchell, 777 F.2d 248, 256-57 (5th Cir. 1985) (disruption of trial proceedings and efficiency are bases for removal).
151. *See* United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987) (intentional delay maneuver by defendant); United States v. Tedder, 787 F.2d 540, 543 (10th Cir. 1986) (no right to lay representation).
152. 471 F. Supp. 847 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 1000 (2d Cir. 1979).
153. *Id.* at 849.
154. *Id.* at 850.
155. *Id.*

that he wished to proceed with Davidson due to his present financial problems.[156]

During the trial, a juror related her concern about Davidson's competence and asked if she could discuss this with the court. The judge agreed to speak privately, but on the record, with the juror in his chambers. He explained to the juror the defendant's right to receive counsel of his choice. The juror, however, expressed that she could not render judgment on the case based only on the evidence. In addition, she related that Davidson was "the center of all the talk in the [jury] room."[157] Despite the defendant's objections, a mistrial was declared due to the number of jurors that were found to be similarly disposed towards Davidson.[158] The government then immediately moved to disqualify Davidson, believing that recusal was an inadequate alternative.[159]

The *Rogers* opinion began with a synopsis of the right to counsel, stating that "[a]lthough a criminal defendant's sixth amendment right to the effective assistance of competent counsel is absolute . . . his concomitant right to counsel of his choice, while entitled to great respect, is qualified."[160]

The court then proceeded to define situations in which a defendant would not be allowed to continue with counsel of choice. Citing *United States ex rel. Carey v. Rundle*,[161] the court restated the rule that a defendant's interest in representation of choice must be balanced against the "public need for the efficient and effective administration of criminal justice."[162]

Next, the court addressed the ability of a judge to remove counsel if the counsel's representation does not comply with "fundamental professional and ethical standards."[163] The court maintained that there is no right to be defended by a layperson or by a person who has been disbarred.[164] Most significant, however, is the situation that

156. *Id.* The defendant stated that he could not afford another attorney since his family was in the process of going "broke." *Id.* His father was "working two jobs now" and they were attempting "to sell the car in order to finish paying the [attorney's] fee." *Id.*

157. *Rogers*, 471 F. Supp. at 850.

158. *Id.*

159. *Id.*

160. *Id.* at 851.

161. 409 F.2d 1210, 1214 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

162. United States v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979) (quoting *United States* ex rel. *Carey*, 409 F.2d at 1214), *aff'd*, 607 F.2d 1000 (2d Cir. 1979).

163. *Id.* at 852.

164. *Id.* at 852-53.

occurs when an attorney's representation compromises the proceedings before the court:

> [T]he court may bar an attorney from further participation at trial when he persists in disrupting the orderly course of proceedings and refuses to comply with rulings and directions of the court. . . . No hard and fast rules govern the exercise of this power; the decision lies within the sound discretion of the trial judge who must undertake to balance, on a *sui generis* basis, the sixth amendment interest of the accused and the court's and public's interest in fair and orderly proceedings.[165]

To illustrate its point, the court referred to the decision in *United States v. Dinitz*.[166] In *Dinitz*, the defendant's attorney, appearing *pro hac vice*, refused to obey the court's admonitions when making his opening statement. The *Dinitz* court held it was appropriate for the judge to order an attorney out of the courtroom if his actions jeopardized the proceedings at hand.[167]

However, the *Rogers* court drew a distinction between the noncomplying counsel in *Dinitz* and Davidson's incompetence.[168] The court felt that although Davidson's actions were not intentionally disruptive or malicious towards the court or opposing counsel, he was nonetheless interfering with the court proceedings.[169] Therefore, this situation gave rise to the court's prerogative to disqualify Davidson. The court stated that "[w]here the integrity of the judicial process is at stake the court must surely possess the power to take whatever steps are necessary to preserve the orderly course of proceedings and to cure [the] 'incipient miscarriage of justice . . . .' "[170]

The court found that Davidson's representation fit within this scenario by falling "far short of the level of competency required of criminal defense counsel."[171] Davidson's failure to engage in discovery, his untimely motions, and his disruption by requiring a repetition of clearly spoken evidence, "subvert[ed] the integrity of the fact-finding process."[172] Therefore, by employing a balancing test, the court found that the judicial interest in protecting the defendant's trial outweighed the defendant's right to continue with Davidson as his attorney.[173]

It is important to note that the *Rogers* court's decision differs from a subjective finding of incompetence by a trial judge. In *Rogers*, the counsel's removal was based on definitive visible actions by Davidson

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165. *Id.* at 853.
166. 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).
167. *Id.* at 1223-24.
168. United States v. Rogers, 471 F. Supp. 847, 853-54 (E.D.N.Y. 1979), *aff'd*, United States v. Raife, 607 F.2d 1000 (2d Cir. 1979).
169. *Id.*
170. *Id.* at 854 (quoting United States v. Williams, 411 F. Supp. 854, 858 (S.D.N.Y. 1976)).
171. *Id.* at 855.
172. *Id.* at 856.
173. *Rogers*, 471 F. Supp. at 856.

which objectively demonstrated his incompetence. His actions directly influenced and distracted the jury in their consideration of evidence. In addition, Davidson's actions jeopardized not only the defendant's case, but also interfered with the prosecution's ability to advocate.[174] Davidson was not relieved as attorney merely because the judge subjectively felt that he was incompetent, but because he was objectively incompetent and severely diminished the trial court's ability to maintain order.[175] It is also important to note that the trial judge did not emphasize that the defendant had a greater right to continue with Davidson because he had been personally retained. The courts have firmly declared that the right to continue with counsel of choice is independent of whether counsel is appointed or retained.[176]

C. *Appointed Counsel and Retained Counsel Must Be Treated Equally*

This rule was thoroughly examined in *Harling v. United States*,[177] where the District of Columbia Court of Appeals declared that the trial judge was mistaken in drawing a distinction between whether the defense attorney had been appointed by the court or personally retained by the defendant.[178] Whether the court pays for counsel, or the defendant pays for counsel, the same opportunity for a trusting attorney-client relationship exists.[179] The appellate court's reasoning followed that of the *Smith* case:

> A superficial response is that the defendant does not pay his fee, and hence has no ground to complain . . . . But the attorney-client relationship is not that elementary; it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or

174. *Id.* at 850.

175. *Id.*

176. Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74-75, 68 Cal. Rptr. 1, 10-11 (1968) (en banc); Harling v. United States, 387 A.2d 1101, 1105-06 (D.C. 1978).

177. 387 A.2d 1101 (D.C. 1978). For a discussion of *Harling*, see *supra* notes 138-49 and accompanying text.

178. *Harling*, 387 A.2d at 1104-06. *See also* People v. Davis, 114 Ill. App. 3d 537, 561, 449 N.E.2d 237, 241 (1983) (trial court erred in believing it had authority to revoke an attorney's appointment at will based on attorney's conduct because court-appointed and retained counsel must be treated equally).

179. *Harling*, 387 A.2d at 1105-06. *See* English v. State, 8 Md. App. 330, 335, 259 A.2d 822, 826 (1969) (whether defendant's attorney was appointed or personally retained, "the accused is entitled to the assistance of *that* counsel at trial") (emphasis in original); Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74-75, 68 Cal. Rptr. 1, 10-11 (1968) (en banc).

