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Why Fools Choose to be Fools: A Look at What Compels Indigent Criminal Defendants to Choose Self-Representation

Mark C. Milton
markcmilton@gmail.com

WHY FOOLS CHOOSE TO BE FOOLS: A LOOK AT WHAT COMPELS INDIGENT CRIMINAL DEFENDANTS TO CHOOSE SELF-REPRESENTATION

"You don't have a name. You don't have a face. You're just another case."[1]

INTRODUCTION

This past summer, codefendants Tyrone Jackson and his girlfriend Madlon Ladd faced a five-count federal felony drug indictment.[2] Both were charged for possession with intent to distribute crack cocaine.[3] Both were deemed indigent,[4] lacking the resources to procure private attorneys, and thus entitled to counsel paid for by the government.[5] Ms. Ladd went to trial with a court-appointed attorney. Mr. Jackson, however, informed the trial court judge that he wished to waive his right to counsel and represent himself, citing dissatisfaction with his assigned federal public defender.[6] After acknowledging that Mr. Jackson had made his waiver of counsel both knowingly and voluntarily, the judge allowed Mr. Jackson to represent himself.[7] After just over four days of trial, a jury found both defendants guilty.

1. Interview with Tyrone Jackson, Pro Se Defendant, in Belleville, Ill. (January 9, 2009) (recording on file with the author).

2. Superseding Indictment, United States v. Jackson, No. 08-30003-WDS-DGW (S.D.Ill., July 8, 2008).

3. *Id.*

4. *See* Criminal Justice Act, 18 U.S.C. § 3006A(a) (2006) (defining indigency as being "financially unable to obtain an adequate representation"); s*ee also* IND. CODE ANN. § 35-33-7-6 (1998); KAN. STAT. ANN. § 22-4504 (2007); COLO. R. CRIM. P. 44(a); ALAB. CODE. § 15-12-1(1) (2007) (defining indigent as "financially unable to pay for his or her defense"); PA. R. CRIM. P. 122(A)(1) (2005) (discussing legal representation for "defendants who are without financial resources or otherwise unable to employ counsel").

5. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (providing that a poor criminal defendant may have counsel provided by the state).

6. Interview with Jackson, *supra* note 1.

7. Minutes of Hearing Regarding Status of Counsel, United States v. Jackson, No. 08-CR-30003-WDS (S.D.Ill., June 6, 2008) ("[The] Court advises the defendant that it would be in his best interest to proceed to trial with an attorney and strongly advises the defendant not to proceed to trial without counsel."). Judge Stiehl, the district court judge, also appointed Rodney Holmes as standby counsel for Mr. Jackson for the remainder of the proceedings. Minutes of Final Pretrial Conference, United States v. Jackson, No. 08-CR-30003-WDS (S.D. Ill., June 18, 2008).

There was never a sense that the trial was unfair or even that Mr. Jackson did an inadequate job of representing himself.[8] To the contrary, his knowledge of the law, courtroom demeanor, and charismatic personality were all quite remarkable. The evidence against him, however, was overwhelming. He likely would have been convicted even with the assistance of counsel. That being said, the intriguing question remains: what compelled Mr. Jackson to proceed without the assistance of counsel? Did he believe he could do a better job of presenting his case to a jury than a trained lawyer appointed by the court? Or simply, did his distrust and disdain for the criminal justice system cause him to refuse assistance from a social institution he perceived as unfair? If so, does the court have an obligation to step in and dispel misunderstandings that underlie the decisions of indigent criminal defendants, like Mr. Jackson, to go pro se? This Comment seeks to gain an understanding of the incentives and misconceptions that induce indigent criminal defendants like Mr. Jackson to forgo their constitutional right to counsel at trial.[9]

It has long been said that one who is his own lawyer has a fool for a client.[10] Still, prosecutors and judges have recently experienced an influx of indigent criminal defendants choosing pro se representation. In response, some in the legal community have harshly criticized this trend.[11] This Comment contends that unless the legal profession changes its approach to providing indigent defense counsel and designs more effective ways to handle waiver-of-counsel inquiries, courts may find an even greater number of pro se indigent defendants flooding their dockets.

Most commentators who are troubled by the inclination of indigent defendants to choose self-representation base their criticisms on unsubstantiated assumptions, suggesting that these defendants do an

8. This is based on the author's experience in the district court for the Southern District of Illinois during Mr. Jackson's trial.

9. It is important to note that this Comment usually refers to "indigent criminal defendants" as a single population. While this classification may suffer the same weaknesses of most generalizations, it does not undermine the goal of this Comment, which is to gain an understanding of what contributes to the decision for *many* indigent defendants to choose self-representation.

10. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 438 (2007).

11. In the 2006 State of the Ohio Judiciary address, Chief Justice Moyer of the Ohio Supreme Court expressed his irritation with the growing number of criminal defendants choosing to represent themselves. Editorial, *Eliminating the Pro Se Litigant*, N. COUNTRY GAZETTE, Sept. 23, 2006, http://www.northcountrygazette.org/articles/092306ProSeLitigants.html; *see also* 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, 489 (1996) (arguing that self-representation "undermines the integrity and efficiency of the criminal justice system").

inadequate job of representing themselves.[12] To the contrary, one empirical study has shown that pro se felony defendants achieve acquittals at rates equivalent or higher than those defendants with attorneys.[13] In addition, nearly 80% of those individuals surveyed did not show any visible signs of mental illness,[14] dispelling the notion that anyone who chooses to waive counsel is somehow chemically imbalanced. Despite the statistical support demonstrating that some indigent defendants are better off (or at least not worse off) by going pro se, the legal profession should nevertheless strive to dispel any misconceptions among defendants that proceeding to trial without licensed counsel is advantageous.

For indigent defendants, perception may not always equate with reality. Yet the concerns of these defendants are not beyond our understanding. This Comment maintains that most indigent defendants make the decision as a last resort to escape their feelings of helplessness. Those quick to criticize the decision to go pro se are likely unwilling to recognize or address the root of such a decision. Rather than condemning pro se representation, or calling for the overturn of the Supreme Court's finding of the right to self-representation,[15] this Comment examines what compels indigent criminal defendants to choose pro se representation in the first place. Deficiencies in the criminal justice system, both real and perceived, foster the desire and understandable *necessity* for many indigent criminal defendants to represent themselves. As such, this Comment questions whether our current system fulfills its constitutional obligation to provide indigent criminal defendants with proper representation in the event they accept court-appointed counsel.[16] From there, this Comment will make recommendations for how the legal profession can diminish the likelihood that indigent criminal defendants will choose pro se representation.

