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A Judicial David Versus Goliath: Prohibiting Capital Defendants from Proceeding Pro Se

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TABLE OF CONTENTS

I. Introduction ........................................................................................................................................ 1
II. The Problem of Pro Se Capital Defendants ..................................................................................... 2
   A. Difference Between Capital Trials and Other Criminal Trials .................................................... 3
      1. Mitigation Investigation .............................................................................................................. 4
      2. Other Differences in a Capital Trial ........................................................................................... 6
   B. Special Skills Required by a Capital Defense Attorney ............................................................... 8
   C. Preparing for a Capital Trial While Incarcerated ...................................................................... 10
   D. Losing an Important Ground of Appeal ..................................................................................... 12
III. “Heightened Reliability” Requires a Solution ................................................................................ 13
   A. The “Heightened Reliability” Doctrine ......................................................................................... 14
   B. “Heightened Reliability” Applied to Self-Representation .......................................................... 15
IV. Why the Solution if Constitutionally Permissible .......................................................................... 19
   A. Origins of Self-Representation .................................................................................................. 20
   B. The Constitutional Right to Self-Representation ..................................................................... 21
   C. Limitations on the Right to Self-Representation ...................................................................... 23
      1. Competency to Waive Counsel ................................................................................................. 23
      2. Other Limitations on Self-Representation ............................................................................... 25
   D. Curtailing Self-Representation to Preserve Integrity ................................................................. 28
IV. The Effects of Proscribing the Pro Se Capital Defendant ............................................................... 29
V. Conclusion ......................................................................................................................................... 31

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I. Introduction

Criminal defendants who represent themselves at trial are admonished that they have a “fool for a client;” this adage has even achieved recognition by the United States Supreme Court. This foolishness is ordinarily tolerated as a risk that a defendant takes when exercising his or her right to proceed pro se. Though not explicitly enumerated in the Constitution, the Supreme Court has held that the right to self-representation is implicitly granted by the enumerated rights of the Sixth Amendment. While self-representation has thus been recognized as an important right with constitutional foundations, it is not absolute and subject to certain limitations. Most significantly for the purposes of this article is the broad limitation announced by the Supreme Court when curtailment is necessary to preserve the integrity of a trial; this limitation comports with the overwhelmingly most important goal of the criminal justice system: ensuring a fair trial.

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2 “Self-representation” and “proceed pro se” and their variations are used interchangeably throughout this article.
3 Kay v. Ehrler, 499 U.S. 432, 437 (1991) (“The adage ‘a lawyer who represents himself has a fool for a client’ is the product of years of experience by seasoned litigators.”)
4 Faretta v. California, 422 U.S. 806 (1975) (stating that criminal defendants have a constitutional right to represent themselves).
5 Id. at 819-820. (“[T]he right to self-representation-to make one’s own defense personally-is thus necessarily implied by the structure of the [Sixth] Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”)
6 For example, a trial court does not have to grant an untimely request to proceed pro se when it would hinder the efficiency of the trial. See John F. Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta, 6 Seton Hall Const. L.J. 483, 544 (1996).
7 Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 162 (2000) (“[T]he government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.”)
It has long been recognized that a capital trial requires “heightened reliability” with regards to both guilty verdicts and death sentences. This article proposes that eliminating a capital defendant’s ability to proceed pro se should be added to the panoply of enhanced protections and procedures begot by the “heightened reliability” doctrine. This conclusion is based on the innate difficulties faced by a self-represented capital defendant and the subsequent adverse effect on the reliability of a capital trial. “Heightened reliability” requires, and the Supreme Court’s jurisprudence in the self-representation arena allows, courts to proscribe capital defendants from proceeding pro se.

It is first necessary to explain the unique problems presented by a pro se capital defendant. The next step is to address why a capital defendant should be treated differently than any other criminal defendant in regard to the ability to exercise the right to self-representation. In other words, it is necessary to detail why the proposed solution is even necessary and need only apply to those facing a possible death sentence. While most would agree that barring capital defendants from representing themselves at trial is a good idea, the most important question addressed in this article is whether the proposed abridgement of a recognized constitutional right is permissible under relevant Supreme Court jurisprudence. The last inquiry made by this article will be the likely effects of proscribing capital defendants from proceeding pro se.

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8 Beck v. Alabama, 447 U.S. 625, 638 (1980) (extending the “heightened reliability” doctrine that was originally required for capital sentences to capital verdicts).

9 See infra p. 3-7.
II. The Problem of Pro Se Capital Defendants

Capital defendants who elect to proceed pro se face a far more onerous task than their non-capital counterparts. It has long been recognized that proper preparation for a capital trial requires an exhaustive effort on the part of specially trained and qualified defense counsel.10 A self-represented defendant is also very likely to be incarcerated while awaiting trial, compounding the difficulty of developing and preparing a competent defense strategy.11 Furthermore, because a pro se defendant cannot claim ineffective assistance of counsel on appeal, a capital pro se defendant forfeits one of the most common avenues of reversal no matter how ineffective the representation at trial.12

A. The Difference Between Capital Trials and Other Criminal Trials

Capital trials are markedly different than other criminal trials and require exhaustive preparation on the part of defense counsel and other members of the “defense team” to prepare an adequate defense strategy.13 These differences make a capital trial tougher to litigate than a non-capital criminal trial for a defense attorney. The same holds true, if not to a higher degree, for pro se capital defendants compared to criminal defendants desiring to represent themselves in non-capital proceedings. Due to the uniqueness of a capital trial, what might be considered

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11 Infra pp. 10—12.
12 Faretta, 422 U.S. at 834 n. 46 (“[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amount to a denial of ‘effective assistance of counsel.’”)
13 Infra n. 20.
sound practices in non-capital proceedings are considered essential when representing a defendant facing a possible death sentence.

1. Mitigation Investigation

The most glaring difference between capital trials and non-capital trials is the bifurcated nature of a capital trial.\(^\text{14}\) If a defendant is convicted of a capital crime and has not waived his or her right to a trial by jury, the trial will proceed to the penalty phase during which the jury will weigh factors that aggravate and mitigate the defendant’s culpability.\(^\text{15}\) The penalty phase has naturally engendered a demanding responsibility for capital defense attorneys: to conduct a thorough mitigation investigation. This investigation seeks to uncover information that will lead the jury to find one or more mitigating factors, thus lessening the defendant’s probability of being sentenced to death.\(^\text{16}\) Failure to adequately fulfill this responsibility can result in reversal of a death sentence on ineffectiveness of counsel grounds.\(^\text{17}\) Conducting an adequate mitigation investigation is not only an essential method of protecting a capital defendant from a death sentence; it is also a constitutionally required responsibility of capital defense attorneys.\(^\text{18}\)

\(^\text{14}\) Gregg v. Georgia, 428 U.S. 153, 191-192 (1976) ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of . . . constitution deficiencies....")

