

# **YOUR ROLE AS STANDBY COUNSEL**

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“Our experience has taught us that a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.” *Martinez v. Court of Appeal, Cal. Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000) (internal quotation omitted).



# CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION

- The Sixth Amendment guarantees not only the right to be represented by counsel, but also the right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819 (1975).
- “The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.” *McKaskle v. Wiggins*, 465 U.S. 165, 174 (1984).

# WHAT IS YOUR ROLE?

- When a defendant chooses to proceed pro se, the court may appoint standby counsel, an attorney to assist the defendant.
- What is your role as standby counsel?

# STANDBY COUNSEL'S ROLE

- The role of standby counsel is not clearly defined in the case law or otherwise; counsel's role can vary from case to case.
- Standby counsel's role is to do what the defendant requests and the court permits, without interfering with the defendant's right to self-representation.



# CLARIFY YOUR ROLE ON THE RECORD

- For the defendant's benefit, and your benefit, it is helpful to clarify your role on the record at the time you are appointed as standby counsel.
- If you have been representing the defendant, discuss the possible standby roles and encourage the defendant to ask questions of the court.

# NO CONSTITUTIONAL RIGHT TO STANDBY COUNSEL

- A defendant does not have a constitutional right to the assistance of standby counsel. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998).
- The district court has discretion, however, to appoint standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 165, 176 (1984).



# WHY DO COURTS APPOINT STANDBY COUNSEL?

- The defendant seeks to proceed pro se and asks for assistance from standby counsel.
- Or -
- The court decides to appoint standby counsel, sometimes over the defendant's objection.

# FAIR TRIAL OR EFFICIENT TRIAL

- Standby counsel's role is difficult because the role is not well defined, and because there is tension between the interests being served:
  - Fair trial
  - Efficient trial

# BASIC RULES FOR STANDBY COUNSEL

- Two rules restrain the role of standby counsel.
  - “First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . If standby counsel’s participation over the defendant’s objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.”
  - “Second, participation by standby counsel without the defendant’s consent should not be allowed to destroy the jury’s perception that the defendant is representing himself.” *McKaskle v. Wiggins*, 465 U.S. 165, 178 (1984).

# ABA DEFENSE FUNCTION STANDARDS

- Obligations of Hybrid and Standby Counsel
  - Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
  - Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

Defense Function Standard 4-3.9



# THE DISTRICT COURT'S DISCRETION

- The district court has “broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense.” *United States v. Lawrence*, 161 F.3d 250, 253 (4<sup>th</sup> Cir. 1998).
- The district court may “place reasonable limitations on the standby counsel's actions and the defendant's use of such counsel.” *United States v. Brown*, 983 F.2d 1058, 1993 WL 998, at \*3 (4th Cir. 1993) (unpublished).

# STANDBY COUNSEL'S ROLE IN PRETRIAL PROCEEDINGS

- The Sixth Amendment limitations on the role of standby counsel, as described by the Supreme Court in *McKaskle*, are most significant at trial before the jury.
- A pro se defendant's *Faretta* rights are adequately protected outside the presence of the jury if the defendant "is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." *McKaskle v. Wiggins*, 465 U.S. 165, 179 (1984).



# INVESTIGATIVE ROLE

- The court expects that standby counsel will play an investigative role, assisting the defendant with tasks an incarcerated defendant cannot easily accomplish. *See, e.g., United States v. Moussaoui*, 591 F.3d 263, 269 (4th Cir. 2010) (district court advised defendant that standby counsel “was available to help him locate witnesses and evidence”); *id.* at 270 (standby counsel could “help [defendant] obtain experts, locate witnesses, and even provide the paper supplies he needs to mount his defense”).

# RESEARCH AND WRITING ROLE

- Depending on the case, standby counsel may play an active role in research and writing.
  - *E.g., United States v. Moussaoui*, 382 F.3d 453, 458, 459 (4th Cir. 2004) (standby counsel filed motions, and at court's direction court briefed question of appropriate sanction for Government's failure to comply with court's order).



# STANDBY COUNSEL AS A SUBSTITUTE FOR A LAW LIBRARY?

- *See United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978) (no error for district court to deny motion to continue defendant filed claiming denial of access to law library, where defendant had declined assistance of counsel).
- *See United States v. Neely*, 63 F. App'x 671, 672 (4th Cir. 2003) (per curiam) (unpublished) (“Where a defendant has elected to proceed pro se in a criminal case, he can be required to rely on standby counsel to overcome any research handicaps due to incarceration.”).

# SPECIAL CASES

- In certain kinds of cases, standby counsel's role may be enhanced where the defendant is not permitted to participate.
  - Classified Information
  - Privileged Information

# STANDBY COUNSEL'S ROLE AT TRIAL

- The guiding principle in defining standby counsel's role at trial is that the defendant has the right to actually control the defense as well as the right to have the jury perceive that the defendant is controlling the defense. *See McKaskle v. Wiggins*, 465 U.S. 165, 178 (1984).
- Beyond this guiding principle, the “extent of standby counsel’s participation is . . . a matter of discretion.” *United States v. Gellis*, 914 F.2d 1492, 1990 WL 139341, at \*6 (4th Cir. 1990) (unpublished).
- “[A] defendant does not have a constitutional right to proceed *pro se* and then call for the special appearance of standby counsel to serve as advocate during selected portions of a trial.” *Id.*; *see McKaskle*, 465 U.S. at 183 (“A defendant does not have a constitutional right to choreograph special appearances by counsel.”).