> liberty. Furthermore, the relationship is independent of the source of compensation . . . . To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.[180]

This issue has been addressed more recently by the South Dakota Supreme Court and the Minnesota Court of Appeals. In *In re Civil Contempt Proceedings Concerning Richard*,[181] an appointed attorney who was acting on behalf of a grand jury witness was cited for contempt. The trial judge felt that the attorney was giving improper advice to the witness, thereby hindering the investigation.[182] The South Dakota Supreme Court relied on *Harling* in ruling that the trial court had improperly removed the attorney.[183]

Similarly, in *In Re M.R.S.*,[184] a trial judge removed appointed counsel for a juvenile defendant. The court of appeals, citing *Smith* and *Harling*, decided that "[a]n inviolate attorney-client relationship had been created and should not be arbitrarily disturbed. The fact that the county was paying for counsel does not in and of itself provide the trial court with sufficient justification for arbitrary removal."[185]

Therefore, an attorney appointed by the court is entitled to and should receive the same deference and treatment as a retained attorney, all circumstances being equal. A denial of this right based upon a determination of who pays for counsel's salary is an arbitrary denial that is both unfair and unconstitutional.[186]

D. What if Replacement Counsel is Competent?

In conclusion, the *Harling* court examined an important counter-argument. The prosecution proposed that even if the defendant loses his ability to proceed with the counsel of his choice, his appeal should be precluded since he received competent substitute counsel and was therefore unprejudiced. The court disagreed, stating that even a fortuitous outcome for the defendant is "irrelevant" and still requires reversal.[187] If a defendant is denied counsel of choice, and so argues on appeal, this argument is distinct from the argument of ineffective counsel.[188] The right denied to the defendant is the right to assist-

180. *Harling*, 387 A.2d at 1105-06 (citing *Smith*, 68 Cal. 2d 561-62, 440 P.2d at 74, 68 Cal. Rptr. at 10).

181. 373 N.W.2d 429 (S.D. 1985).

182. *Id.* at 432-33.

183. *Id.* at 432.

184. 400 N.W.2d 147, 150 (Minn. Ct. App. 1987).

185. *Id.* at 152.

186. *See* McQueen v. Swenson, 498 F.2d 207, 217 & n.14 (8th Cir. 1974); Monroe v. United States, 389 A.2d 811, 820 (D.C. 1978), *cert. denied*, 439 U.S. 1006 (1978) (drawing a distinction between retained and appointed counsel serves no purpose in an incompetence analysis).

187. Harling v. United States, 387 A.2d 1101, 1106 (D.C. 1978).

188. *Id.*

ance of counsel, not that of effective assistance of counsel.[189] The court cited as authority the Supreme Court's ruling in *Glasser v. United States*,[190] in which the Court held that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[191] Therefore, notwithstanding a lack of prejudicial representation, a defendant's denial of the right to choice of counsel may be raised on appeal.[192]

III. THE RIGHT TO WAIVE COMPETENT COUNSEL: REQUIREMENTS

The majority of cases which have dealt with a criminal defendant's right to waive competent counsel have followed the rationale of waiving effective counsel enumerated in *Smith v. Superior Court*.[193] In their attempts to recognize this novel qualified right to waive competent counsel, the courts have expanded the concept of *pro se* representation and the right to counsel of choice.[194] Additionally, the courts have analogized the right to waive competent counsel with the right to waive conflict-free counsel.[195] In this examination of the available case law, particular reference will be made to those cases where the defendant was allowed to retain and proceed with incompetent counsel during his criminal trial.[196] This section attempts to define the standard by which courts should accept waivers of competence. The courts have apparently adopted a waiver standard which incorporates the *Faretta* waiver of counsel, demonstrated either by an express waiver or by a clear "on the record" account of the trial court's actions in receiving the waiver. The initial waiver requirement, as delineated in *Faretta v. California*,[197] mandates that the defendant make a knowing and voluntary waiver of his rights.[198] The

189. *Id.*
190. 315 U.S. 60 (1942).
191. *Id.* at 76, *cited in Harling*, 387 A.2d at 1106.
192. *See* Harling v. United States, 387 A.2d 1101 (D.C. 1978).
193. *See* Stearnes v. Clinton, 780 S.W.2d 216 (Tex. Crim. App. 1989) (en banc); *In Re* M.R.S., 400 N.W.2d 147, 150 (Minn. Ct. App. 1987); People v. Escarcega, 186 Cal. App. 3d 379, 230 Cal. Rptr. 638 (1986).
194. *See* People v. Escarcega, 186 Cal. App. 3d 379, 230 Cal. Rptr. 638 (1986); People v. Johnson, 75 Ill. 2d 180, 387 N.E.2d 688 (1979).
195. *See* Wheat v. United States, 486 U.S. 153 (1988); Stearnes v. Clinton, 780 S.W.2d 216 (Tex. Crim. App. 1989) (en banc); Harling v. United States, 387 A.2d 1101 (D.C. 1978).
196. *See supra* note 193.
197. 422 U.S. 806 (1975).
198. *Id.* at 835.

first case defines the prerequisites for court acceptance of a defendant's waiver.

A. *Knowingly, Intelligently, Voluntarily: Faretta Revisited*

People v. Johnson[199] involved a case of first impression in the state of Illinois.[200] The defendant, Johnson, was charged with battery and cruelty to children.[201] On the second day of trial, the judge observed that Johnson's retained counsel was providing inadequate legal representation.[202] A meeting was held in chambers where the judge, court reporter, Johnson, and his retained counsel conferred on the record.[203]

The judge privately informed Johnson of his dual rights to receive competent counsel and to choose his attorney. The judge also made an inquiry into Johnson's own competence and divulged reasons why he felt Johnson's counsel was incompetent.[204] The judge further told Johnson that he could proceed with his present counsel, but would be barred from raising an incompetence of counsel argument because that right would have been properly waived. Finally, Johnson was explicitly informed of his right to alternative counsel, that appointed counsel was in fact available without cost to him, and that a mistrial would be declared should Johnson wish to replace his attorney.[205] Johnson was then instructed to discuss this matter with his family and his retained counsel to decide how he wished to proceed.

Johnson expressed that he wished to remain with his retained counsel. The trial court found Johnson's actions to be a valid waiver of his Sixth Amendment right to effective counsel.[206] Johnson was subsequently convicted and as one basis of his appeal, he claimed ineffectiveness of counsel.[207]

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199. People v. Johnson, 75 Ill. 2d 180, 387 N.E.2d 688 (1979).

200. People v. Johnson, 61 Ill. App. 3d 819, 820, 378 N.E.2d 786, 787 (1978) (the Appellate Court of Illinois stated, "[N]o case telling us what the trial judge should have done has been called to our attention . . . no case has ruled whether [the defendant] has a right to proceed by counsel who, although licensed, is deemed by the trial court to be incompetent."), *rev'd*, 75 Ill. 2d 180, 387 N.E.2d 688 (1979).

201. *Johnson*, 75 Ill. 2d at 183, 387 N.E.2d at 688.

202. *Id.* at 184, 387 N.E.2d at 688.

203. *Id.*

204. *Id.* The judge asked the defendant about his educational level. The judge, feeling that defendant was capable of understanding what he had to say, informed the defendant that he felt his counsel was incompetent. He mentioned the defense counsel's inappropriate questions and failure to bring objections which "may have seriously prejudiced defendant's case." *Id.* at 184, 387 N.E.2d at 689.

205. *Id.* at 184, 387 N.E.2d at 690. The judge weighed as an alternative possibility the appointment of assistant or advisory counsel, but decided that it was too late in the trial to do so. *Id.* at 184-85, 387 N.E.2d at 690.

206. *See* People v. Johnson, 61 Ill. App. 3d 819, 820, 378 N.E.2d 786, 787 (1978).