To accomplish these ends, this Comment is broken into four segments. Part I details the historical development of the right to proceed pro se, beginning with an examination of the right to counsel, and continuing with a discussion of the Supreme Court's recognition of the constitutional guarantee of the right to self-representation. Part II examines the current state of the

12. Hashimoto, *supra* note 10, at 438.

13. *Id.* at 423.

14. *Id.*

15. Former Solicitor General, Kenneth Starr, unsuccessfully petitioned the Supreme Court to overturn *Faretta*, which conferred upon criminal defendants the right to self-representation. *See* United States v. Egwaoje, 335 F.3d 579 (7th Cir. 2003), *petition for cert. filed*, 2003 WL 22697568 (U.S. Nov. 6, 2003) (No. 03-691); Egwaoje v. United States, 541 U.S. 958 (2004) (denying cert.).

16. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

indigent defense system,[17] showing how its shortcomings seemingly validate the decision by many indigent defendants to proceed pro se. Part III addresses the psychological or sociological factors that may compel indigent defendants, like Tyrone Jackson, to refuse the assistance of counsel in favor of self-representation. In accordance with the belief that pro se representation is not the preferred course of action for indigent criminal defendants, Part IV will recommend some normative policies designed to encourage indigent criminal defendants to accept the assistance of counsel rather than choosing self-representation.

I. THE RIGHT TO COUNSEL VS. THE RIGHT TO SELF-REPRESENTATION

This section examines two important constitutional rights that arise from the Supreme Court's interpretation of the Sixth Amendment: (1) the indigent defendant's right to counsel and (2) the right to self-representation.[18] In *Gideon v. Wainwright*,[19] the Court granted indigent defendants the right to counsel in all serious criminal matters,[20] while in *Faretta v. California*,[21] the Court held that a defendant could waive that right and choose self-representation.[22] Although *Gideon* envisioned something akin to representation for all, its implementation has done very little to bolster indigent defendants' confidence in those attorneys assigned to their defense.[23] As a result, some indigent defendants choose to waive the right to counsel and exercise the right of self-representation. Since *Faretta*'s conferral of the right to self-representation, the careless administration of waiver-of-counsel inquiries by trial courts has further facilitated the propensity of indigent defendants to exercise their constitutionally protected right to self-representation.

A. The Right to Counsel for Indigent Defendants

Without the *Gideon* Court finding that the government has a constitutional obligation to provide the assistance of counsel to indigent defendants in criminal proceedings, discussion of whether such defendants should be

17. "Indigent defense system" encompasses both federal and state public defender offices and court-appointed attorneys utilized by many courts. *See, e.g.*, ALAB. CODE. § 15-12-1(5) (describing indigent defense system as a "method or mixture of methods for providing legal representation to an indigent defendant, including use of appointed counsel, use of contract counsel, use of public defenders, or any other alternative method meeting constitutional requirements").

18. *See* U.S. CONST. amend. VI.

19. 372 U.S. at 335.

20. *Id.* at 335.

21. 422 U.S. 806 (1975).

22. *Id.* at 807.

23. *See* David A. Simon, Comment, *Equal Before the Law: Toward a Restoration of* Gideon*'s Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 582 (2008).

allowed to proceed with pro se representation would be moot. Many would simply have no choice but to represent themselves.

That was the predicament facing Clarence Earl Gideon. Charged with a felony and lacking the financial means to procure a lawyer, Clarence Gideon was forced to conduct his own defense.[24] After providing the best defense that "could be expected from a layman,"[25] a jury convicted Mr. Gideon and sentenced him to five years in prison.[26] In a handwritten letter to the Justices of the Supreme Court, Mr. Gideon pleaded for help.[27] Analogizing the note to a writ of certiorari, the Court decided to hear his case.[28] The Court ultimately held that the Constitution guarantees indigent defendants the right to counsel when facing serious criminal charges, and such counsel must be paid for by the state.[29] Since then, however, states have struggled with the financial burden of providing such representation.[30]

1. If They Have No Say, Why Not Go Pro Se?

The right to counsel does not confer upon indigent criminal defendants any right to the counsel of their choice.[31] Further, the lack of sufficient safeguards to protect such defendants from ineffective indigent defense counsel and the inability to style a mode of defense to their liking also contributes to the unwillingness to acquiesce to indigent defense counsel.[32] It is this general lack of *choice* which forces the hand of many indigent defendants to choose self-representation when permitted to do so by trial courts.

a. Lack of Choice Breeds Contempt: The System's Disdain for Indigent Defendants

In most cases, indigent criminal defendants do not choose their lawyers.[33] Lacking financial means to procure a private attorney, some defendants may be

24. *Id.* at 581.

25. *Gideon*, 372 U.S. at 337.

26. Simon, *supra* note 23, at 581.

27. *Id.*

28. *Id.*

29. *Gideon*, 372 U.S. at 335. *Gideon* extended the right to counsel by including indigent defendants in all cases, both federal and state. The Court had previously established that indigent defendants have the right to the assistance of counsel in federal court cases. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

30. *See infra* Part II.

31. Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 199 (1998); *see also* Wheat v. United States, 486 U.S. 153, 159 (1988) ("[A] defendant may not insist on representation by an attorney he cannot afford.").

32. "Indigent defense counsel" refers to both public defenders and private court-appointed attorneys.

33. *See* Holly, *supra* note 31, at 199.

fortunate enough to have a lawyer in the family or an acquaintance who is willing to provide legal assistance. Perhaps in a widely publicized case, they may garner the attention of an attorney who offers to take the case pro bono. Yet these are options available to few indigent defendants, and in some instances, the "family friends" and/or "pro-bono" lawyers referenced above may lack the experience to handle serious criminal cases, potentially leaving the defendant worse off. Most indigent defendants, therefore, are forced to settle for the attorney appointed by the court or assigned by a local public defender office. [34] Based on that spin of the roulette wheel, indigent criminal defendants are stuck with attorneys whom they did not choose and, in many cases, do not trust.