\(^\text{15}\) See for example Ohio Rev. Code Ann. § 2929.04 (West) (detailing Ohio's aggravating and mitigating circumstances to be considered by a capital jury).


\(^\text{18}\) Id.
The accepted professional standards for what actions a capital defense attorney must undertake for a sufficient mitigation investigation are promulgated by the American Bar Association (hereinafter “ABA Standards.”)\(^{19}\) For example, the ABA Standards compel a capital defense attorney to use all possible means of acquiring a litany of the defendant’s records in an attempt to unearth information that may mitigate his or her culpability for a capital crime.\(^{20}\) These records include, amongst others, school records, medical records, criminal records, alcohol and drug treatment records, and immigration records.\(^{21}\) A non-capital criminal trial may also require investigation into these records, but it is much more likely to be the product of a pre-sentence investigation report conducted by a probation officer or similarly situated employee of the state.\(^{22}\) In a capital case, this responsibility falls squarely within the parameters of a member of the capital defense team.\(^{23}\)

A *pro se* defendant attempting to conduct his or her own mitigation investigation will face numerous difficulties. For example, the ABA Standards require a capital defense attorney to discover and interview witnesses who can

\(^{19}\) *Supra* n. 9 at 1015.

\(^{20}\) *Id.* at 1025.

\(^{21}\) *Id.*

\(^{22}\) H. M. LaFont, *Assessment of Punishment-A Judge or Jury Function?*, 38 Tex. L. Rev. 835, 839 (1960). (“[The pre-sentence investigation report is a] factual and diagnostic study [that] gives the judge the information essential to achieving objectivity in his final judgment. The more comprehensive sources of information, the more completely will the report reveal the defendant's characteristic behavior pattern, the defendant's strength and weaknesses.”)

\(^{23}\) A capital defense attorney almost never works alone. The ABA Standards recommend a “defense team” that includes, at minimum, two attorneys, an investigator, and a mitigation specialist. *Supra* n. 9 at 952. The fact that four specifically trained individuals in the field are accepted as the minimum number of people need to properly conduct a capital defense case in itself demonstrates the wisdom of barring capital defendants from proceeding *pro se.*
provide information about a relevant aspect of the crime or the defendant’s life. In some circumstances, it is unlikely that a witness with important information for the defense would wish to speak with a defendant. Even if the witness wished to do so, capital defendants are frequently incarcerated prior to their trials, greatly compounding the difficulty of conducting a thorough mitigation investigation. Overall, a capital defendant will have a far more difficult, if not impossible, time of conducting a mitigation investigation that will be vitally important if the defendant is convicted at the first stage of his or her capital trial.

2. Other Differences in a Capital Trial

The required mitigation investigation is not the only difference between a capital trial and a non-capital trial that renders self-representation of a capital defendant infeasible. *Voir dire* in a capital case allows defense attorneys and prosecutors to undertake a special line of questioning about a venireman’s attitude toward capital punishment in a process known as “death qualification” or its inverse “life qualification.” Both the defense and prosecution can ask potential jurors questions regarding their ability to follow the law in deciding whether to sentence a

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24 *Supra* n. 9 at 1019 (stating these witnesses include eyewitnesses, potential alibi witnesses, witnesses familiar with the defendant’s life history, members of the defendant’s family, neighbors and friends who know the defendant or the defendant’s family, correctional officers who have interacted with the defendant, and former teachers, clergy, employers, co-workers, doctors, and social service providers who know the defendant.)

25 It is not difficult to imagine circumstances where a capital defendant has alienated prior relationships. 

26 *See infra* pp. 10—12 for discussion of difficulties faced by an incarcerated capital defendant.

defendant convicted of a capital crime to death.  Those on the venire who are 
“unalterably in favor of, or opposed to, the death penalty in every case” must be 
excused by the trial court judge for cause. This line of questioning is unique to the 
capital arena and requires knowledge of relevant Supreme Court jurisprudence and 
the limits of how far opposing counsel can go in ascertaining desired information. 
Capital jury selection is far different, and often considerably more time-consuming, 
than *voir dire* in a non-capital criminal trial.  

Capital trials are often governed by rules foreign to a non-capital proceeding. 
For example, in Pennsylvania, prosecutors are forbidden from quoting the Bible 
during the penalty phase as an argument in support of sentencing a defendant to 
death. The likelihood of a capital defendant, even one who studiously prepares for 
trial, knowing that an objection should be made in response to this type of 
prosecutorial argument, is extremely small compared to the probability that a 
seasoned and statutorily qualified capital litigator would do so. Capital defense 
attorneys must also be aware of the interpretation of a state’s statutory aggravating 
and mitigating factors, not just the language of the statute. For example, in many

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29 Id. at 735.


31 *Com. v Chambers*, 528 Pa. 558, 586 (Pa. 1991). The prosecutor in this case had said "Karl Chambers has taken a life. As the Bible says, ‘and the murderer shall be put to death.’" Id.
jurisdictions an aggravating factor is that the murder was committed in an unnecessarily cruel manner.\textsuperscript{32} \textit{A pro se} capital defendant is less likely to know how this type of aggravating factor has been interpreted by higher courts and thus is less likely to know whether the prosecution’s arguments to the jury fall within the bounds of the relevant interpretation.

\textbf{A. Special Skills Required by a Capital Defense Attorney}

Due to the above-discussed difficulties of litigating a capital case, states that have retained capital punishment as a sentencing option have developed minimum qualifications for a court-appointed capital defense attorney.\textsuperscript{33} Additionally, the ABA Standards detail minimum standards that capital defense attorneys must meet.\textsuperscript{34} With the unlikely exception of a statutorily qualified attorney being charged with a capital crime and electing to proceed \textit{pro se}, a self-represented capital defendant will not meet these requirements. The adoption of the ABA Standards and its state counterparts speak for themselves in demonstrating the infeasibility of a capital defendant electing to represent himself or herself at trial. Capital cases are so difficult to litigate that states and the professional organizations of attorneys in the United States have decided to adopt specific standards detailing when an attorney is sufficiently qualified to do so.

\textsuperscript{32} \textit{E.g.} Fla. Stat. Ann. § 921.141 (West) (enumerating an “especially heinous, atrocious, or cruel” capital felony as an aggravating factor in a capital trial.)