# LIMITING STANDBY COUNSEL'S ROLE AT TRIAL

- Trial Efficiency Concerns
  - Standby counsel can be limited to assisting with procedural matters. *United States v. Lawrence*, 161 F.3d 250, 253 (4<sup>th</sup> Cir. 1998).
- Pro Se Defendant's Appearance of Control
  - The district court may limit standby counsel from passing unsolicited questions to the defendant in the jury's presence. *See United States v. Brown*, 983 F.2d 1058, 1993 WL 998, at \*3 (4th Cir. 1993) (unpublished).

# STANDBY COUNSEL EFFECTIVELY ACTING AS TRIAL COUNSEL

- If the district court permits it, the pro se defendant may allow the standby counsel to take a very active role at trial.
  - Voir Dire
  - Opening Statement
  - Witness Examination and Cross Examination
  - Objections to Testimony and Evidence
  - Closing Argument



# THE PRO SE DEFENDANT TESTIFIES AT TRIAL

- What is standby counsel's role if the pro se defendant testifies as trial?
  - Scripted Examination of the Defendant
  - Defendant Testifies in Narrative

# STANDBY COUNSEL STANDS IN FOR THE DEFENDANT

- The Fourth Circuit has affirmed in cases where the district court allowed standby counsel to act when the defendant was not in the courtroom.
  - *United States v. Lawrence*, 161 F.3d 250, 252-53 (4th Cir. 1998) (defendant allowed to leave courtroom during jury selection and presentation of evidence).
  - *United States v. Bailes*, 935 F.2d 1287, 1991 WL 101582, at \*2 (4th Cir. 1991) (with defendant not in courtroom, standby counsel discusses court's response to jury question; no error).



# STANDBY COUNSEL TAKES OVER THE DEFENSE

- Part of the job of standby counsel is to be ready to take over the defense of the case if the defendant withdraws a request to proceed pro se, or if the court terminates the defendant's right to proceed pro se.





# STANDBY COUNSEL TAKES OVER THE DEFENSE

- Prepare as if you are going to take over the defense?
  - *See United States v. Hagen*, 468 F. App'x 373, 388-890 (4th Cir. 2012) (unpublished) (appointing as standby counsel attorney who had been representing defendant and ordering counsel “to continue preparing for trial as if he were trying the case” and to “assist defendant if and when and to the extent called upon by defendant”).
- Ask for continuance if the district court elevates you to counsel for the defendant?
  - *See United States v. West*, 877 F.2d 281, 286-87 (4th Cir. 1989) (no error for district court to deny motion to continue after court replaced pro se defendant with his standby counsel, who had been appointed only eleven days before trial).



# STANDBY COUNSEL'S ROLE AT SENTENCING

- Standby counsel may play an active role at sentencing.
  - *E.g., United States v. Johnson*, 38 F. App'x 896, 897 (4th Cir. 2002) (per curiam) (unpublished) (standby counsel “actively participated at the sentencing hearing, challenging provisions in the presentence investigation report, and playing a significant role in obtaining a lower offense level than that recommended in the report”).

# INEFFECTIVE ASSISTANCE OF STANDBY COUNSEL?

- No Fourth Circuit case law on point.
- Every Circuit Court that has considered the question has held that a defendant cannot bring an ineffective assistance of counsel claim based on standby counsel's actions (or inaction), because there is no constitutional right to standby counsel. *See, e.g., United States v. Oliver*, 630 F.3d 397, 413-14 (5th Cir. 2011); *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998).

# CASE STUDY: *UNITED STATES v. GELLIS*

- EDNC; Judge Fox
- Ed Walker
- Defendant charged with assault with a deadly weapon and conspiracy.



## CASE STUDY: *UNITED STATES v. GELLIS*

- At pretrial conference, defendant moves to dismiss counsel.
- District court denies motion; gives defendant option to proceed pro se with standby counsel: “I will appoint Mr. Walker as standby counsel to assist you in the event you want to ask him questions or whatever use you want to make of him.”



## CASE STUDY: *UNITED STATES v. GELLIS*

- The next day, defendant files motion to dismiss standby counsel based on alleged differences in trial strategy.
  - “I do not want Mr. Walker to assist me in anything. As a *pro se* litigant I want to go *pro se* . . . .”
- Court denies defendant’s request for another court-appointed counsel.

# CASE STUDY: *UNITED STATES v. GELLIS*

- On first day of trial, defendant asks court to appoint different counsel; if court will not appoint different counsel, defendant states he would rather be represented by Walker.
- Court orders Walker to resume full representation.
- Walker moves to withdraw. Court denies motion.
- Walker explains he has not interviewed many of the witnesses.
- Court orders defendant to represent himself with Walker as standby counsel.



# CASE STUDY: *UNITED STATES v. GELLIS*

- Court holds defendant in summary criminal contempt four times as defendant makes opening statement.
- Defendant asks court to permit Walker to examine witnesses; court denies request, allowing defendant only to consult with Walker before examining a witness.
- Court holds defendant in summary contempt again when defendant complains it was not “a self-choice type of deal.”
- Court holds defendant in summary contempt a sixth time during defendant's examination of first witness.



## CASE STUDY: *UNITED STATES v. GELLIS*

- Defendant convicted.
- On appeal, defendant argued he had not knowingly and voluntarily waived his right to counsel, and that the court erred when it refused to allow Walker to examine witnesses and otherwise participate in the trial.

# CASE STUDY: *UNITED STATES v. GELLIS*

- “[T]he granting of standby counsel to Gellis was a discretionary benefit conferred by the district court, not the fulfilling of a constitutional right.”
- “[A] defendant does not have a constitutional right to elect to proceed *pro se* and then call for the special appearance of standby counsel to serve as his advocate during selected portions of a trial.”
- “Just as the appointment of standby counsel is solely within the discretion of the district court, the subsequent extent of standby counsel's participation is also a matter of discretion.”