Nonindigent defendants choose lawyers with whom they hope they can develop trust, and without that trust, "the relationship is indeed meaningless."[35] Such trust helps facilitate the notion that the attorney is advocating on behalf of his client.[36] Much of the rationale underlying the idea that nonindigent defendants should be allowed to retain the counsel of their choice encompasses constitutional ideals that should carry over to indigent defendants as well.[37] Those include maintaining an adversarial system to ensure fairness in criminal prosecutions, the right to free choice, and the preservation of individual freedom.[38] Yet for indigent criminal defendants, the power of selecting their attorneys is vested in the sole discretion of the trial court or a local state or federal public defenders' office.[39]

The choice is made without any regard for the defendant's preferences, and courts make it extremely difficult for indigent defendants to replace attorneys with whom they find no comfort. While making the decision to disregard a defendant's preferences when appointing counsel or in deferring to a public defender's office may provide judicial economy, it fails to instill the indigent defendant with any faith in counsel. But in support of deferring to the trial court's determination of appointed counsel, some argue that judges are better able to make the choice because they "know the abilities of the available local

34. *See* Criminal Justice Act, 18 U.S.C. § 3006A (2006).

35. Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525, 527 (2007); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt.2 (2009) [hereinafter MRPC] (highlighting that "trust 'is the hallmark of the client-lawyer relationship'").

36. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 645 (1989) (Blackmun, J., dissenting) ("[T]rust between attorney and client . . . is necessary for the attorney to be a truly effective advocate."); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) ("[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney.").

37. Holly, *supra* note 31, at 200.

38. *Id.*

39. *See* 18 U.S.C. § 3006A.

counsel,"[40] and allowing defendants the choice will "disrupt the 'even handed distribution of assignments.'"[41] Allowing defendants to choose counsel might also enable repeat offenders to monopolize the best lawyers.[42] Still, none of these justifications erase reservations in the minds of many indigent defendants regarding the level of protection their appointed counsel will provide.

Maybe it is a product of our country's capitalist foundation, but people like having choices, and we tend to react negatively when told we *must* do something, or that we are stuck with a particular outcome. Human nature compels us look for a way out of such situations, especially when our backs are to the wall. Many indigent criminal defendants, already skeptical of a system they perceive as unfair, are particularly concerned about being stuck with an attorney assigned by a system they feel is designed to throw them in prison.[43] For the indigent, the lines blur between the four arms of the criminal justice system: (1) the judge, (2) the prosecutor, (3) the defense attorney, and (4) the jury.[44] So when a judge tells them that they must accept "lawyer X" as their attorney, suspicion arises. Thus, the legal profession must determine how to foster faith in the system.

b. Difficulty in Substituting Counsel

In addition to lacking the initial choice of counsel, it is also extremely difficult for indigent defendants to replace counsel once it has been assigned. The defendant may obtain substitute counsel *only* upon a showing of "good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict."[45] Courts have concluded that even a good-faith lack of confidence by a defendant in his attorney does not establish sufficient "good cause" to allow for replacement of counsel.[46] More often than not, courts refuse additional substitutes, leaving many indigent defendants with a choice between the lesser of two perceived evils: accepting indigent defense counsel or going pro se.[47]

40. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.4(a), at 550 (1999) (quoting Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 79 (1974)).

41. *Id*. (quoting United States v. Davis, 604 F.2d 474 (7th Cir. 1979)).

42. *Id.* at 551.

43. *See* Interview with Jackson, *supra* note 1.

44. *See infra* Part III.

45. 3 LAFAVE ET AL., *supra* note 40, at 555 (quoting McKee v. Harris, 649 F.2d 927 (2d Cir. 1981)).

46. *Id.* at 555.

47. Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1216 (2006) ("[T]he courts should be more receptive when an indigent defendant who is not satisfied with the representation by assigned counsel moves to substitute counsel.").

Probably the greatest impediment to success on a motion to substitute counsel is that blame for any friction in the current attorney–client relationship is automatically attributed to the indigent defendant.[48] The boy who cries wolf (in the form of an indigent defendant who chronically demands different lawyers) diminishes the likelihood that an indigent defendant's legitimate concerns about his attorney's ability to represent him will be properly addressed.[49] In many instances, "Defendants not only are given bad lawyers, they are tethered to them because defendant have no right to replace even the most incompetent and unsympathetic lawyer."[50] It is that tetherball cord that indigent defendants snap when they elect to go pro se, hoping that somehow self-representation enables them to present a more compelling case to a jury.

c. No Right to Meaningful Representation

It is not unreasonable for indigent defendants to believe that the system does not care about them. In fact, Chief Justice Burger stated in *Morris v. Slappy*,[51] that the Supreme Court "reject[s] the claim that the Sixth Amendment guarantees a '*meaningful relationship*' between an accused and his counsel."[52] How can an indigent defendant ever develop trust with someone with whom they are guaranteed no meaningful relationship? The Court's language does little to foster confidence in indigent defense counsel. For most indigent defendants, the right to counsel of choice is already "a right that is nonexistent" for them.[53] *Slappy* goes further and refuses an indigent defendant's right to retain counsel that they may have developed a positive rapport with during a prior case.[54] Allowing indigent defendants to keep an attorney that they trust would potentially dissuade some of them from electing pro se representation. Regardless of the inherent difficulties in implementing such a scheme, courts should try to furnish attorneys for indigent defendants with whom they have a positive preexisting relationship.[55]

48. *See, e.g.*, Douglas v. Warden, 591 A.2d 399, 405 (1991) ("Our courts are not, however, constitutionally required to comply with a demand for the appointment of a replacement counsel on the basis of a purported conflict that arises from the unreasonable conduct of the accused himself.").

49. *Id.* at 406.

50. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 253–54 (2006).

51. 461 U.S. 13 (1983).

52. *Id.* at 14 (emphasis added); *see also* Hoeffel, *supra* note 35, at 539 ("Chief Justice Burger . . . scoffed at the notion that the Sixth Amendment contains a right to a meaningful attorney-client relationship.").

53. Hoeffel, *supra* note 35, at 526.

54. *Slappy*, 461 U.S. at 12–13.

55. *See* Hoeffel, *supra* note 35, at 549 ("[G]iven the importance of trust, autonomy, and fairness to the right to counsel of choice, the court should appoint the same attorney to represent an indigent defendant in his subsequent cases, if the defendant so chooses.").

The more recent decision in *Gonzalez–Lopez*[56] may indicate the Court's willingness to allow for a more meaningful relationship between indigent defendants and their attorneys. Justice Scalia suggested in his opinion, that for a trial to be truly fair, the accused should "be defended by the counsel he believes to be the best."[57] While the "trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar" precludes the Court from allowing the right to counsel of choice for indigent defendants,[58] Professor Janet Hoeffel sees hope in Scalia's opinion.[59] She feels that by disaggregating the right to counsel of choice from the "mere effective assistance of counsel, Justice Scalia gives the issue new life,"[60] possibly allowing greater expansion into the indigent's ability to choose counsel.[61]

d. Lack of Control Over Decision-Making

Not only are indigent defendants left with an attorney they did not choose, they also have little control over the decision-making responsibilities regarding how their case should be handled. Courts have traditionally found that defense counsel controls the tactical and strategic decision-making in a case.[62] Distrust for counsel is thus only compounded when a defendant is unable to put forth the sort of defense he or she prefers. From there, the option of pro se representation may be seen as the only viable way of presenting a defense that adheres to the desires of the indigent defendant, particularly given the unwillingness of courts to allow indigent defendants to substitute counsel with whom they disagree.[63]

Lawyers have an obligation to consult with their clients in order to investigate possible defenses and to keep their client informed regarding developments of a pending case.[64] Disagreements between a lawyer and a

56. 548 U.S. 140 (2006).