\textsuperscript{34} \textit{Supra} n. 9 at 961.
The standards adopted by the ABA are similar to the requirements of many states. Florida’s bevy of minimum qualifications are representative of most state’s adopted standards for a capital defense attorney. The Florida rule requires that attorneys have a minimum of five years of experience in criminal law, have served as lead counsel in at least nine jury trials “of serious and complex cases which were tried to completion,” have served as lead counsel or co-counsel in two death penalty cases, are familiar with the use of expert witnesses, have demonstrated “necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and have attended a continuing legal education program devoted to the defense of capital cases within the last two years.

These exacting requirements were adopted because “...providing high quality legal representation in capital cases requires unique skills.” When faced with a pro se defendant that lacks these skills, courts are under no obligation to assist the defendant in presenting his or her case even though a self-represented defendant is under the same requirements as any other defense counsel in following the rules of

35 FL ST RCRP Rule 3.112.
36 Id.
37 Supra n. 9 at 979. (“Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.”)
procedure and evidence.\textsuperscript{38} The overwhelming majority of licensed attorneys are unqualified to litigate a capital case, but a self-represented defendant need make no greater showing than that his or her decision to proceed \textit{pro se} was made “knowingly and intelligently.”\textsuperscript{39} The American capital scheme recognizes the incredible challenges of litigating a capital case but simultaneously allows an individual with no legal training whatsoever to proceed \textit{pro se} when the individual’s very life is at stake.

\textbf{B. Preparing for a Capital Trial While Incarcerated}

While all \textit{pro se} capital defendants are faced with staggering difficulties in preparing for trial, those who are incarcerated prior to their trials are even further challenged.\textsuperscript{40} When a defendant exercises the right to self-representation, he or she “relinquishes . . . many of the traditional benefits associated with the right to counsel.”\textsuperscript{41} This is because criminal defendants are under no obligation to represent themselves, and a knowing and intelligent waiver of the right to counsel includes forfeiting tools that might be instrumental in preparing a sound defense.\textsuperscript{42} This includes access to legal resources such as research tools and the ability to use

\begin{footnotes}
\footnotetext[38]{\textit{U.S. v. Hung Thien Ly}, 646 F.3d 1307, 1315 (11th Cir. 2011) (“And ignorance is no hidden virtue; a \textit{pro se} defendant must follow the rules of procedure and evidence, and the district court has no duty to act as his lawyer.”)}
\footnotetext[39]{\textit{Faretta}, 422 U.S. at 835. The required competency standard for exercising the right to self-representation is discussed further at infra pp. 23—25.}
\footnotetext[40]{\textit{Decker}, supra n. 5 at 560-565.}
\footnotetext[41]{\textit{Faretta}, 422 U.S. at 835.}
\footnotetext[42]{\textit{U.S. v. Farhad}, 190 F.3d 1097, 1110 (9th Cir. 1999) (the defendant was “informed that there were resources, such as investigators and legal research tools, that were unavailable to him, but which were available to attorneys.”)}
\end{footnotes}
investigators that would otherwise be a statutorily required component of the capital defense team in many states. Even the ability to access a law library, notwithstanding its quality, is not a protection granted to pro se defendants incarcerated prior to their trial. When legal resources are available, incarcerated defendants who elect to exercise their right to self-representation are not exempt from normal correctional procedures. These procedures may place restrictions on a defendant’s ability to access correctional facilities that would assist in the preparation for trial.

Capital defendants are particularly susceptible to experiencing the heightened difficulties faced by incarcerated pro se defendants, because they are more likely to be imprisoned prior to trial than non-capital defendants. Several state constitutions specifically limit a defendant’s general right to be released on bail when charged with a capital offense. Even if bail is granted, it is likely to be set at a prohibitively high amount, because one of the factors judges use in setting bail is the

43 Id.; see supra n. 9 at 952.
44 U.S. v. Byrd, 208 F.3d 592, 593 (7th Cir. 2000) (“[W]hen a person is offered appointed counsel but chooses instead to represent himself, he does not have a right to access to a law library.”) This is not to say that most incarcerated individuals do not have access to a library but stands for the proposition that it is a not a protected right. Even when libraries are available, there is no guarantee as to their quality.
45 People v. Heidelberg, 338 N.E.2d 56, 69-70 (Ill. App. 3d Dist. 1975) (“The constitution does not require in the case of a prisoner who elects to represent himself pro se, that he be exempted from regular jail procedures and searches [and] a prisoner in custody may not expect favored and privileged treatment even though the result may be that he is less effective as his own attorney.”)
46 Id.
47 See Vt. Const. ch. II, § 40 (excepting a “person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great” from Vermont’s constitutional right to bail) and Alaska Const. art. I, § 11 (stating that an accused person in Alaska is entitled to bail “except for capital offenses when the proof is evident or the presumption great.”)
severity of the charged offense. Because capital defendants are typically indigent, they are unlikely to have the financial wherewithal to make bail. Incarcerated capital defendants electing to proceed *pro se* also face the prospect of conducting a mitigation investigation from within the confines of a prison without access to investigators. Lastly, some of the requirements for capital defense counsel detailed in the ABA Standards, such as visiting the scene of the alleged crime, are inherently unavailable to incarcerated defendants.

C. Losing an Important Ground of Appeal

One of the most common grounds for the reversal of a conviction in a capital case or a resulting death sentence is ineffective assistance of counsel. A defendant who proceeds *pro se* does not have this ground for appeal available, because forfeiting an ineffectiveness claim is among the “dangers and consequences associated with self-representation.” The sound reasoning behind this limitation is that if *pro se* defendants could raise ineffectiveness claims on appeal, they could

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50 *Infra* pp. 10—12; *Farhad*, 190 F.3d at 1110.

51 *Id.; see supra* n. 9 at 1020-1021.

52 *See generally* Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 Judicature 64 (2001-2001) (explaining that a common reason for reversal of a capital conviction or sentence is “incompetent defense lawyers.”)

purposefully perform so abhorrently as to guarantee a new trial.\textsuperscript{54} If the defendant were permitted to keep representing himself or herself at subsequent trials, a \textit{pro se} defendant could endlessly prolong the legal process. Of course, this limitation placed on self-represented defendants does not merely apply when there is evidence of a purposefully ineffective performance at trial; it applies to all \textit{pro se} defendants. The result is that a \textit{pro se} defendant is barred from raising an ineffectiveness claim on appeal no matter how dismal the representation at trial.