207. *Id.*

The appellate court reversed,[208] explaining that although the trial judge had made a "most diligent and forthright inquiry into the finding of incompetence and had properly related this fact to the defendant,"[209] the judge had failed to explain to Johnson the ramifications of the sentence and the charges he faced.[210]

The Illinois Supreme Court again reversed, finding that the trial judge's actions were sufficient in that Johnson had indeed made an effective waiver of his constitutional right.[211] The court noted the awkward situation facing the trial judge, referring to the possibility of reversal or the alternative of having to declare a mistrial as undesirable consequences of the trial judge's decision.[212] Citing previous United States Supreme Court decisions as authority, the court held that a "clearly established" showing of waiver would be sufficient.[213]

The United States Supreme Court's decision in *Faretta v. California* was postulated by the court to be the controlling standard.[214] The court cited to the *Faretta* waiver, stating that "the defendant's right to counsel of his own choice, like Faretta's right to represent himself . . . required that he be allowed to make a voluntary, knowing and understanding waiver of the right to competent counsel in order to receive the representation of his choice."[215]

The *Faretta* waiver was also cited by the court for the proposition that if a defendant has the right to waive counsel and represent himself, then a right to reject a court-appointed attorney also must attach, or interference with the right to proceed *pro se* would result.[216]

However, the Illinois Supreme Court, in overturning the decision of the appellate court, drew a distinction between the requirements of a self-representation waiver and the waiver of competent counsel.[217] The court specifically cited Illinois Supreme Court Rule 401(a), which governs receipt of waivers of right to counsel.[218] The court noted that a higher standard of duty is imposed on a judge

208. People v. Johnson, 61 Ill. App. 3d 819, 378 N.E.2d 786 (1978).
209. *Id.* at 820, 378 N.E.2d at 787.
210. *Id.* at 820-21, 378 N.E.2d at 787-88.
211. People v. Johnson, 75 Ill. 2d 180, 188, 387 N.E. 2d 688, 691 (1979).
212. *Id.* at 185, 387 N.E.2d at 690.
213. *Id.* at 187, 387 N.E.2d at 691.
214. *Id.* at 186, 387 N.E.2d at 690 (citing Faretta v. California, 422 U.S. 806 (1975)).
215. *Id.*
216. *Id.* at 185, 387 N.E.2d at 690.
217. *Id.* at 186, 387 N.E.2d at 690-91.
218. Illinois Supreme Court Rule 401, Waiver of Counsel, states in pertinent part:
Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprison-

when accepting a complete waiver of counsel than that imposed when accepting a waiver of competent counsel, stating:

> This rule, however, was not intended to apply to the novel situation [of waiving competent counsel] . . . [t]he rule applies when a criminal defendant waives counsel entirely and elects, instead, to represent himself. Here, defendant did not seek to waive counsel and represent himself, but, rather, elected to proceed with counsel of his own choosing despite the judge's caution . . . that counsel was incompetent."[219]

The court further concluded that the fact that Johnson did not receive an explanation of the charges brought against him was unimportant.[220] In this finding, the court emphasized a totality of the circumstances approach, focusing specifically on whether Johnson was "sufficiently aware of the likely consequences of continuing with incompetent counsel."[221] Based on the court's conclusions, a defendant must demonstrate a sufficient knowledge of the surrounding circumstances and the likely potential results of his actions.[222] If this determination points to a knowing, voluntary, and understanding relinquishment of rights, the court must then adequately reflect and preserve this waiver in the trial record.[223]

B. Express Finding or Clearly on the Record

Courts, in general, are hesitant to recognize waivers of constitutional rights.[224] However, a court record replete with admonishments and recommendations directed by the trial judge to the defendant concerning the repercussions of his waiver will suffice.[225]

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ment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) The nature of the charge;

(2) The minimum and maximum sentence prescribed by law, including . . . the penalty to which the defendant may be subjected . . .; and

(3) That he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

Illinois Code of Civil Procedure and Rules of Court, State and Federal, 1990, ILL. S. CT. R. 401 (West 1990).

219. People v. Johnson, 75 Ill. 2d 180, 186, 387 N.E.2d 688, 691 (1979).

220. *Id.* at 187-88, 387 N.E.2d at 691.

221. *Id.* at 188, 387 N.E.2d at 691. *See also* Brady v. United States, 397 U.S. 742, 748 (1970) ("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waivers must be intentional).

222. *Johnson*, 75 Ill. 2d at 188, 387 N.E.2d at 691.

223. *Id.* at 188, 387 N.E.2d at 691.

224. *See* Brewer v. Williams, 430 U.S. 387, 404 (1977) (waivers of counsel are not presumed due to the overriding interest of a fair trial); Estelle v. Williams, 425 U.S. 501, 515 (1976) (Powell, J., concurring) (presumption against waiver of a constitutional right); Miranda v. Arizona, 384 U.S. 436, 475 (1966) (holding silence of defendant does not imply a waiver of counsel).

225. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (waiver must be knowing and intelligent); Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (holding a "penetrating and

In *People v. Escarcega*,[226] the issue before the California Court of Appeal was whether a criminal defendant could waive the adequacy of his representation. The defendant, Raul Escarcega was charged with kidnapping and robbery, and had been represented at trial by an appointed attorney, Marvin Part. After a delay of several continuances to accommodate Part's congested calendar, the court asked Escarcega if he wished to have another attorney appointed, but informed him that it would result in another continuance.[227] Escarcega stated he desired to continue with Part.

However, Escarcega later enjoined the court for a replacement of counsel. The court recognized Escarcega's request, appointing Antonio Sandoval, an attorney who was privately retained by the defendant. Trial was then postponed five additional times.[228]

Thereafter, the court became concerned with the effectiveness of Sandoval's representation, noting that Sandoval might be too inexperienced to handle such serious charges. A meeting was held in chambers, wherein the judge inquired as to Sandoval's abilities and willingness to continue with the case. Sandoval stated that he wished to proceed, and upon resuming trial the court privately informed the defendant of its inquiry. For the record, the judge on two separate occasions warned Escarcega of his "serious doubts" as to Sandoval's abilities, and inquired if the defendant wished to have another attorney appointed. The defendant was also instructed that if he chose to continue with Sandoval, he would be precluded from raising the issue of Sandoval's incompetence or ineffectiveness on appeal.[229] The de-

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comprehensive examination of all the circumstances under which such a plea is tendered" is part of the inquiry).

226. 186 Cal. App. 3d 379, 230 Cal. Rptr. 638 (1986).

227. Although beyond the scope of this article, it is interesting to note that the increasing workload placed upon both the public defender's office and the court system actually contributes to the incompetency of attorneys during trial. For a good discussion of this relationship, see Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C.L. REV. 531 (1988).

228. *Escarcega*, 186 Cal. App. 3d at 378, 230 Cal. Rptr. at 639.

229. *Id.* at 385, 230 Cal. Rptr. at 640. The colloquy between the Court, Escarcega, and Sandoval is reproduced here in pertinent part:

> The court: "The record will reflect we are in chambers. . . . What I'm about to say is not easy. . . . May I ask you, sir, how long you have been a member of the bar."
> Mr. Sandoval (defense counsel): "Several years, two or three years."
> The court: "How many felonies have you tried?"
> Mr. Sandoval: "One."
> The court: "Okay. Sir, it's my opinion, based upon what I have seen today— . . . —that I really think you're out of your element in trying a case this seri-

fendant stated several times for the record that he wished to proceed with Sandoval, and continued with the trial. Escarcega was convicted by the jury on both charges. He appealed, claiming ineffective assistance of counsel due to lack of an express finding of waiver by the court.[230]

The California Court of Appeal held that Escarcega had made an effective waiver of his right to effective representation.[231] The court challenged Escarcega's argument that a court must receive an express waiver of effective counsel stating:

> We find factually distinguishable those cases which hold that the court must make an express finding on the record that defendant voluntarily, intelligently, and knowingly waived his right to counsel. In such cases the record was either silent or unclear with regard to the nature and scope of the court's inquiry and defendant's responses concerning the issue of waiver or reflected an inadequate inquiry by the court . . . [w]here . . . the record is unambiguous and reveals a fulsome inquiry by the court, including advisement and admonishments . . . substantial evidence suffices.[232]

The court cited to *Johnson v. Zerbst*[233] when it asserted that the purpose of mandating an express waiver on the court record is to prevent a waiver by "mere acquiescence."[234] Waivers of constitutional rights are not to be presumed.[235] In this case, the court of appeal

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ous . . . . [S]everal things have been said on the record already that I think probably lays the basis for making an assertion that you are ineffective."
Mr. Sandoval: "Okay, Your Honor. You know the problem with this case; you're right. I have not been prepared. . . . But given the time that I have had, I have concentrated especially on trying the case . . . . Basically that is my position and I want to try this case."
The court: "All right."
Mr. Semow (Deputy District Attorney): "My question is whether or not the court feels that in order to protect the record the concerns that the court has just voiced now should at some point prior to commencement of this trial be voiced directly to the defendant in open court so that he can make, what the record may already reflect, is an informed decision as to go ahead but has never been expressly so voiced by him."
The court: "The record will reflect we're back in open court. The defendant Mr. Escarcega is present . . . .
Mr. Escarcega, I have indicated to Mr. Sandoval that based upon what I have seen in court this afternoon, some of the answers to the questions I've received, that although I feel he's probably a very good lawyer in other areas of the law, particularly in the civil area which is his primary service, I do not feel or I have serious doubts as to whether or not he is able to take on a case of the complexity and the seriousness of yours.
However, it is your choice, sir. He is your lawyer. And if you wish to proceed with him, we will go ahead and proceed. . . . [I]f you feel that you would want other counsel and cannot afford other counsel, the court is prepared to go ahead and appoint you private counsel. However it must be your choice . . . Now do you wish to proceed with Mr. Sandoval?"
Defendant Escarcega: "Yes."