57. *Id.* at 146.

58. *Id*. at 152.

59. Hoeffel, *supra* note 35, at 548.

60. *Id.*

61. *See infra* Part IV.

62. Poulin, *supra* note 47, at 1239; *see also* Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). In discussing the authority of defense counsel, Justice Burger stated:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter be made *without consulting the client.*

Id. (emphasis added).

63. *See* Poulin, *supra* note 47, at 1236 ("Only by electing to proceed pro se can the defendant assert control over the myriad tactical and strategic decisions that must be made in the course of any criminal case.").

64. *See* MRPC, *supra* note 35, at R. 1.4(a)–(b).

client, however, are more prone to arise when a defendant distrusts his or her lawyer.[65] Many choosing self-representation find the "sharing of authority with lawyers as intolerable."[66] Thus, when an indigent defendant chooses to proceed pro se, "the problem of conflict between lawyer and client disappears."[67]

2. Weak Protection from Ineffective Counsel

Indigent defendants who choose to waive their right to counsel and proceed with pro se representation also forego the opportunity to appeal their convictions on grounds of ineffectiveness of counsel.[68] At first glance, this could be seen as relinquishing a substantial right, and makes the decision to go pro se seem even more foolish since courts are supposed to protect indigent defendants from ineffective counsel. Yet the legal standards defining "effective counsel" are satisfied by "the most minimal competence" from attorneys.[69] Incidents of what seem like grossly improper conduct have been held to meet the standard of effective counsel by courts. Not only may "overworked and incompetent" attorneys from a public defender's office lead to "wrongful convictions,"[70] but judges have sometimes condoned the conduct of private court-appointed lawyers who were unaware of applicable governing law and even those who have been intoxicated and/or asleep during trial.[71]

In *Strickland*, the Supreme Court established a two-pronged test for determining the effectiveness of the assistance of counsel in criminal proceedings.[72] Under this "cramped definition" of effective counsel,[73] a criminal defendant must not only prove that counsel was deficient in his performance, but that the deficiency was a "but-for" cause of the outcome of the proceedings, i.e., a guilty verdict.[74] Such a standard has been difficult for

65. Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 44–45 (2004).

66. *Id.* at 45.

67. *Id.* at 44.

68. Sarah Livingston Allen, Note, Faretta*: Self-Representation, or Legal-Misrepresentation*, 90 IOWA L. REV. 1553, 1564 (2005) (stating that pro se defendants may not appeal their convictions "based on the quality of the defense that they provide for themselves"); *see also* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

69. Hoeffel, *supra* note 35, at 526.

70. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006).

71. Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 785–86 (1997).

72. Strickland v. Washington, 466 U.S. 668, 700 (1984).

73. Hoeffel, *supra* note 35, at 526.

74. *Strickland*, 466 U.S. at 687.

indigent defendants to overcome when appealing convictions on ineffectiveness of counsel grounds,[75] particularly since it fails to address the financial shortcomings that inevitably lead to ineffective counsel.[76] Moreover, the cavalier manner with which appellate courts have dismissed ineffective counsel appeals is troubling. For instance, in more than 100 cases, the Sixth Circuit rejected such challenges by "issuing single-sentence orders that lacked explanation."[77] Additionally, other appellate courts have gone out of their way to rationalize the reprehensible conduct of counsel.[78]

Roberto Miranda found out the hard way that courts often provide very little protection from ineffective counsel.[79] Mr. Miranda was charged with several felonies, including first-degree murder, robbery with a deadly weapon, and larceny.[80] His court-appointed public defender only recently had graduated from law school and had never handled a murder trial.[81] On trial for his life, Mr. Miranda's attorney failed to serve a subpoena on any of the forty people his client claimed could provide him with an alibi.[82] Failure to investigate such a lynchpin matter ultimately contributed to Mr. Miranda's conviction and subsequent death sentence.[83] Such stories leave little assurance to defendants concerned about the quality of representation they will receive from indigent defense counsel. It is reasonable to expect that some indigent defendants would feel uncomfortable with counsel they do not choose and have difficulty replacing.

75. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1 (2004).

76. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732 (2005). The approach established in *Strickland* concerns only the end result rather than taking into account the detrimental effect on the quality of representation, which can result from an under funded and over worked public defender. *Id.*

77. Fredric N. Tulsky, *The High Cost of a Bad Defense*, THE SAN JOSE MERCURY-NEWS, Jan. 24, 2006, at A1.

78. *See id.* In one case, the court "suggested that an alcoholic lawyer's repeated absences and tardiness during trial may have been a knowing tactic to permit him time to sober up before the jury saw him." *Id.*

79. *See* Miranda v. Clark County, 279 F.3d 1102 (9th Cir. 2002).

80. *Id.* at 1105; *see also* Backus & Marcus, *supra* note 70, at 1034.

81. *Miranda*, 279 F.3d at 1105.

82. *Id.*

83. *Id.* Mr. Miranda's conviction was ultimately overturned, and he received a settlement from Clark County for $5 million in a lawsuit alleging a failure to provide adequate representation. Carri Greer Thevenot, *Settlement Ends Ex-Inmate's Saga*, LAS VEGAS REV. J., June 30, 2004, at 1A.

B. Constitutional Right to Proceed Pro Se

Even with the constitutional right to counsel in serious criminal matters, indigent defendants who complain about their treatment may be greeted by the old adage, "beggars can't be choosers." Rather than be perceived as a beggar, perpetually dissatisfied with assistance provided by the government, some indigent defendants understandably choose to waive the right to such counsel and proceed pro se.