\textbf{III. “Heightened Reliability” Requires a Solution}

“Heightened reliability” refers to the doctrine announced by the Supreme Court in 1976 that posits that due to the qualitative difference between death and any other criminal sanction, there is a corresponding difference in the reliability required for capital sentencing.\textsuperscript{55} The mantra of this doctrine is that “death is different” and thus special protections and procedures are necessary to ensure the reliability of a capital trial.\textsuperscript{56}

\textsuperscript{54} \textit{Com. v. Szuchon}, 484 A.2d 1365, 1377 (Pa. 1984) (“To hold otherwise would create a situation wherein a defendant, by design, could build into his case ineffective assistance of counsel claims, thus guaranteeing himself a basis for a new trial if the verdict were adverse to him.”) While this logic is applied to defendants representing themselves, at least one American jurist believes capital defense attorneys purposefully provide ineffective assistance in a risky effort to protect their clients from execution. \textit{Poindexter v. Mitchell}, 454 F.3d 564, 587 (6th Cir. 2006) (Boggs, C.J. concurring).

\textsuperscript{55} \textit{Woodson v. North Carolina}, 428 U.S. 280, 305 (1976) (“...the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”)

\textsuperscript{56} Carol S. Steiker & Jordan M. Steiker, \textit{Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment}, 109 Harv. L. Rev. 355, 397 (1995) (“According to the Court, the qualitative difference between death and all other punishments justifies a corresponding difference in the procedures appropriate to capital versus non-capital proceeding.”)
capital sentencing, the doctrine has been subsequently extended to practices concerning the reliability of a guilty verdict in a capital case.\textsuperscript{57} A pro se defendant, for the reasons detailed above, adversely affects the reliability of both the guilt and penalty phases of a capital trial.\textsuperscript{58} Accordingly, the “heightened reliability” doctrine demands that a capital defendant be prohibited from proceeding pro se.

A. The “Heightened Reliability” Doctrine

“Heightened reliability” has the sole goal of attempting to increase the reliability of capital trials.\textsuperscript{59} While mistakes are tolerated in other criminal proceedings, the nature of capital punishment requires as accurate a result as possible.\textsuperscript{60} This doctrine is constitutionally required by the Eighth Amendment’s ban on cruel and unusual punishment as applied to the states through the Fourteenth Amendment.\textsuperscript{61} The underlying reasoning of this doctrine is intuitive: a mistake in a capital trial, whether during the penalty or guilty phase, could lead to a wrongful execution. Such an occurrence is clearly repugnant to a basic sense of morality and anathema to constitutional values and protections.\textsuperscript{62} When a mistake is made in any other

\textsuperscript{57} Beck, 447 U.S. 625, 538 (1980) ("...we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilty determination.")
\textsuperscript{58} See supra pp. 2—10.
\textsuperscript{59} Woodson, 428 U.S. at 305.
\textsuperscript{60} Callins v. Collins, 510 U.S. 1141, 1149 (1994) ("[T]he risk of mistake in the determination of the appropriate penalty may be tolerated in other areas of the criminal law...")
\textsuperscript{61} Woodson, 428 U.S. at 287, 301 (saying that it is a constitutional requirement for “the State’s power to punish be exercised within the limits of civilized standards") (internal quotation marks removed).
\textsuperscript{62} Herrera v. Collins, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (commenting that the execution of an innocent person would be a “constitutionally intolerable event.”) The Supreme Court has also held that “the quintessential miscarriage of justice is the execution of an innocent person.” Schlup v. Delo, 513 U.S. 298—299 (1995).
criminal trial, though undesirable, the state can at least take some corrective action such as release and compensation. No such remedy exists for a wrongful execution.

Under this doctrine, the Supreme Court has created numerous procedures and protections unique to the capital arena. For example, a capital defendant charged with the murder of a person of a different race has the constitutional right to have prospective jurors told the race of the victim and to question jurors on any potential racial biases they harbor. There is no corollary right for a non-capital defendant. Another example is that capital defendants are entitled to a jury instruction regarding lesser-included offenses when the evidence at trial supports alternate verdicts, while no such constitutional protection exists for non-capital crimes.

B. “Heightened Reliability” Applied to Self-Representation

“Heightened reliability” cannot require every conceivable protection and procedure that would likely engender more accurate results in a capital trial; such a course would render our capital system unrealistic and even more inefficient than

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65 Ristaino v. Ross, 424 U.S. 589, 594 (1976) (“The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him.”)
66 Beck, 447 U.S. at 627, 634 (“[W]e have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process....”)
67 For example, the Jewish Talmud required a jury of 23 judges and two eyewitnesses to the crime who warned the person about to commit a capital crime that he or she would face execution. Furthermore, a criminal’s confession could not be used against the defendant at trial nor was circumstantial evidence permitted at trial. Such requirements would likely lead to the abolition of capital punishment in the United States. Rabbi Louis Jacobs, The Death Penalty in Jewish Tradition, http://www.myjewishlearning.com/life/Life_Events/Death_and_Mourning/About_Death_and_Mourning/Death_Penalty.shtml (accessed Nov. 15, 2011).
its current state. For example, those convicted of a capital crime do not have the constitutional right to an attorney while involved in state collateral review. When a defendant filed suit with the Supreme Court asserting this purported constitutional right, the Court concluded that just as those convicted of non-capital crimes have no right to an attorney on collateral review, neither do those convicted of capital crimes.

It is difficult to gauge the Court’s reasoning in creating some enhanced safeguards for capital defendants while rejecting others. Yet, the basic rationale of “heightened reliability” suggests that at least some protections and procedures should be implemented when doing so would increase the reliability of capital trials. Logic dictates that the greater the harm to the reliability of capital trials without a proposed safeguard, the more likely it is that the safeguard is required by the “heightened reliability” doctrine.

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69 Murray v. Giarratano, 492 U.S. 1, 10 (1989). ("We think that [the rule saying prisoners have no constitutional right to counsel during collateral review] should apply no differently in capital cases than in noncapital cases.")
70 Id.; Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (stating that non-capital defendants do not have the right to counsel on state collateral review) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today.");
71 Carol S. Steiker & Jordan M. Steiker, The Constitutional Regulation of Capital Punishment Since Furman v. Georgia, 29 St. Mary’s LJ 971, 976 (1998) (concluding that the Supreme Court has applied the doctrine "extremely sparingly and in isolated and fairly idiosyncratic instances.")
72 Supra n. 54.
It is widely accepted\(^73\) that self-representation is typically a poor choice for criminal defendants.\(^74\) As was discussed above, this is particularly true for capital defendants who face daunting challenges in preparing a competent defense and mitigation strategy for trial.\(^75\) Allowing a capital defendant the nearly unrestrained constitutional right to undertake as ineffective representation as the defendant desires or is capable of undertaking conflicts wildly with the proclaimed goal of providing specifically trained and statutorily qualified counsel to capital defendants. Jurisdictions across the country recognize that the uniqueness and complexity of a capital trial require a lawyer well versed in the skills and knowledge necessary to litigate a capital case.\(^76\) Without a prohibition of *pro se* capital defendants, a person without any legal knowledge or skill, let alone the specialized training recognized as a prerequisite to the ability to defend a person facing a possible death sentence, will be permitted to serve as the lawyer in a capital case so long as the defendant is competent to waive assistance of counsel.\(^77\)

When the Supreme Court first determined that indigent capital defendants must be provided with counsel nearly eighty years ago, it correctly asserted that the right

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\(^73\) For an article suggesting that felony defendants do not suffer adverse consequences due to a decision to represent themselves see Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423 (2006). This study does not claim to speak for the self-represented capital defendant, and the article readily admits the limitations imposed on its conclusions. Id. at 441—446.