Id. at 388-92, 230 Cal. Rptr. at 642-44.

230. *Id.* at 385, 230 Cal. Rptr. at 640.
231. *Id.* at 399, 230 Cal. Rptr. at 648.
232. *Id.* at 396-97, 230 Cal. Rptr. at 646.
233. 304 U.S. 458, 464 (1938).
234. People v. Escarcega, 186 Cal. App. 3d 379, 396, 230 Cal. Rptr. 638, 646 (1986).
235. *Id. See* Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938).

found that Escarcega had exhibited a complete understanding of the trial judge's reservations concerning Sandoval's competence.[236] The court maintained that an express waiver was unnecessary under these circumstances because the rationale behind an express waiver was satisfied, stating that, "an express finding is not mandated where the *record fully sets forth* the colloquy between the court and defendant concerning the issue of waiver and substantial evidence exists to support an implied finding of waiver."[237]

The preceding cases stand for the proposition that if a defendant demonstrates his choice to continue a trial with incompetent counsel in a "knowing, intelligent, and voluntary" manner, a valid waiver of effective counsel has been given.[238] The trial court has the responsibility of ensuring that the defendant has the right to choice of counsel, a right that "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."[239] Finally, the court must strive to adequately reflect the defendant's waiver in the trial record, either expressly or through a totality of the circumstances approach.[240] In either case, the importance of the court record in both protecting the defendant's sixth amendment rights and in preserving the finality of the judgment is paramount.[241]

However, this waiver of competent counsel entails a myriad of other considerations which must be addressed. Part III addressed the "mechanics" of a court's receipt of a defendant's waiver of competent counsel. The following section addresses the practical and subtle considerations involved with such waivers and focuses primarily on the

236. *Escarcega*, 186 Cal. App. 3d at 397, 230 Cal. Rptr. at 646-47.

237. *Id.* at 397, 230 Cal. Rptr. at 646 (emphasis added).

238. *See id.*

239. *Id.* at 397, 230 Cal. Rptr. at 647 (citing People v. Crovedi, 65 Cal. 2d 199, 208, 417 P.2d 868, 894, 53 Cal. Rptr. 284, 290 (1966)). *See also* Maxwell v. Superior Court, 30 Cal. 3d 606, 614, 639 P.2d 248, 180 Cal. Rptr. 177 (1982) (stating that a court's determination of "potential incompetence . . . usually does not justify court-ordered removal"); State v. McCabe, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980) ("mere lack of confidence is not necessarily grounds for substitution of counsel in the absence of extraordinary circumstances").

240. *See supra* notes 221, 236 & 237.

241. People v. Escarcega, 186 Cal. App. 3d 379, 399, 230 Cal. Rptr. 638, 648 (1986). *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); *see also* State v. McCabe, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980) (where defendant clearly rejected trial judge's attempt to explain the dangers of proceeding *pro se* and recommendation that co-counsel should assist, record was held to be knowing and intelligent).

impact of such waivers upon the defendant, the judge, and the judicial system as a whole.

IV. IMPACT AND IMPLICATIONS

Allowing a waiver of a constitutional right affects the interests of the accused, the practicing bar, and the judicial system at large. But it is truly the defendant who bears the burden and consequences of the waiver. The question thus becomes: Why would a defendant relinquish his right to competent representation and opt instead for a substandard attorney to advocate his liberty, and perhaps even his life?

A. The Viability of the Accused's Defense

The ability of an accused to present an effective defense is substantially decreased if he is represented by an incompetent attorney.[242] Clearly, the accused would be lacking a prudent and skilled advocate and advisor during the trial. The readily apparent effects of such counsel include, ineffective discovery[243] and questioning of witnesses,[244] inadequate diligence in bringing motions,[245] and improper formulation of defense arguments.[246]

Less obvious, but equally prejudicial, are the adverse effects an incompetent attorney has on the trier of fact.[247] First, a judge whose patience is tested may be less inclined to grant motions or entertain defense objections.[248] Second, as in *United States v. Rogers*,[249] the incompetence of the attorney may prejudice the defendant in the eyes

242. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

243. *See* Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (lack of proper discovery is not adequate assistance of counsel).

244. *See* Montgomery v. Petersen, 846 F.2d 407, 413-16 (7th Cir. 1988) (counsel's assistance was inadequate because witness not questioned).

245. *See* Rice v. Marshall, 816 F.2d 1126, 1132 (6th Cir. 1987) (counsel's failure to make a motion to suppress evidence was denial of competent counsel).

246. *See generally* Pocaro v. United States, 784 F.2d 38, 44 (1st Cir. 1986) (counsel's lack of effective defense presentation was inadequate assistance), *cert. denied*, 479 U.S. 916 (1986).

247. *See* Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985) (trial judge became hostile, short-tempered and "exploded" due to counsel's waste of time during trial), *cert. denied*, 474 U.S. 1013 (1985). The trial judge may become biased or prejudiced against defense counsel, perhaps leading to a situation where less credence is given to the defense efforts.

248. *Id.* Counsel's incompetence and ineffectiveness may also cause the judge to be biased against the attorney. An obvious bias of the trial judge may well influence the jury. *See* Pocaro v. United States, 784 F.2d 38, 41-42 (1st Cir. 1986) (counsel's actions caused the judge to react in disbelief by shaking his head and making facial gestures), *cert. denied*, 479 U.S. 916 (1986).

249. 471 F. Supp. 847 (E.D.N.Y. 1979), *aff'd*, United States v. Raife, 607 F.2d 1000 (2d Cir. 1979).

of the jury, resulting in improper considerations by jurors.[250] Therefore, in deciding to continue with deficient counsel, a defendant may in fact have these and other considerations in mind.

1. Tactical Moves: A Floor Show

An accused who is confronted with an ominous prosecutorial case may opt for an attorney's incompetent actions as a trial tactic or strategic move to cause delay, confusion, or interference with the prosecution's case.[251] The defendant could also attempt to solicit sympathy from the jury if he can convince them that he should be pitied due to his apparent helplessness and 'advocateless' situation.[252]

The accused's attorney may also play a role in this decision. If counsel feels that his client has little hope of success, displays of incompetence during trial may be a conscious decision of both parties. A defendant's counsel, through his actions, has the capacity to disrupt the trial by encouraging the judge to intervene continuously with admonitions and guiding remarks.[253] In this manner, the attorney may hope to mislead the jury by causing the jurors to focus their attention on his actions, rather than on the defendant who is on trial.

Incompetence may also be used by an attorney to cause delays in court,[254] perhaps as a means of buying time for other strategies he wishes to develop. Time is an important element in terms of a witness' ability to accurately recollect: as time passes, memories may fade and facts may become confused. From a tactical point of view, such delays might be employed as a weapon by the defendant and his counsel.[255]

Additionally, the defendant's underlying intentions may not be

250. *Id.* at 850.

251. *See id.* (accommodations made for hearing impediment of defense attorney disrupted courtroom and frustrated jury).

252. *See id.* During the trial in *Rogers*, a juror stated that she could not impartially render judgment based solely on the facts of the case. She stated that her concern for the defendant's proper representation was the cause.

253. *See id.* at 849-50; United States v. Brandt, 196 F.2d 653 (2d Cir. 1952) (judge's repeated questioning during trial resulted in reversal); United States v. Wyatt, 442 F.2d 858 (D.C. Cir. 1971) (same). *Cf. In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972) ("Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows"), *cert. denied*, 420 U.S. 990 (1975).

254. *See* United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987) (improperly rejecting defendant's claim for new counsel because court thought it to be a delaying tactic).