Prior to 1976, there had never been reason for the Court to consider the issue of whether an indigent defendant could waive the constitutional right of counsel established in *Gideon* and choose self-representation.[84] Then, Anthony Faretta, an indigent man who refused to settle for court-appointed defense counsel whom he deemed unfit to represent his interests,[85] posed the then-novel question: Did *Gideon* mean that indigent defendants are required to accept court-appointed counsel for their defense?[86] The Supreme Court said no.[87] Since then, however, courts have struggled with how to administer waiver of counsel inquiries in a way that ensures indigent defendants enter pro se representation with their "eyes open."[88]

1. The Supreme Court Grants the Right of Self-Representation

In *Faretta*, the Supreme Court decided the issue of whether a state may force a lawyer onto a criminal defendant who desires to represent himself.[89] The Court found it unconstitutional to do so, and that free choice in the form of self-representation should prevail.[90] The Court found that such a right was implied by the Sixth Amendment,[91] relying on the language suggesting that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel . . . ."[92] The majority of the Court interpreted "the assistance of counsel" clause to mean that a defendant has the right to the aid of counsel, but not that the state may impose such counsel on an unwilling defendant.[93] The Court took the position that since "the defendant, and not his

84. Faretta v. California, 422 U.S. 806, 807 (1976).

85. *Id.* At trial, Mr. Faretta "did not want to be represented by the public defender because he believed that that office was 'very loaded down with . . . a heavy case load.'" *Id.*

86. *Id.* at 833–34.

87. *Id.*

88. *Id.* at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

89. *Faretta*, 422 U.S. at 807.

90. *Id.* at 834.

91. *Id.* at 819 ("[T]he right to self-representation . . . is thus necessarily implied by the structure of the [Sixth] Amendment.").

92. U.S. CONST. amend. VI.

93. *Faretta*, 422 U.S. at 819.

lawyer or the State, will bear the personal consequences of a conviction," the defendant should be allowed to make the ultimate determination.[94]

The majority in *Faretta* believed that the Framers of the Constitution conceived the right to counsel as an optional means of defending oneself, not a mandate.[95] As such, this ruling may be seen as a vote of confidence to indigent defendants—that the Constitution has faith in their ability to conduct their own defense in the event they choose to do so.[96] People take great pride in rights given to them under the Constitution. For indigent defendants facing criminal prosecution and potential prison time, clinging to such rights may amount to their last hope.[97] Logically, many of those same defendants would seem more inclined to exercise those rights in order to flex their constitutional muscle at a system they perceive as unfair.

2. Critics of *Faretta* Share Sentiments with Those Concerned About Pro Se Trend

Those critical of the holding in *Faretta* argue that more is at stake than the self-indulgent interests of the criminal defendant.[98] Perhaps society has a stake in ensuring the appearance of propriety in our criminal justice system.[99] Chief Justice Burger, in his dissenting, and seemingly disgruntled, *Faretta* opinion, dismissed the notion that "the quality of . . . representation at trial is a matter with which only the accused is legitimately concerned."[100] The dissent would instead grant greater deference to the trial court in assessing whether the accused is sufficiently capable of conducting his or her defense.[101] The dissent maintained that the integrity of the criminal justice system is undermined when

94. *Id.* at 834.

95. *Id*. at 832 ("[T]he colonists and the Framers . . . always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself."). The Court was also *very* careful not to underestimate the value of a lawyer for a defendant in a criminal proceeding. *Id.*

96. *See id.* at 834 (stating that the Founders would have thought the idea of a forced lawyer untenable).

97. *See id.* at 834–35 (recognizing that the Founders understood the value of freedom of choice).

98. *Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting) ("Nor is it accurate to suggest . . . that the quality of representation at trial is a matter with which only accused is legitimately concerned.").

99. *Id*. ("[The] goal [of justice] . . . in every criminal trial . . . is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel.").

100. *Id.* at 840 (Burger, C.J., dissenting) (stating that the criminal justice system "should not be available as an instrument of self-destruction"); *see also* Johnson, *supra* note 65, at 41–42 ("Many besides the defendant suffer when courts wrongfully convict or condemn, and our adversary system relies on the presentation of the best defense . . . .").

101. *Faretta*, 422 U.S. at 840.

we allow defendants to waive counsel and proceed with pro se representation.[102] This coincides with contemporary commentators who are alarmed by an increasing trend among indigent criminal defendants to select self-representation.[103]

3. Strengthening the Trial Court's Discretion: Waiver of Counsel Inquiries and the Relative Ease with Which Indigent Defendants Are Enabled to Go Pro Se

Following *Faretta*, procedural safeguards intended to ensure the appearance of propriety in criminal prosecutions (and ease the concerns of the dissenters in *Faretta*) have been loosely implemented by trial courts. More specifically, courts have failed to exercise the sort of discretion allowed by the Court when deciding whether to allow indigent defendants to proceed pro se. The reluctance of trial courts to assert their ascendancy over indigent defendants has undoubtedly contributed to the rise in pro se representation. This article contends that one of the reasons so many indigent defendants opt to go pro se is that the decision can be made far too hastily. As such, courts have an obligation to step in and try to dissuade or, at a minimum, slow down indigent defendants who motion to waive their right to counsel and proceed pro se.

The right to self-representation has never been held to be absolute, nor is it guaranteed throughout the entirety of proceedings.[104] The majority in *Faretta* stated several grounds for denying a defendant the right to proceed pro se or to discontinue his self-representation once the trial has commenced.[105] First, the defendant must make the request to proceed pro se in advance of trial to avoid disruption of scheduled proceedings.[106] Typically, the motion must be made sometime before trial, and the trial court has broad discretion to reject what is perceives as untimely motions.[107] Second, the trial court will not tolerate a pro se defendant who "engages in serious and obstructionist misconduct."[108] These goals of the *Faretta* inquiry, however, serve to promote judicial economy and the avoidance of a filibustering pro se defendant.[109] They are not necessarily intended to serve the indigent defendant's best interests.

102. *Id.* at 839. Chief Justice Burger surely would be even more distraught over indigent defendants choosing self-representation because of their presumably lesser degree of intelligence.

103. *See supra* notes 8–9 and accompanying text.

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

105. *See id.*

106. *See id.* (stating that the decision to go pro se is not "a license not to comply with relevant rules of procedural . . . law"). The Court also mentions with approval that Faretta's request was made "weeks before trial." *Id.* at 835.

107. *Id.*; *see also* United States v. Young, 287 F.3d 1352 (11th Cir. 2002).