\(^74\) *Martinez*, 528 U.S. at 161 (“Our experience has taught us that “a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney”) (internal quotation marks omitted).

\(^75\) See supra pp. 2—10.

\(^76\) See supra pp. 8—10.

\(^77\) See infra pp. 23—25.
to be heard in court has little meaning when a defendant is not qualified to serve as his or her own lawyer.\textsuperscript{78} The Court recognized that an unrepresented defendant would face a host of obstacles including the possibility of being found guilty solely due to lacking the requisite skills and knowledge to establish innocence.\textsuperscript{79} The majority opinion noted that the repercussions of failing to provide a capital defendant with a lawyer were even more severe for uneducated defendants.\textsuperscript{80}

The very same reasoning that mandates counsel be appointed for a capital defendant also demands that a capital defendant be prohibited from proceeding as his or her own attorney. While the obstacles a \textit{pro se} defendant will face may be tolerable in non-capital cases, it has long been recognized that “death is different” and requires increased reliability of both guilty verdicts and death sentences.\textsuperscript{81} Though every conceivable safeguard cannot be afforded to capital trial, if ever one fit the mold of “heightened reliability,” it is proscribing a capital defendant from proceeding \textit{pro se}. Accordingly, the judicially created and constitutionally mandated

\textsuperscript{79} \textit{Id.} at 69. (“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”)
\textsuperscript{80} \textit{Id.} (stating that the repercussions associated with not providing a capital defendant a lawyer are “more true . . . of the ignorant and illiterate, or those of feeble intellect” when compared to “men of intelligence.”)
\textsuperscript{81} \textit{Gardner v. Florida}, 430 U.S. 349, 357 (1977) (finding that a death sentence is “different [in] both its severity and its finality.”)
“heightened reliability” doctrine requires that a capital defendant be prohibited from exercising the right to self-representation.

**IV. Why the Solution is Constitutionally Permissible**

Thus far, this article has contended that the problems associated with a *pro se* capital defendant impair the reliability of both the verdict and sentence in a capital trial. Accordingly, “heightened reliability” bars a capital defendant from proceeding *pro se*. However, the Supreme Court has held that self-representation is a constitutional right derived from the protections of the Sixth Amendment. Therefore the question arises whether the proposed proscription of a capital *pro se* defendant is a constitutionally permissible limitation to the right of self-representation.

It is indisputable that self-representation has long been recognized as an important right in the United States. Yet, through relevant Supreme Court jurisprudence, it is clear that the right to self-representation is qualified by certain restrictions. The most important limitation on a defendant’s ability to proceed *pro se*

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82 [*Faretta*, 422 U.S. at 819-820 (“The 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. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’ Although not stated in the Amendment in so many words, the right to self-representation-to make one’s own defense personally-is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”)]

83 The Judiciary Act of 1789 (passed by Congress just 13 years after the United States’ independence) gave all parties in federal court the ability to “plead and manage their own causes personally.” 28 U.S.C.A. § 1654.

84 A famous example of this is the “Unabomber,” Ted Kaczynski, who was prohibited from proceeding *pro se*, because the trial judge believed the sole purpose of his request was to delay the trial. Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. Col. L. Rev. 789 (2000).
se for the purposes of this article is curtailing the right when doing so is necessary to ensure the fairness of a trial.\textsuperscript{85} Recent Supreme Court jurisprudence in the self-representation arena indicates that the Court is more willing to allow trial judges to exercise discretion in evaluating when a criminal defendant can represent himself or herself.\textsuperscript{86} As a whole, these decisions allow for the abridgement of the ability to proceed \textit{pro se} for a capital defendant.

\textbf{A. Origins of Self-Representation}

In the long history of English common law, courts never forced a criminal defendant to accept an attorney against their will.\textsuperscript{87} The origins of the right to self-representation in this country predate independence.\textsuperscript{88} The American colonists associated attorneys with the oppressive government of Great Britain and therefore viewed lawyers with distrust.\textsuperscript{89} In federal courts, parties to a lawsuit have had the ability to proceed \textit{pro se} since President Washington signed the Judiciary Act of 1789 into law.\textsuperscript{90} Prior to the Supreme Court’s decision in 1975 constitutionalizing the right to self-representation, criminal defendants in state courts desiring to proceed \textit{pro se} had to look to state law.\textsuperscript{91} Before 1975, the constitutions of 36 states

\textsuperscript{85} 	extit{Martinez}, 528 U.S. at 163; \textit{supra} n. 7.
\textsuperscript{86} \textit{Indiana v. Edwards}, 554 U.S. 164 (2008) (permitting states to create different competency standards for standing trial and proceeding \textit{pro se}). Previously these standards were required to be tantamount.
\textsuperscript{87} Williams, \textit{supra} n. 83 at 798.
\textsuperscript{89} \textit{Id}. at 921. (“The right to self-representation was firmly entrenched in the colonies in large part because lawyers were viewed with distrust and associated with the British Crown.”)
\textsuperscript{90} \textit{Supra} n. 82. The ability to proceed \textit{pro se} therefore has a longer history than the Sixth Amendment’s right to counsel. \textit{Faretta}, 422 U.S. at 812-813.
\textsuperscript{91} Williams, \textit{supra} n. 83 at 796.
granted a criminal defendant the right to represent himself or herself at trial.\textsuperscript{92} Even more states give criminal defendants the ability to conduct their own defense via case law and statute.\textsuperscript{93} In 1942, the Supreme Court held that the Constitution does not require a federal criminal defendant to retain the services of an attorney against his or her will.\textsuperscript{94} Importantly, the Court did not rule that states can be prohibited from preventing a criminal defendant to proceed \textit{pro se}.\textsuperscript{95}

\textbf{B. The Constitutional Right to Self-Representation}

The seminal case in the Supreme Court's jurisprudence regarding self-representation is \textit{Faretta v. California}, decided in 1975.\textsuperscript{96} For the first time, the Court announced that self-representation was a personal right with a constitutional foundation in the Sixth Amendment.\textsuperscript{97} The language of the Sixth Amendment does not directly confer the right to proceed \textit{pro se}, but the Court held it was necessarily

\textsuperscript{92} \textit{Faretta}, 422 U.S. at 813. For example, see C.R.S.A. Const. Art. 2, § 16 (granting criminal defendants in Colorado "the right to appear and defend in person and by counsel") and West's F.S.A. Const. Art. 1 § 16 (stating that criminal defendants in Florida can "be heard in person, by counsel or both.").