255. *See, e.g.*, Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985) (defense counsel at-

readily visible to the court. The defendant could shield himself behind the "smokescreen" of the attorney-client relationship. This would enable the defendant to utilize his right to counsel of choice as a tactical maneuver in playing on the sympathy of the trier of fact. Moreover, the courts' present general reluctance to interfere with defense counsel's tactics and strategies or the attorney-client relationship may diminish the likelihood of an inquiry into counsel's actions.[256] Therefore, the beneficial judicial policy of favoring the independence of the bar could foreseeably prejudice a proceeding if the court chooses not to intervene.

2. The Ulterior Motive

A defendant may voluntarily choose to proceed through his trial with incompetent counsel in the hopes of successfully claiming ineffective counsel during the appeal of his conviction.[257] In this scenario, the defendant could then later claim that the inadequate assistance of counsel he received adversely prejudiced his ability to present a reasonable defense.[258] As previously discussed, the *Strickland* standard is the yardstick by which incompetency of counsel claims are evaluated.[259] A defendant may claim a right to counsel of his choice in an attempt to qualify for a reversal under the *Strickland* test.[260] This "future claim" strategy, resulting in additional petitions and appeals, would increase the backlog of cases in an already overburdened court system.[261]

3. Pure Motives

In citing the importance of an established attorney-client relation-

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tempted to delay trial by making continuous motions and objections), *cert. denied*, 474 U.S. 1013 (1985).

256. *See* Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc); People v. Escarcega, 186 Cal. App. 3d 379, 230 Cal. Rptr. 638 (1986).

257. *See* People v. Escarcega, 186 Cal. App. 3d 379, 399, 230 Cal. Rptr. 638, 648 (1986) (A defendant advised during trial of his attorney's incompetence who nevertheless voluntarily continues through trial with that attorney, cannot appeal such a claim. "A contrary rule would impermissibly allow a defendant 'an automatic right to reversal on appeal should the defense or defenses at trial fail' ") (quoting People v. Cook, 13 Cal. 3d 663, 673 n.10, 532 P.2d 148, 154 n.10, 119 Cal. Rptr. 500, 506 n.10 (1975)); People v. Brownlee, 74 Cal. App. 3d 921, 933-34, 141 Cal. Rptr. 685, 692 (1977).

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

259. *See supra* notes 27-61 and accompanying text.

260. *But see* People v. Pope, 23 Cal. 3d 425, 426 n.17, 590 P.2d 859, 867 n.17, 152 Cal. Rptr. 732, 740 n.17 (1979) (en banc) ("The claim of ineffective assistance does not exist as a tool for reversing validly obtained convictions, but as a means of assuring that criminal defendants receive the legal assistance to which they are constitutionally entitled").

261. *See, e.g.*, Ayres, *In Baltimore, A Breakdown of Justice*, N.Y. Times, Aug. 17, 1991, § 1, at 6, col. 1 (overcrowded dockets); Buckley, *Howard County Judges, Prosecutors Struggle With a Crush in the Courts*, Wash. Post, June 2, 1991, at B5 (prosecutors' and judges' caseloads have "quadrupled in the past decade").

ship,[262] courts have correctly realized that a defendant's decision to continue with incompetent counsel may be based on factors other than harassment and the possibility of appeal.[263]

First, a defendant may not acknowledge the judge's concerns as genuine if he perceives the judge as a part of the "governmental entity" that is pitted against him. The defendant may misperceive that the judge's attempt to remove his defense attorney as the government's attempt to mislead or incorrectly advise him, thereby increasing his risk of incarceration. From a defendant's perspective, why should he listen to a judge when the visible governmental intent is to convict him? A defendant with this frame of mind might very well trust only his advocate and counsel, even if that counsel is declared by other parties to be incompetent.

Second, there may exist a firmly established attorney-client relationship between the accused and his defense counsel.[264] The defendant may have disclosed a significant amount of confidential information to his attorney, who, in turn, may have expended a great deal of time striving to gain the defendant's trust. Thus, the defendant may wish to continue with his present attorney due to the trusting relationship which has matured and the many privileged communications which have transpired between them.

Given the varying motives which may underlie a defendant's decision to proceed with incompetent counsel, a trial court must intervene and perform a sufficient inquiry into the defendant's choice to continue with ineffective counsel as well as the defendant's knowledge and ability to make that decision.[265] The responsibility of preserving the integrity of the judicial process directly involves the intervention and possible remedial action of the trial judge.[266]

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262. *See* Smith v. Superior Court, 68 Cal. 2d 457, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc); Douglas v. United States, 488 A.2d 121 (D.C. 1985); Harling v. United States, 387 A.2d 1101 (D.C. 1978).

263. *See infra* note 265.

264. *See* Smith v. Superior Court, 68 Cal. 2d 457, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc); Douglas v. United States, 488 A.2d 121 (D.C. 1985); Harling v. United States, 387 A.2d 1101 (D.C. 1978).

265. "When it appears in the course of litigation that a lawyer's performance is falling short, it should be the trial judge's responsibility, as the person responsible for the manner in which justice is administered in his court, to take appropriate action." Schwarzer, *Dealing With Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633, 639 (1980). *See also*, McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts").

266. *See supra* note 265.

B. *The Role of the Judge*

Courts have recognized the duty of a trial judge to maintain and regulate the events that occur during a trial.[267] This duty to safeguard the integrity of a trial necessarily gives a judge the power to supervise the proceedings at hand.[268] As stated previously, a defendant's decision to continue through his trial with incompetent counsel may involve many factors.[269] Judges should be more involved and offer assistance when a defendant is confronted with the decision of whether or not to proceed with incompetent counsel.[270] One way in which a judge could greatly influence a defendant's rational decision would be to allow the defendant to confer with others before deciding to waive his right to competent counsel.[271]

1. Appointment of Advisory Counsel

In situations where the defendant is faced with the decision of continuing with incompetent counsel, the trial judge should appoint co-counsel or advisory counsel to assist the defendant. This temporary counsel would discuss the defendant's options with him and advise him accordingly. This is analogous to the situation a trial judge often faces in monitoring a *Faretta* defendant's defense.[272] In a *Faretta* scenario, if the trial judge believes that the defendant is inadequately representing himself, the judge has the discretion to appoint co-coun-

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267. *See In re* Subpoena Served Upon John Doe, 781 F.2d 238, 250-51 (2d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1108 (1986); Morris v. Slappy, 461 U.S. 1, 26-27 (1983); People v. McKenzie, 34 Cal. 3d 616, 626, 668 P.2d 769, 775, 194 Cal. Rptr. 462, 468 (1983) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused") (quoting Glasser v. United States, 315 U.S. 60, 71 (1942)).

268. *See* Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) (judge's duty to maintain fair administration of justice imparts power to control proceedings); Glasser v. United States, 315 U.S. 60, 71 (1942). Additionally, a judge has the power to impose disciplinary actions and sanctions upon counsel. *See generally* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE, § 1.1(a) (1974) (trial judge may take the initiative to inquire into issues which affect a proper trial determination).

269. *See supra* text accompanying notes 251-55.

270. Judicial involvement should, however, be limited. *See generally* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1161, 1170 (1982) (the inquiry should not place counsel's every move under a judicial microscope, for such actions could "destroy[] the adversary system by second-guessing 'tactical' decisions, and impairing the attorney-client relationship").

Specifically, the judge's role as a neutral figure and the sanctity of the attorney-client relationship are potential victims of judicial intervention. Schwarzer, *supra* note 265, at 637-38. However, as stated earlier, without judicial intervention, an attorney's incompetence in the trial court may lead to a reversal upon appeal and the destabilization of the administration of justice. *See supra* notes 251 & 257.

271. Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (court may order advisory counsel to assist the defendant). *See* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION (1974).

272. *Faretta*, 422 U.S. at 834 n.46.

sel or standby counsel to assist the defendant, even above the defendant's objections.[273] Similarly, in the case of incompetent counsel, such an appointment may be necessary if the defendant is unable to adequately assess the dangers of proceeding after disposing with incompetent counsel.[274]

Additionally, as brought to the attention of the court in the *Johnson*[275] case, there may be something wrong with a system that declares counsel incompetent but then allows that same incompetent counsel to advise the defendant on potential removal.[276] Such a likely scenario may indeed mandate the appointment of advisory counsel.