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

109. *Id.*

More relevant to this discussion is that courts seem to have considerable discretion in determining whether the defendant fully appreciates the choice of self-representation and its potential risks, but often neglect to exercise such power.[110] This judicial complacency only contributes to the rise of indigent defendants choosing pro se representation. A more stern approach is necessary to curtail this trend. Currently, the inquiry into whether the defendant grasps the magnitude of the decision to proceed pro se only hinges on whether the defendant has knowingly and intelligently relinquished the benefits of representation by counsel.[111] Some courts begin with what has been coined the *Von Moltke* inquiry, which obligates the trial court to assess whether the defendant is making an informed decision to proceed pro se.[112] For a waiver of counsel to be valid under that standard, the defendant must make such a waiver intelligently. As the court stated, the defendant must possess:

> [A]n apprehension of the nature of the charges, the statutory offenses included within in them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.[113]

The *Von Moltke* inquiry stems from a case where the defendant waived counsel and then pleaded guilty.[114] In cases where the defendant seeks to go further and elect self-representation at trial, the additional *Faretta* inquiry is necessary.

Faretta only states that the defendant "*should* be made aware of the dangers and disadvantages of self-representation . . . so that . . . 'his choice is made with eyes open.'"[115] *Faretta* does not specifically require the court to warn indigent criminal defendants about the potential pitfalls of self-representation, nor does it require the court to point out the latent benefits of representation from counsel.[116] Over the years, courts have struggled with how

110. *See* Michael J. Kelly, Note, *Making* Faretta v. California *Work Properly: Observations and Proposals for Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN'S J. LEGAL COMMENT. 245, 279–80 (2005).

111. A person charged with a felony in a state court has an unconditional and absolute constitutional right to a lawyer. Gideon v. Wainwright, 372 U.S. 335, 335 (1963). This right attaches at the pleading stage of the criminal process. Rice v. Olson, 324 U.S. 786, 788–89 (1945). It may be waived only by voluntary and knowing action. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

112. Von Moltke v. Gillies, 332 U.S. 708, 723 (1948).

113. *Id*. at 724.

114. *Id*. at 709.

115. Faretta v. California, 422 U.S. 806, 835 (1975) (emphasis added) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

116. *See* Kelly, *supra* note 110, at 271–72 (discussing various interpretations of the waiver requirement among the circuits, and emphasizing the difference between 'should' and 'must').

to conduct waiver-of-counsel inquiries under the amorphous dictum of *Faretta*.[117]

Whether *Faretta*'s insistence that defendants "should" be made aware of the dangers of self-representation requires that trial courts provide an explicit warning to defendants prior to allowing them to elect self-representation has been the subject of much debate.[118] All courts seem to recognize that the dicta in *Faretta* asks trial courts to strike a delicate balance between: 1) serving as a counselor to defendants by advising them of the potential pitfalls of self-representation, and 2) overemphasis of the disadvantages of self-representation, thereby scaring an otherwise pro se prone defendant into acquiescing to court-appointed counsel.[119] Regarding these concerns, Judge Posner of the Seventh Circuit issued a warning: "If a judge exaggerates the advantages of being represented or the disadvantages of self-representation, he will be accused of having put his thumb on the scale and prevent[ing] the defendant from making an informed choice."[120] Posner feels that a judge should take responsibility for the defendant's awareness of his rights.[121] With respect to indigent criminal defendants, Posner's take on the limited discretion that should be exercised by lower courts during waiver-of-counsel inquiries seems inconsistent with the sort of paternal protections the American government is accustomed to providing the indigent in matters of critical importance.

Albeit not its job to act as advisor to every defendant who enters the courtroom without the assistance of counsel, the judge plays a key role in the propensity of *indigent* defendants choosing to go pro se. In particular, judges who neglect to dispel misunderstandings that compel many indigent defendants to choose self-representation abandon their duty to ensure that such defendants elect pro se representation with "eyes open," as the Constitution requires.[122] This Comment recommends a more thorough waiver-of-counsel to encourage courts to act in a paternal role when dealing with indigent defendants. The lack of oversight when dealing with this group has undoubtedly led not only to the inclination, but the ability of indigent defendants to choose self-representation. While, perhaps, a court should not be obligated to issue an

117. *See* United States v. McBride, 362 F.3d 360 (6th Cir. 2004) (requiring the trial judge to ask the defendant a list of thirteen questions from a Bench Book for United States District Judges); United States v. Erskine, 355 F.3d 1161, 1167 (9th Cir. 2004) (stating that the trial judge must "insure that [the defendant] understands 1) the nature of the charges against him; 2) the possible penalties; and 3) 'the dangers and disadvantages of self-representation'")).

118. *See supra* note 96 and accompanying text.

119. *See* Kelly, *supra* note 110, at 263–65, 276.

120. *Id.* at 276 (quoting United States v. Oreye, 263 F.3d 669, 672 (7th Cir. 2001)).

121. *Id.* (quoting *Oreye*, 263 F.3d at 672).

122. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

explicit warning about the potential pitfalls of self-representation to indigent defendants, the court should sternly advise the defendant about the gravity of the decision and have the discretion to prohibit such a move when made on largely irrational grounds.

The less than well-to-do of American society (i.e. those qualifying as would-be indigent criminal defendants) often receive greater paternalistic supervision from the U.S. government,[123] and there seems like no more suitable circumstance to perpetuate that control than when their liberty hangs in the balance. In addition to the sentiments of Chief Justice Burger's dissent in *Faretta*, trial courts should be given *greater* discretion during waiver of counsel inquiries,[124] particularly when an indigent defendant chooses to go pro se based on concerns about the counsel assigned to represent him.[125] A stern role for judges presiding over the decision to proceed at trial seems necessary for several reasons. First, more is at stake when an indigent defendant decides to commence to trial rather than accept a plea bargain (usually for significantly less jail time) in the early stages of proceedings.[126] Second, indigent defendants electing pro se representation at trial may have distorted ideas about what the experience will be like: defenses they will be able to assert, things they can say, etc.[127] Judges should seize the opportunity to clear up any misconceptions that the defendant may have about going pro se.

During waiver-of-counsel inquiries, many courts make use of the totality of circumstances approach rather than any sort of formulated test.[128] This approach seems most appropriate for determining whether an indigent defendant is truly making the decision to go pro se with "eyes open," because it allows the judge flexibility in determining whether the defendant appreciates the gravity of the decision.[129] This allows the court to investigate concerns the indigent defendant may have regarding his attorney's ability to conduct his defense.[130] Yet, many courts fail to take advantage of this opportunity to

123. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 10–11 (6th ed. 2006) ("[Paternalistic regulations] are at least partly justified on the grounds that government has a certain obligation to protect individuals from their own confusion and irresponsibility.").

124. *Faretta*, 422 U.S. at 840 (Burger, C.J., dissenting) ("[T]he trial judge is in the best position to determine whether the accused is capable of conducting his defense.").