\textsuperscript{93} Williams, supra n. 82 at 795-796. ("[T]wo [states] protect the right through their case law, and one protects the right statutorily.").

\textsuperscript{94} \textit{Adams v. U.S. ex rel. McCann}, 317 U.S. 269, 277—280(1942) ("What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense . . . unless, against his will, he has a lawyer to advise him . . . is to imprison a man in his privileges and call it the Constitution.").

\textsuperscript{95} \textit{Faretta}, 422 U.S. at 814-815 ("The Adams case does not, of course, necessarily resolve the issue before us. It held only that 'the Constitution does not force a lawyer upon a defendant. Whether the Constitution forbids a State from forcing a lawyer upon a defendant is a different question.'").

\textsuperscript{96} Decker, supra n. 5 at 492-495.

\textsuperscript{97} Supra n. 81.
implied from the protections that are expressly given in the language of the amendment and by the amendment’s structure. By exercising the right to self-representation, the Court explained that a pro se defendant forfeits many of the benefits obtained by having a lawyer; therefore, the Court established the requirement that the waiver of counsel must be made “knowingly and intelligently.” To ensure that the waiver of counsel truly is made “knowingly and intelligently,” a trial judge must explain to the defendant the disadvantages he or she will experience as a consequence of the decision to proceed pro se. However, the Supreme Court made clear that a defendant’s legal ability or legal knowledge are not factors in the competency evaluation. The defendant in Faretta was “literate, competent, and understanding” and his decision was made voluntarily; thus the state could not deny him the ability to represent himself at trial.

Interestingly, the Court’s opinion, while acknowledging that defendants are better served when represented by a licensed attorney, failed to address the

98 Decker, supra n. 5 at 494 (“In support of its holding that a criminal defendant has the right to personally make a defense, the Court posited that although the Sixth Amendment does not expressly grant the right to self-representation, it is necessarily implied by the amendment’s structure. This implied right, the Court explained, is derived from the language of the Sixth Amendment....”) (internal quotation marks omitted).
100 Davis, 150 F.Supp.2d at 921. (“The Supreme Court . . . required that the trial court advise such a defendant of the perils of self-representation so that the record will show an intelligent and knowing waiver”)
101 Faretta, 422 U.S. at 835.
102 Id. at 835—836 (“The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the ‘ground rules’ of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.”)
ramifications this decision would have on the criminal justice system.\textsuperscript{103} The dissenting opinions harshly criticized this omission and predicted dire consequences for the integrity of trials where a defendant is permitted to exercise the right to self-representation.\textsuperscript{104}

C. Limitations on the Right to Self-Representation

Supreme Court jurisprudence has made clear that while self-representation is an important right with a constitutional foundation, it is not absolute.\textsuperscript{105} The primary limitations on a defendant's right to proceed \textit{pro se} are that he or she must make a valid waiver of counsel and that exercising the right will not unduly delay or disrupt the trial. While these limitations will affect some capital defendants who wish to represent themselves, they do not specifically address the problems posed by all \textit{pro se} capital defendants.

1. Competency to Waive Counsel

The baseline requirement for a judge to grant a defendant's request to serve as his or her own lawyer is that a waiver of counsel be made “knowingly and intelligently.”\textsuperscript{106} While the argument that a capital defendant desiring to waive counsel can never be made “intelligently” is logical on its face, such an argument

\textsuperscript{103} Id. at 834; Decker \textit{supra} n. 5 at 497—498 (the majority opinion contained no “discussion regarding the potential effects on the criminal justice system caused by recognizing a right to self-representation.”)

\textsuperscript{104} \textit{Faretta}, 422 U.S. at 852 (Contending that the questions unresolved by the majority will “haunt the trial of every defendant who elects to exercise his right to self-representation”) (Blackmun, J., dissenting).

\textsuperscript{105} \textit{Martinez}, 528 U.S. at 161.

\textsuperscript{106} \textit{Faretta}, 422 U.S. at 835.
would not carry much sway in court.\textsuperscript{107} Prior to 2008, the competency standard to waive counsel and proceed \emph{pro se} was tantamount to the competency required to stand trial.\textsuperscript{108} The competency necessary to stand trial is hardly exacting: it merely requires the ability to consult with attorneys and a rational understanding of the proceedings.\textsuperscript{109} Given the low standard, it is unsurprising that defendants inflicted with significant mental illnesses or plagued by other problems were found sufficiently competent to represent themselves.\textsuperscript{110}

In 2008 the Supreme Court decided that states could establish different competency levels for proceeding \emph{pro se} and standing trial.\textsuperscript{111} Recognizing that gauging competency on a barometer of the ability to consult with counsel makes little sense for a \emph{pro se} defendant, the Court held that setting a higher competency level for self-representation than standing trial does not violate the constitutional right to proceed \emph{pro se}.\textsuperscript{112} Rejecting the request of one of the parties, the Court declined to promulgate a specific standard that states could set as the minimal competency required for a defendant to conduct his or her own defense.\textsuperscript{113} While

\begin{itemize}
  \item \textsuperscript{107} This is because a defendant’s legal abilities are not a factor in the competency evaluation. \textit{Supra} n. 101.
  \item \textsuperscript{108} \textit{Godinez v. Moran}, 509 U.S. 389, 398 (1993) (”[W]e reject the notion that competency to plead guilty or to waive the right of counsel must be measured by a standard that is higher than (or even different from) the [competency standard to stand trial.”)
  \item \textsuperscript{109} \textit{Dusky v. U.S.}, 362 U.S. 402 (1960) (announcing the competency standard for a defendant to stand trial).
  \item \textsuperscript{110} \textit{Decker, supra} n. 5 at 517—524.
  \item \textsuperscript{111} \textit{Edwards}, 554 U.S. 164, 178 (”[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under \textit{Dusky} but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”)
  \item \textsuperscript{112} \textit{Id.} at 174-175 (”These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.”)
  \item \textsuperscript{113} \textit{Id.} at 178 (“Indiana has also asked us to adopt, as a measure of a defendant’s ability to conduct a trial, a more specific standard that would ‘deny a criminal defendant the right to represent himself at trial where the
the decision does allow setting a different competency standard, it only concerns defendants with mental health concerns; trial judges can still not take a defendant’s capabilities as an advocate, the complexity of the case, or the magnitude of the sentence into account.\textsuperscript{114} Though this decision is undoubtedly a step in the right direction, it does squarely address the special concerns of a self-represented capital defendant.\textsuperscript{115} It does however express a willingness on the part of the Supreme Court to allow trial court judges more discretion in evaluating a defendant’s competency to serve as his or her own attorney.