The importance of the attorney-client relationship also mandates appointment of an advisory attorney to counsel the defendant. Many defendants may be hesitant to relinquish their attorneys because of an established attorney-client relationship.[277] Confidences have been revealed and motives for actions have passed between the parties. This undoubtedly will affect a defendant's choice in deciding to continue with counsel which may be incompetent. The valuable role that advisory counsel could play in informing and explaining to the defendant other available alternatives must be recognized.[278]

Similar measures taken by a trial judge when dealing with incompetence would also help to eliminate any mistrust the defendant might have concerning the judge's finding that his counsel is incompetent. If the defendant is instructed by an impartial observing attorney in addition to the remarks of the trial judge, a better informed decision by the defendant will likely result.

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273. *Id. See* People v. Crandell, 46 Cal. 3d 833, 861, 760 P.2d 423, 436-37, 251 Cal. Rptr. 227, 239-40 (1988) (en banc) (courts are capable of appointing advisory counsel for *pro se* defendants in death penalty cases. If a *pro se* defendant requests advisory counsel, a trial court's refusal of appointment may be an abuse of discretion), *cert. denied*, 490 U.S. 1037) (1989).

274. *See* Schwarzer, *supra* note 265, at 652-53.

275. People v. Johnson, 75 Ill. 2d 180, 387 N.E.2d 688 (1979).

276. *Id.* at 188-89, 387 N.E.2d at 691-92.

277. *See Crandell*, 46 Cal. 3d at 893, 760 P.2d at 458, 251 Cal. Rptr. at 261-62 ("Effective assistance of counsel also contemplates a relationship of trust and cooperation between attorney and client, particularly when the attorney is defending the client's liberty") (citations omitted). *But see* Morris v. Slappy, 461 U.S. 1, 14 (1983) (the sixth amendment does not provide for a "meaningful relationship between an accused and his counsels").

278. *See supra* note 271.

2. A Family Affair

As demonstrated in *Johnson*, the court should also allow the defendant to discuss possible counsel alternatives with his family, if readily available.[279] Similar to the effect of appointing advisory counsel, additional input from the family will likely result in a sound decision as well as less mistrust on the part of the defendant.[280]

In *People v. Escarcega*,[281] the need for appointed advisory counsel and discussions with family were evident. In his appeal, Escarcega claimed that the series of continuances and the extended prolongation of his trial resulted in "stress induced by months of delay while he was incarcerated."[282] The defendant maintained that the system had failed him, urging that he was forced to hire and continue with a low-priced, inexperienced attorney to rid himself of the long delays caused by the overworked court-appointed attorney. The court found that Escarcega's case had not been prejudiced by the lengthy trial delays,[283] stating the defendant himself did not assert that the delay had aversely affected his defense.[284] However, the court glossed over the fact that Escarcega did suffer months of delay. Instead, the court found that the connection between the previous delay of appointed counsel and the defendant's choice to continue with his retained attorney was "so attenuated as to be nonexistent."[285] Although Escarcega was advised of the problems that he might encounter with Sandoval as his attorney, he may have also been genuinely frustrated with the delays which caused his further incarceration. His first attorney, Part, caused him a postponement of almost seven months.

The possibility that Escarcega relied upon the substituted Sandoval who "promised [him] the moon" clearly exists.[286] The prolongation of his trial and frustration with Part could have affected Escarcega's frame of mind, causing him to adopt a "just get it over with" state of mind.[287] Thus, with the increasingly crowded court dockets and overworked public defenders,[288] a long trial delay which involves a waiver of competent or effective counsel should be carefully examined for signs that the defendant may genuinely be frustrated with the justice system. Such frustration may not adequately be ex-

279. People v. Johnson, 75 Ill. 2d 180, 185, 387 N.E.2d 688, 690 (1979).
280. *Id.*
281. 186 Cal. App. 3d 377, 230 Cal. Rptr. 638 (1986).
282. *Escarcega*, 186 Cal. App. 3d at 388, 230 Cal. Rptr. at 642.
283. *Id.*
284. *Id.* at 387, 230 Cal. Rptr. at 642.
285. *Id.*
286. *Id.* at 388, 230 Cal. Rptr. at 642.
287. Escarcega experienced over 11 trial delays during his seven-month wait. *Id.* at 383-84, 230 Cal. Rptr. at 639.
288. The problems associated with overburdened court systems continue to affect a defendant's right to a fair and competent trial. *See generally* Klein, *supra* note 227.

posed by questioning on the record. A thorough investigation, involving appointment of advisory counsel, might be necessary to protect the defendant's right to a fair trial, especially when the system may be directly contributing to his choice of actions.

Although it can be argued that this procedure could invariably cause delays and tax an already overburdened public defender system, it would promote judicial efficiency in the long run. First, an automatic assignment of advisory counsel would help to ensure that the court makes a sufficient inquiry into the defendant's choice and ability to waive his sixth amendment right to effective counsel. A trial record which evidences the appointment of advisory counsel to assist the defendant with the resolution of this predilection would more likely satisfy the "adequately reflected in the record" waiver requirement if an express waiver were not given by the defendant.

Second, trial court decisions would be less prone to reversal or remand if the defendant is well-informed and advised before delivering a waiver of his rights.[289] This would in turn promote the finality of judgments; a judicial goal of efficiency. Trial court decisions would be less prone to attack from claims of incompetent counsel upon appeal.[290] In addition, if the guiding purpose behind court procedures is truly the protection of a defendant's constitutional rights, an adequately informed defendant will ensure that the adversarial system is not biased in favor of one side or the other.

3. Other Measures

In the case of an attorney who is grossly incompetent, appointment of advisory counsel may be an inadequate measure. If the attorney's incompetence is directly jeopardizing the trial proceedings and seriously interferes with the administration of justice, a judge may warrant the attorney's removal by ordering a substitution of counsel.[291] This contingency would arise in a situation where the interest of the defendant in counsel of choice is greatly outweighed by the need of the court to further the interests of justice.[292]

289. *See* People v. Escarcega, 186 Cal. App. 3d 377, 399, 230 Cal. Rptr. 638, 648 (1986).

290. One of the prosecutor's worst nightmares is the need to watch opposing counsel's every action to protect against the possibility of reversal for reasons of incompetence. Babcock, *supra* note 270, at 1170.

291. *See supra* note 110. However, the trial judge should initially question the attorney during a sidebar conference or privately in his chambers. Schwarzer, *supra* note 265, at 662.

292. Schwarzer, *supra* note 265, at 662.

This standard has also been utilized by courts in previous holdings concerning the right to waive conflict-free counsel.[293] However, recent decisions have demonstrated the increasing reluctance of courts to recognize a defendant's right to waive conflict-free counsel.[294] This right is somewhat analogous to the defendant's right to waive competent counsel in that the defendant is asserting his right to counsel of choice, even though that choice may be viewed by the court as against his best interests. The recent judicial determinations concerning a defendant's right to waive conflict-free counsel should not similarly hinder the defendant's right to waive competent counsel, but rather, should serve to encourage courts to diligently evaluate the defendant's right to counsel of choice.[295]

V. WAIVING THE RIGHT TO COMPETENT COUNSEL: FUTURE IMPLICATIONS

A. *Waiving Conflict-Free Counsel: Is There An Analogy?*

The sixth amendment's right to counsel provision guarantees a right to conflict-free counsel.[296] Courts which have dealt with the issue of waiving the right to competent counsel have analogized this right to the right to waive conflict-free representation.[297] The right to waive conflict-free counsel was firmly imbedded in caselaw until the 1988 United States Supreme Court decision in *Wheat v. United States*.[298] In *Wheat*, the Court examined the issue arising when a defendant requests to continue with new counsel of his choice, although that new counsel is burdened by a conflict of interest.[299]

B. *Wheat: The Facts*

Petitioner Mark Wheat and two others were charged with conspiracy in possession of marijuana with the intent to distribute. Attorney Eugene Iredale represented the two codefendants, Juvena Gomez-Barajas and Javier Bravo. Gomez-Barajas was exonerated on the

293. *See* Wheat v. United States, 486 U.S. 153, 162 (1988); Cuyler v. Sullivan, 446 U.S. 335 (1980) (court has duty to avoid a conflict of interest between defendant and counsel); Holloway v. Arkansas, 435 U.S. 475, 484 (1978) (court should be apprised of the risk and appoint counsel if conflict is too great).