125. *See* Klein, *supra* note 75, at 663–73 (providing an overview of conditions associated with representation by a public defender).

126. *See* Kelly, *supra* note 110, at 274.

127. Interview with Jackson, *supra* note 1. Mr. Jackson was under the impression that he would be able to say and do things at trial that he otherwise would not have been able to do unless afforded the opportunity to represent himself.

128. Kelly, *supra* note 110, at 263, 266–69.

129. *Id.* at 264.

130. *Id.* at 266.

dissuade a defendant from proceeding pro se or, at least, discover the basis of that decision.[131]

This is not to say that trial courts should never allow an indigent defendant to waive his right to counsel when the defendant truly believes that self-representation is his best course of action. But the court should only allow the waiver after it has engaged in a discussion to determine the basis for the defendant's decision. While a formal warning may not be required,[132] the court should have discretion to intervene and override free choice when an indigent defendant makes an irrational decision to proceed pro se. This is especially so when the qualifications of appointed counsel is balanced against the borderline competency of the defendant to conduct his own defense.

Prudence should allow for an indigent defendant to understand not only the risks of self-representation, but to be informed of the possible benefits of acquiescing to indigent defense counsel. Many defendants may fail to grasp exactly what level of defense they will receive from indigent defense counsel. For instance, a highly-respected attorney with the Federal Public Defender's Office for the Southern District of Illinois was the appointed attorney for Tyrone Jackson in his case. Federal public defenders have significantly lighter case loads than most state public defenders,[133] and thus Mr. Jackson's attorney would not have been so hindered by a crushing workload that might diminish his ability to serve Mr. Jackson. But perhaps hearing about the incidences of overwhelming caseloads in public defender offices,[134] Mr. Jackson was improperly influenced by that stereotype into dismissing his attorney.

Another factor at the heart of Mr. Jackson's decision to proceed pro se was that he was upset because his public defender never asked him whether or not he was innocent or guilty before going forward with his case.[135] What defendants like Mr. Jackson fail to realize is that it is actually in the client's best interest that attorneys not pry into the defendant's guilt or innocence. According to Tom Flynn, a federal public defender for the Eastern District of Missouri, when criminal defense attorneys first meet their clients, they don't say, "Johnny, did you do it?"[136] If they do that and the client says, "'Yeah, I did it,' then that precludes [the attorney] from putting [the defendant] on the

131. Interview with Thomas Flynn & Kevin Curran, Federal Public Defenders for the Eastern District of Missouri, in St. Louis, Missouri. (Jan. 22, 2009). Kevin Curran believes that courts are mistaken in failing to discuss with indigent defendants why exactly they are making the decision to proceed pro se. *Id.* Many judges concern themselves with the defendant's behavior or mental state rather than asking about the attorney's conduct which may underlie the defendant's decision. *Id.*

132. *See* Kelly, *supra* note 110, at 254–57.

133. Interview with Flynn & Curran, *supra* note 131.

134. *See infra* Part II.

135. Interview with Jackson, *supra* note 1.

136. Interview with Flynn & Curran, *supra* note 131.

witness stand to say he didn't do it, because then [we would] be knowingly suborning perjury."[137] During the waiver of counsel discussion, a judge could clear up such idiosyncrasies of the process that indigent defendants may not understand.

It must be noted that some defendants elect to proceed to pro se after they become legitimately dissatisfied with their appointed indigent defense counsel and realize that substitute counsel is not a viable option.[138] Perhaps the court conducting a more substantial inquiry into why that particular lawyer is unsatisfactory may help legitimize the court's willingness to allow the defendant to waive the right to counsel. This also provides the trial judge an opportunity to refute the defendant's assertions about his counsel by, for instance, citing that attorney's qualifications for handling the case.

If one of the underlying reasons for granting discretion to trial courts in choosing counsel for indigent defendants is because they know local attorneys best,[139] then when a defendant makes a motion to go pro se, the trial judge should be obligated to make a good-faith argument to the indigent defendant as to why he should retain his attorney. Or, in the event that the lawyer is from a locally funded public defender office, someone with persuasive candor should be called on to speak to the capabilities of that individual. Perhaps then, the defendant will reconsider his pro se decision in light of such an endorsement. If his failure to recognize the value of such assistance persists, the court should have the discretion to refuse a waiver that is irrational and arguably lacks intelligence.

II. INDIGENT DEFENSE CRISIS IN AMERICA INFLUENCES THE DECISION TO WAIVE COUNSEL

The Supreme Court has voiced its disapproval of indigent defendants who waive their right to counsel: "Our experience has taught us that 'a pro se defense is usually a bad defense, particularly compared with a defense provided by an experienced criminal defense attorney.'"[140] Yet, such skill allegedly possessed by public defenders and court-appointed counsel does not always translate into the sort of compassionate counsel that so many indigent defendants desire.[141] If society equates the appearance of justice in criminal

137. *Id.*

138. *See supra* Part I.A.1.b.

139. *See supra* text accompanying note 34.

140. Martinez v. Court of Appeals of Cal., 528 U.S. 152, 161 (2000) (quoting Decker, *supra* note 11, at 598).

141. *See* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 105 (1993) (quoting United States v. Ely, 719 F.2d 902, 905 (7th Cir. 1983) (describing why "[t]he best criminal lawyers who accept appointments" might still provide indigent defendants unsatisfactory representation)). *See also*

prosecutions with the indigent receiving representation by counsel, then society must address the shortfalls of the indigent defense counsel system and realize that an attorney may not always be more adept at handling a case than an indigent defendant representing himself.[142]

A. A Broken System for the Indigent Defendant

Most public defenders work for little pay and little gratitude, and many court-appointed attorneys are too distracted by their own private practices to care about indigent criminal cases assigned to them by local courts.[143] If assistance from indigent defense counsel can be shown, in certain instances, to be only marginally better than self-representation, then why should we be surprised by an indigent defendant who chooses to proceed pro se?

In the area of indigent criminal defense, one of the harshest critics of our criminal justice system has been Stephen Bright, a defense attorney and Professor of Law at Yale University.[144] Over the years, he has fought to strengthen the indigent defendant's constitutional right to counsel, and has often painted a picture of exactly why some defendants would choose to forego representation.[145] Bright has criticized jurisdictions that overwork their public defenders and utilize incompetent local attorneys as court-appointed counsel. Bright notes:

> We're seeing court systems that are run about like a fast food restaurant. A fast food restaurant may be a little better, because at least there [are] some choices and a menu there for the customers. But people are processed through court not understanding what's happening to them, with no investigation by the lawyer, no understanding of who they are, when they're sentenced. They're just processed through the system.[146]

Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (discussing how the time constraints caused by excessive case loads hinder public defenders from providing each indigent defendant with the appropriate representation).