Limitations on the ability to proceed \textit{pro se} regarding mental competency only impact those who suffer from some sort of mental illness or ailment. Even the most intellectually developed of capital defendants will experience the same difficulties when engaged in self-representation. While a lack of mental competency will certainly aggravate the challenges a \textit{pro se} capital defendant will encounter, an absence of mental health problems will not in itself alleviate the obstacles in preparing a competent defense for a capital trial.

2. \textit{Other Limitations on Self-Representation}

Another significant limitation is that a judge can appoint standby counsel to assist a \textit{pro se} defendant in conducting the defense at trial even if the defendant cannot communicate coherently with the court or a jury. ‘We are sufficiently uncertain, however, as to how that particular standard would work in practice to refrain from endorsing it as a federal constitutional standard here. We need not now, and we do not, adopt it.’\textsuperscript{114} \textit{Supra} n. 99; \textit{supra} n. 108.

\textsuperscript{115} \textit{Edwards} only concerns defendants with mental health conditions that could impair their ability to represent themselves. \textit{Supra} n. 110.
objects to any participation by an attorney. The participation of standby counsel, when a pro se defendant objects to their role, cannot hinder the defendant's ability to have actual control of presenting the defense to the jury and cannot destroy the jury's perception that the defendant is engaged in self-representation. While the ability of courts to appoint standby counsel may seem to undercut the necessity of barring pro se capital defendants, this conclusion would misconstrue how courts have interpreted the parameters of standby counsel when the defendants wishes that they have no role in the proceedings. As one court explained, the defendant maintains near absolute control over the defense strategy. The same court held that labeling the type of minimal assistance standby counsel can provide to the unwilling pro se defendant as counsel is a misnomer. This is because standby counsel is much more akin to an observer providing feedback on the pro se

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116 McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel-even over the defendant's objection-to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.")
117 Id. at 178.
118 For a general discussion on the role of standby counsel appointed over the defendant's objection see Decker supra n. 5 at 530-533.
119 U.S. v. Taylor, 933 F.2d 307, 313 (5th Cir. 1991) ("Standby counsel is thus quite different from regular counsel. Standby counsel does not represent the defendant. The defendant represents himself, and may or may not seek or heed the advice of the attorney standing by. As such, the role of standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense") (internal quotation marks omitted) (emphasis original).
120 Id. at 313 ("Thus, as useful as standby counsel may be when a defendant wishes to represent himself, this Court holds that standby counsel is not "counsel" within the meaning of the Sixth Amendment.")
defendant’s performance than a bona fide attorney.\textsuperscript{121} Accordingly, in the context of capital defendants standby counsel would not increase the reliability of the trial.

Other important limitations placed on the right to self-representation concern the efficiency of the trial process.\textsuperscript{122} A defendant who behaves in an extraordinarily disruptive manner after warnings to cease such behavior may forfeit his or her right to be present in the courtroom at the court’s discretion.\textsuperscript{123} Additionally, defendants who fail to make a timely request to proceed \textit{pro se} may also be denied the ability to represent themselves at trial.\textsuperscript{124} Once the trial has begun, a defendant wishing to terminate counsel and proceed \textit{pro se} must demonstrate that the prejudice he or she will suffer outweighs the disruption that would be caused by granting the request to proceed \textit{pro se}.\textsuperscript{125} The limitations concerning the efficiency of the proceedings are particularly relevant in capital trials, which are typically considerably longer than their non-capital counterparts.\textsuperscript{126}

\textsuperscript{121} \textit{Supra} n. 108.
\textsuperscript{122} \textit{Infra} nn. 122-124.
\textsuperscript{123} \textit{Illinois v. Allen}, 397 U.S. 337, 343 (1970) ("[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.")
\textsuperscript{124} \textit{U.S. v. Dunlap}, 577 F.2d 867, 868 (1978) ("In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury. In light of this limitation on the right of self-representation . . . the courts held that whether the defendant could dismiss counsel and proceed pro se was within the sound discretion of the trial court.")
\textsuperscript{125} \textit{U.S. ex rel. Maldonado v. Denno}, 348 F.2d 12, 15 (2d Cir. 1965) (There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.")
\textsuperscript{126} The average capital trial is 3.5 longer than a non-capital trial with \textit{voir dire} in a capital trial alone typically taking 5.3 times longer than in a non-capital case. Robert L. Spangenberg & Elizabeth R. Walsh, \textit{Capital Punishment or Life Imprisonment—Some Cost Considerations}, 23 Loy. L.A. L. Rev. 45, 52—53 (1989).
Overall, the limitations discussed above do not adequately address the problems of a self-represented capital defendant. A defendant charged with a capital crime who makes a timely request to proceed pro se and behaves appropriately in the courtroom will not be denied the ability to conduct his or her defense. At most, a trial judge can appoint standby counsel, but such counsel is limited to minimal participation when the defendant does not wish that they have any role.

D. Curtailing Self-Representation to Preserve Integrity

The most basic tenant of our justice system is that criminal defendants must be afforded fair trials. 127 Therefore, it is unsurprising that the justice system’s interest in ensuring the integrity of a criminal trial can outweigh a defendant’s interest in proceeding pro se. 128 Moreover, courts have a substantial interest in conducting trials in a manner that appears fair to observers. 129 As described above, pro se capital defendants face a bevy of obstacles that substantially impair, if not wholly prevent, the preparation of a sound defense strategy. 130 A system that allows capital defendants to proceed as their own attorneys so long as they meet a low level of mental competence unacceptably risks a criminal trial devolving into little more

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127 Sell v. U.S., 539 U.S. 166, 180 (2003) ("[T]he Government has a . . . constitutionally essential interest in assuring that the defendant's trial is a fair one.")

128 Martinez, 528 U.S. at 162. See supra n. 6. ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.")

129 Wheat v. U.S., 486 U.S. 153, 160 (1988) ("Courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all observe them.")