294. *Wheat*, 486 U.S. at 164.

295. As the California Supreme Court stated more than two decades ago, "We do not demand prescience of trial courts faced with decisions involving the right of representation by counsel — but we must require of them a resourceful diligence directed toward the protection of that right to the fullest extent consistent with effective judicial administration." People v. Crovedi, 65 Cal. 2d 199, 209, 417 P.2d 868, 875, 53 Cal. Rptr. 284, 291 (1966).

296. *See* Glasser v. United States, 315 U.S. 60, 70 (1942).

297. *See* People v. Johnson, 75 Ill. 2d 180, 185-86, 387 N.E.2d 688, 690 (1979).

298. 486 U.S. 153 (1988).

299. *Id.* at 161-64.

drug charges and intended to enter guilty pleas on remaining allegations. Bravo pled guilty on one drug charge. Wheat then requested that Iredale be substituted as his counsel or, in the alternative, appointed as co-counsel at his trial. The district court denied the request.[300]

The Ninth Circuit Court of Appeals agreed with the district court, noting the judge's obligation to balance the defendant's right to counsel of choice with the right to conflict-free representation.[301] The appeals court observed that the district judge's decision must be respected in an attempt to avoid the scenario where "denial of either of these would result in . . . reversible error."[302]

Chief Justice Rehnquist, writing for a majority of five on the Supreme Court, agreed. He rejected the defendant's position that the right to conflict-free counsel should be allowed to be waived.[303] The Court stated that there is a presumption of allowing the defendant's choice of counsel, but depending on the specific facts, this may be outweighed by the vigil of conflict.[304] The function of the right to counsel was defined "simply to ensure that criminal defendants receive a fair trial."[305] The defendant's right to counsel of choice was not emphasized. As illustrations, the Court recounted that the defendant has no right to appointment of any attorney he wishes, no right to representation by a non-attorney, and no right to be represented by counsel with ties to the opposing side.[306]

C. Separating the Wheat from the Chaff

The Court's decision in *Wheat* demonstrated instances where the results of and the situations surrounding waiver of conflict-free counsel are analogous to waiver of competent counsel. First, the Court identified the role of the court system as the guardian of fair trials and ethical legal standards. The Court also noted the lower courts' desire for finality in decisions, stating that courts have a "legitimate wish . . . that their judgments remain intact on appeal."[307] The majority believed that this interest would be undermined if defendants,

300. United States v. Wheat, 813 F.2d 1399, 1401 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988).
301. *Id.* at 1402.
302. *Id.*
303. Wheat v. United States, 486 U.S. 153, 164 (1988).
304. *Id.*
305. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).
306. *Id.* at 159.
307. *Id.*

after waiving the right to conflict-free counsel at trial, were allowed to appeal their ineffective assistance of counsel claims.[308]

The majority also found that there were too many unknown variables involved in permitting potential conflict of counsel problems to develop. Chief Justice Rehnquist stated that "the likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials."[309] The Court further stated that a "[d]istrict [c]ourt must be allowed substantial latitude in refusing waivers of conflicts of interest . . . ."[310] Thus, the Court noted that another court under similar circumstances could reasonably reach a different result.[311]

What impact will this decision have regarding a defendant's right to waive competent counsel? This comment suggests that the majority's position on waivers of conflict-free representation in *Wheat* is readily distinguishable from that of a knowing and voluntary waiver of competent counsel.

First, a waiver of competent counsel by definition does not involve a conflict of interest between the attorney and the defendant. The attorney in the former case is visibly acting in the sole interests of his client, and cannot be said to hold disparate interests to those of the accused. However, in a conflict of interest case, the attorney may be acting for other parties, for his own interests, or for the interests of third parties with a stake in the outcome. The United States Supreme Court's holding in *Wheat* deals specifically with a conflict of interest situation between counsel and the defendant. If an attorney did possess interests which were discordant or incompatible with those of the defendant, and the attorney was also incompetent, a conflict of interest situation would be established, and the Court's position would then be applicable. However, if the attorney is "only" incompetent and lacks a conflict of interest, the Court's fact-specific ruling would not apply.

Furthermore, the situation of waiving competent counsel differs from that of waiving conflict-free counsel in that a judge has a pronounced ability to foresee the results and potential difficulties which a competency waiver may pose later in the trial. In *United States v. Dolan*,[312] the Third Circuit Court rationalized that a judge facing a possible conflict of interest "may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might

308. Wheat v. United States, 486 U.S. 153, 161-62 (1986).
309. *Id.* at 162-63.
310. *Id.* at 163.
311. *Id.* at 164.
312. 570 F.2d 1177 (3d Cir. 1978).

entail for him."[313] The trial judge in a conflict of interest situation is placed in a position to determine whether the conflict he perceives "may or may not burgeon into an actual conflict as the trial progresses."[314]

However, where an attorney is incompetent, the trial judge is not in a position where he must "wait and see" if counsel's acts will prejudice the defendant. The judge who deals with a waiver of competent counsel does not need to be concerned with the types of unpredictable ulterior motives under which a defendant's conflict of interest attorney may be acting. Due to this fact, the judge is better able to foresee the present and future effects of the waiver. This enables him to more accurately control and gauge the future conduct of both the attorney and the trial.

In addition, the judge can observe and note firsthand the capabilities of the lawyer by evaluating his demeanor before the court. The attorney's skill can be judged by the discovery methods, motions, objections, and arguments put forth in defense. The judge can then analyze exactly how incompetent the attorney is in representing the defendant's interests. Therefore, this places the judge in a superior position to advise and counsel the defendant of his options or to aid with the accused's defense, should that be necessary.

This comment suggests that judges must be given more liberty in deciding what actions to take with individual defendants. The trial judge is in a key position to gauge potential problems as they arise. He is active and in control of the developments, and can take appropriate measures as he sees fit. As the dissent in *Wheat* emphasized, a trial judge will have "greater familiarity with such factors as the ability of the defendant knowingly and voluntarily to waive potential conflict . . . , the character of the lawyers, [and] the particular facts of the case . . . ."[315] This familiarity should enable a judge to maintain his ability to further the interests of justice.

Furthermore, the court may exercise many judicial options to protect the proceedings, such as stepping in to disallow the waiver if a determination is made that such an act would "gravely imperil[] the prospect of a fair trial."[316] This would "grant a criminal defendant effective control over the conduct of his defense,"[317] while concur-

313. *Id.* at 1181.
314. Wheat v. United States, 486 U.S. 153, 163 (1988).
315. *Id.* at 173 (Stevens, J., dissenting).
316. *Id.* at 166 (Marshall, J., dissenting).
317. *Id.* at 165.

rently protecting the function of the sixth amendment right to counsel of choice. As the Court stated in *Strickland v. Washington*,[318] "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[319]

Finally, the Court's decision in *Wheat* is consistent with previous court holdings that allow waivers of effective counsel. The *Wheat* holding mandates that a district court must acknowledge a defendant's right to counsel of choice, but allows that right to be overridden by an existing conflict or a "potential for serious conflict."[320] This holding harmonizes with decisions that have followed the *Smith v. Superior Court*[321] line of cases. The *Smith* progeny similarly mandates a right to choose one's counsel unless there is a severe threat to the adjudication of a fair trial.[322]

If the trial court fulfills its duty of relating to the defendant the hazards and consequences of continuing with ineffective counsel, the defendant will satisfy the *Johnson* knowledge requirement based upon the *Faretta* waiver. A defendant has never been obligated to make an accurate appraisal of "each factor that was relevant to his decision" before waiving his rights.[323] Thus, a defendant making a waiver of effective counsel similarly does not need to contemplate every potential implication of his waiver. A trial court faced with a waiver of competent counsel should follow the precedent and reasoning set out in the *Smith* line of cases.