130 See supra pp. 2—10.
than a circus. A trial is an adversarial proceeding, and a pro se capital defendant faces the awesome powers and resources available to prosecutors. Comparing the matchup between an experienced prosecutor and a self-represented defendant to the biblical tale of David versus Goliath may actually overstate the qualifications of the competing parties in an adversarial capital trial. Such a glaring disparity in abilities may be acceptable when warring nations wage battle, but the jurisprudence of the Supreme Court makes pellucidly clear that capital trials are to yield reliable results. If the primary mission of courts is providing defendants with a fair trial, then allowing a capital defendant to proceed pro se is anathema to the paramount goal of our justice system. Furthermore, if a capital trial is to appear fair to observers, a prohibition of a pro se capital defendant is a logical curtailment of an otherwise little qualified constitutional right.

V. The Effects of Proscribing a Pro Se Capital Defendant

It is difficult to understand why criminal defendants would choose to proceed pro se rather than be represented by appointed counsel to which they are

131 Williams, supra n. 83 at 791-792 (describing one self-represented defendant’s trial as “a sham, a circus, and a charade.” The defendant’s standby counsel described “Instead of a trial about mental illness, we’re having a trial that is an exercise in mental illness.”
133 Mary Fairchild, David and Goliath-Bible Story Summary, http://christianity.about.com/od/biblestorysummaries/p/davidandgoliath.htm (accessed Nov. 18, 2011) (recounting the story of an undersized David challenging the Philistine giant Goliath to a fight). Though David of course emerges victorious, the relevant consideration for the purposes of this article is the odds going into the battle and the perception of observers thereof. While there is certainly the possibility of a pro se capital defendant “defeating” prosecutors, it is the risk involved that warrants barring this matchup.
135 Supra n. 121.
constitutionally guaranteed. \(^{136}\) Intuitively, one reason is to maximize the autonomy of conducting a proceeding where a defendant has an enormous personal stake. Though it is certainly true that a client represented by a counsel has a lesser role in his or her defense, a criminal defendant is entitled to make several important decisions before and during a trial as well as be consulted regarding strategic decisions made during trial.\(^{137}\) Accordingly, capital defendants who desire to proceed *pro se* but are barred from doing so would still play an important role in their defense.

Though not binding, the American Bar Association’s Model Rules of Professional Conduct (hereinafter “Model Rules”) are reflective of the rules governing the legal profession adopted by each state.\(^{138}\) The Model Rules allocate ultimate decision-making authority to a criminal defendant regarding the objectives of the representation.\(^{139}\) The Model Rules state that lawyers must abide by a criminal defendant’s decision regarding a plea to be entered, waiving a jury trial, and whether the defendant will testify.\(^{140}\) Aside from these specified decisions, the Model Rules also require that an attorney consult with the defendant regarding the

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\(^{136}\) *Gideon v. Wainwright*, 372 U.S. 335 (1963) (stating that the Sixth Amendment’s guarantee of counsel to a criminal defendant is applicable to state courts). For a discussion of the reasoning behind proceeding *pro se*, see Decker, *supra* n. 5 at 485—486.

\(^{137}\) *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case.”)


\(^{139}\) MRPC Rule 1.2 (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation.”)

\(^{140}\) Id. (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”)
proposed means of accomplishing the objectives of the representation.\textsuperscript{141} One of the factors in determining when an attorney must discuss the means of achieving an objective prior to undertaking action is the importance of the decision; thus, defendants are entitled to a greater degree of consultation when an important choice is to be made.\textsuperscript{142} No matter the magnitude of the decision, criminal defense lawyers are ethically required to keep defendants reasonably informed of the proceedings.\textsuperscript{143}

If this article’s proposed solution is recognized, capital defendants desiring to proceed \textit{pro se} would be forced to accept the services of an attorney. Yet, they would not be left powerless in regards to the decisions that will impact how an attorney pursues their interests. While inarguably not providing the same degree of autonomy as is available under self-representation, the protections given to represented clients by the Model Rules and relevant jurisprudence do require attorneys to allow criminal defendants to have a voice in the decision-making process.\textsuperscript{144} Therefore, capital defendants who would be denied the opportunity to proceed \textit{pro se} under the idea proposed by this article would still have the ability to impact their defense.

\textbf{VI. Conclusion}

\textsuperscript{141} Id. (stating that an attorney must “consult with the client as to the means by which [the objectives] are to be pursued.”) For example, if the objective of the representation is achieving a not guilty verdict, the attorney must consult with the defendant about how that objective will be obtained.
\textsuperscript{142} Id.; MRPC Rule 1.4 comment 3 (“In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action.”)
\textsuperscript{143} MRPC Rule 1.4.
\textsuperscript{144} Supra nn. 138—142.
In recognizing the right to self-representation, the Supreme Court constitutionalized the ability for a criminal defendant to make a fool of himself.\textsuperscript{145} While the criminal justice system may allow this foolishness in non-capital trials, a trial where the potential penalty is execution demands a system that yields reliable results.\textsuperscript{146} Enhanced procedures and protections for a capital trial have been recognized under the doctrine of “heightened reliability,” and a prohibition of a \textit{pro se} capital defendant should be added to the list of unique characteristics seeking to ensure the integrity of a capital trial. A self-represented capital defendant, facing professional prosecutors, is hampered by numerous obstacles rendering the preparation of a competent defense strategy nearly impossible.\textsuperscript{147} The difficulty in advocating on behalf of a capital defendant is the precise reason why states and the American Bar Association have adopted specific minimum qualifications for capital defense attorneys.\textsuperscript{148}

Fortunately, self-representation is not an absolute right.\textsuperscript{149} The existing limitations regarding a defendant's ability to proceed \textit{pro se} do not specifically address the problems presented by the self-represented capital defendant.\textsuperscript{150} Because the primary purpose of the justice system is providing defendants with fair trials, the right to self-representation must be curtailed when necessary to ensure

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\footnotetext[145]{\textit{Faretta}, 422 U.S. at 852 (Blackmun, J., dissenting) (“If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.”)}
\footnotetext[146]{\textit{Supra} pp. 14—15.}
\footnotetext[147]{\textit{Supra} pp. 2—8.}
\footnotetext[148]{\textit{Supra} pp. 8—10.}
\footnotetext[149]{\textit{Martinez}, 528 U.S. at 161.}
\footnotetext[150]{\textit{Supra} pp. 23—25.}
\end{footnotesize}
the integrity of proceedings.\textsuperscript{151} Even when defendants are not permitted to proceed 
pro se, they are still ensured an important role in their defense.\textsuperscript{152}

As a whole, “heightened reliability” demands and existing Supreme Court jurisprudence allows a per se rule that capital defendants be prohibited from representing themselves as trial. Adopting this limitation to the right of self-representation will further increase the reliability of capital trials and help to ensure the integrity of our criminal justice system.

\textsuperscript{151} Id.
\textsuperscript{152} Supra pp. 30—32.