D. A Synopsis: Stearnes v. Clinton

Recently, the holdings suggested by the *Smith* line of cases were collated and harmonized against the backdrop of the Supreme Court's pronouncement in *Wheat*.[324] In *Stearnes v. Clinton*,[325] the Court of Criminal Appeals of Texas held that a judge may not arbi-

318. 466 U.S. 668 (1984).

319. *Id.* at 686.

320. Wheat v. United States, 486 U.S. 153, 156 (1988).

321. 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc).

322. *See* Stearnes v. Clinton, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989); *see also* Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir. 1989) (stating "[w]e do not understand the language in *Wheat* to mean that the right to counsel of choice is important *only* insofar as it secures the right to effective assistance of counsel. . . . [T]he amendment also comprehends other related rights, such as the 'right to select and be represented by one's preferred attorney' ") (emphasis in original) (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)).

323. Brady v. United States, 397 U.S. 742, 757 (1970). *See also* Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege").

324. 486 U.S. 153 (1988).

325. 780 S.W.2d 216 (Tex. Crim. App. 1989).

trarily remove a defendant's counsel for potential incompetence.[326] Rather, a judge may only remove a defendant's counsel when there is an unreasonable interference with the administration of justice.[327]

In *Stearnes*, the defendant was charged with murder. The trial judge appointed an attorney, Carlton McLarty, to represent the defendant. A key witness against Stearnes, Anita Hanson, had previously been allowed to stay at the residence of the assistant district attorney, Marta Rosas. McLarty wished to interview Hanson as part of his preparation for trial, and attempted to do so through compliance with the state's rules regarding the interviewing of witnesses. His requests for an interview were ignored.[328]

Some time later, Hanson contacted McLarty herself, agreeing to talk with him. McLarty suggested he meet her with one of his colleagues at her apartment. Hanson, her roommate, McLarty, and an attorney from McLarty's office were all present at the meeting. After McLarty questioned Hanson for a period of time, Hanson telephoned Rosas to inform her the interview was in progress. Rosas summoned the police, and ended the interview.[329]

Because he had not completed the interview, McLarty motioned to depose Hanson for further questioning. At the trial hearing on the motion, the district attorney, in addition to opposing McLarty's motion, also motioned the court to have McLarty removed. The trial judge ignored McLarty's motion, and instead ruled to remove McLarty as Stearnes' counsel. The judge stated that he was "concerned" over McLarty's actions, which he felt could potentially have raised serious issues involving the tampering of witnesses.[330] The judge announced that "since I did appoint you, I am going to rescind that appointment."[331] The trial judge then removed McLarty, stating that McLarty "was not competent to continue on this, and he has so antagonized the District Attorney's Office that he can't get any cooperation from them in any shape, form or fashion."[332] Stearnes then petitioned for a writ of mandamus to reverse the trial judge's deci-

326. *Id.* at 225.
327. *Id.* at 223.
328. *Id.* at 217.
329. *Id.* at 217-18.
330. *Id.* at 218.
331. *Id.* at 219.
332. *Id.* Interestingly, the judge had informed replacement counsel of his substitution appointment before the trial hearing occurred. *Id.* This may imply the judge had previously made his finding concerning McLarty's incompetence.

sion to remove McLarty as his attorney.[333]

The Court of Criminal Appeals of Texas, sitting en banc, granted Stearnes' request.[334] The court began its analysis with the holding in *Smith v. Superior Court*,[335] a case the court found to be "remarkably similar" to Stearnes'.[336] The *Stearnes* court concurred with the *Smith* holding that "a trial court did not have the inherent power to remove trial counsel because in his subjective opinion counsel was incompetent."[337]

Later, in discussing the facts of *Harling v. United States*,[338] the *Stearnes* court also agreed that a trial judge, when seeking to replace counsel, must treat appointed counsel and retained counsel identically.[339] The court stated that "any effort to distinguish between the two will be premised upon a fallacy because the 'attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.' "[340]

The appeals court then examined the impact of the *Wheat* decision on the present state of law in allowing a trial judge to remove appointed counsel.[341] The court stated that although previous holdings in the area of waiving conflict-free representation might be of "questionable validity,"[342] the *Wheat* decision still prohibits a trial judge from acting unreasonably in removing counsel: "[T]he basis of the opinion is still sound: a defendant has the right to retain counsel of his choice and establish an attorney-client relationship. It logically follows . . . that once an attorney is appointed[,] the same attorney-client relationship is established and it should be protected."[343]

In further support against arbitrary removal of counsel, the court cited *Wheat* directly: "The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome. . . ."[344] The court then concluded: "The Supreme Court has held, consistent with *Smith*, . . . [and] *Harling* . . . that a presumption exists that a defendant is entitled to counsel of his choice and a trial court cannot infringe upon one's constitutional right to counsel unless there is an actual or serious potential for con-

333. *Id.*
334. *Id.*
335. 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (en banc).
336. Stearnes v. Clinton, 780 S.W.2d 216, 220 (Tex. Crim. App. 1989) (en banc).
337. *Id.*
338. 387 A.2d 1101 (D.C. 1978).
339. *Stearnes*, 780 S.W.2d at 221-22.
340. *Id.* at 222 (quoting Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74, 68 Cal. Rptr. 1, 10 (1968) (en banc)).
341. *Id.* at 223.
342. *Id.* at 222.
343. *Id.*
344. *Id.* at 223 (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).

flict."[345] Therefore, because a trial judge must give deference to the defendant's right to counsel of choice, a "serious" showing will be required before counsel may be removed.[346]

VI. CONCLUSION

The judicial protection afforded a criminal defendant under the Sixth Amendment guarantees the accused a qualified right to counsel of choice. Flowing from this constitutional prerogative is the novel right of a defendant to waive competent counsel. Although this right arguably conflicts with the judiciary's duty to provide effective representation to the defendant, the defendant's right to present his own personal defense must be respected.

The right to waive competent counsel may be used by a defendant as a weapon by which to attack and appeal a conviction on grounds of ineffectiveness of counsel, or it may be used to potentially interfere with the course of proceedings during a trial. However, the waiver may also be legitimately claimed to protect an established attorney-client relationship. Whichever motive the defendant may possess in making a competence waiver, the trial court is forced to consider and balance the underlying motives.

On one hand, as protector of the defendant's right to a fair trial, the court must ensure that justice is administered orderly and efficiently. This analysis requires the trial court to mandate that a defendant's waiver meet the *Faretta* standard: knowingly, intelligently, and voluntarily made, and adequately reflected on the court record.[347] When used properly, the established waiver standard ensures that the defendant will receive a fair trial, and that the resulting judgment will be protected from later claims of ineffective counsel from the defendant, thus promoting finality.

Likewise, as protector of the trial proceedings, the court must also ensure that the defendant has the right to counsel of choice. The trial judge, in recognizing this qualified constitutional prerogative, may appoint advisory counsel to assist the defendant with his decision in weighing his available alternatives. This analysis requires that the trial judge give deference to the defendant's right to waive competent counsel and the established attorney-client privilege unless the result seriously jeopardizes the interests of justice. Gener-

345. *Id.*
346. *Id.*
347. *See supra* notes 65-91 and accompanying text.

ally, the court should interfere with a defendant's choice to continue with incompetent counsel only in situations of gross incompetence.

Very few cases have addressed a defendant's right to waive competent counsel. When faced with this issue, the courts will continue their struggle to balance a duty both to the defendant and to the criminal justice system. Additionally, as the surge of narcotics-related cases overcrowd our court dockets, the depersonalization of these and other routine trials will occur and the attention paid to individual defendants and their counsel may diminish. The appeals court for Nightstalker Richard Ramirez may be confronted with a waiver of competent counsel from the trial court.[348] If Ramirez made an effective waiver of competent counsel before the trial judge, his claim of incompetent counsel will be meaningless. However, if the trial court did not receive an effective waiver, it may have left itself open to an attack and possible reversal. Richard Ramirez may have yet another day in court.

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348. *See supra* notes 8-10 and accompanying text.