142. To reiterate, the phrase "indigent defense counsel" is a broad term encompassing both lawyers from public defender offices and private attorneys appointed by the courts to represent indigent defendants.

143. *See Frontline: The Plea* (PBS television broadcast June 17, 2004) [hereinafter *Frontline*] (interviewing Stephen Bright, President and Senior Counsel, Southern Center for Human Rights); Hoeffel, *supra* note 35, at 543.

144. Bright also serves as President and Senior Counsel for the Southern Center for Human Rights. The Law Office of the Southern Center for Human Rights, Who We Are, http://www.schr.org/ (last visited Jan. 11, 2010).

145. *See* Bright, *Neither Equal Nor Just*, *supra* note 71; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

146. *Frontline*, *supra* note 143.

Bright also reiterates: "Our courts have such a large volume of cases and so little resources devoted to providing representation to people accused of crimes, that this sort of fast food justice is what we've ended up with."[147] This sort of "McJustice" may not only deter poor criminal defendants from wanting to accept indigent defense counsel, but it also undermines the constitutional right to counsel.[148]

Case loads have become so heavy for public defender offices that some jurisdictions have elected to stop using their services.[149] A judge in Miami-Dade County recently ruled that the court would stop sending lesser felony cases to the region's public defender's office until the situation imposing a "crushing caseload" on the office had improved.[150] The judge cited budget problems as chief cause for this shortage of public defenders.[151] Further, many court-appointed attorneys believe that budget cuts and soaring case loads have pushed them to the brink.[152] In fact, the situation has become so dire that "[public defenders] can't ethically handle this many cases."[153] As a result, the "quality of public defense" everywhere "is absolutely deteriorating."[154]

With such turmoil in the criminal justice system, it is no wonder that so many indigent defendants have grown to distrust the system. To some, self-representation is perceived as the most viable option to avoid misrepresentation. As J. Marty Robinson, head of the Missouri public defender office put it, "If you're providing [just] a warm body, you're providing meaningless representation to everyone."[155] Indigent defendants demand and deserve more than just a warm body when their freedom is at stake, and the hot-bloodedness that results from criminal prosecution likely prompts some of them to take matters into their own hands in the form of self-representation.

147. *Id.*

148. Eckholm, *supra* note 141, at A1 (discussing how lawyers in Michigan joke about the "McJustice" in their state, while in New York, lawyers "make dark jokes about the plea bargain 'assembly line'").

149. *See, e.g.*, Robert Patrick, *Public Defender Rules Are Set to Change: Lawyers Say It's Unethical to Represent Some with So Little Time to Prepare*, ST. LOUIS POST-DISPATCH, July 3, 2005, at E1; Eckholm, *supra* note 141, at A1.

150. Curt Anderson, *Public Defenders Make Drastic Proposals Amid Cuts*, SAN FRANCISCO CHRONICLE, July 17, 2008, at A1. Circuit Judge Stanford Blake believes that "evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused." *Id. See also* Patrick, *supra* note 149, at E1.

151. Anderson, *supra* note 150.

152. Eckholm, *supra* note 141, at A1.

153. *Id*. (quoting David J. Carroll, Director of Research for the National Legal Aid and Defender Association).

154. *Id*. (quoting Norman Lefstein, Professor of Law at Indiana University School of Law).

155. Donna Walter, *Missouri's Public Defender Caseload Reductions to Begin*, KANSAS CITY DAILY NEWS-PRESS, June 23, 2008, at A1.

Probably the greatest challenge facing jurisdictions that are strapped for funding is persuading the public to contribute more financial support to indigent criminal defense programs. Indigent criminal defendants are politically unpopular.[156] So mustering up financial or political capital to fix the problems facing those individuals is difficult to accomplish through the legislature.[157] This leaves the courts to create a remedy.[158] This Comment does not purport to call for sweeping reforms in the funding of indigent criminal defense systems; plenty of work has been done on that topic.[159] Rather, this Comment suggests potential ways to alleviate concerns held by indigent criminal defendants with regard to the level of representation they will receive from court appointed defenders. Frankly, it seems unlikely that such reform will ever come about. As such, it is up to the courts and members of the legal profession to figure out a way to combat the indigent defense counsel crisis.

B. Resisting the Pressure to Plead

One of the outcomes of a criminal justice system overwhelmed by caseloads is a necessity for criminal prosecutions to end in quick plea bargains. Everyone involved in the criminal justice process, less the indigent defendant who maintains his innocence, has an interest in seeing that a case not to go to trial.[160] In particular, there is substantial pressure on both prosecutors and indigent defense counsel to convince defendants to take deals for lesser offenses in order to avoid the time and expense of trials.[161] This only helps facilitate the notion held by many indigent defendants that their attorneys are playing an integral part in a "system" that is trying to lock him up.

Admittedly, in cases where an indigent defendant is guilty of a crime and may take a lesser sentence by avoiding trial, this is probably in his or her best interest. But when pro se defendants considering pro se representation

156. *Effectively Ineffective*, *supra* note 76, at 1731–32 ("Due to the political unpopularity of criminal defendants and their lack of financial and political capital, state legislatures are unlikely to allocate significant attention or resources to the problem indigent defense, leaving courts with the task of creating a constitutionally mandated remedy."); *see also*, Editorial, *Hard Times and the Right to Counsel*, N.Y. TIMES, Nov. 21, 2008, at E1 ("With states struggling to come up with financing for schools and hospitals, we fear politicians are unlikely to argue for significantly more money for public defenders' offices.").

157. *Effectively Ineffective*, *supra* note 76, at 1731–32.

158. *Id*.

159. *See, e.g.*, Backus & Marcus, *supra* note 70, at 1046 (examining the "broader impact of inadequate funding, excessive public defender caseloads and insufficient salaries and compensation for defense lawyers"); *see also* Schulhofer & Friedman, *supra* note 141, at 73.

160. *See* Eckholm, *supra* note 141 (noting the overwhelming prevalence of plea bargaining and the pressure on defendants to plead guilty when it may not be in their best interest).

161. *See id.*

staunchly profess their innocence, and are unwilling to take any sort of deal, the pressure put on them by their appointed attorney to plead only entrenches the notion that the system is against them and that their best option is to go it alone.

"One of the reasons that so many people plead guilty is because they really don't have legal representation," which Bright attributes to large case volumes and insufficient resources.[162] This is particularly true with regards to many private court-appointed attorneys, who have a contract with the court to handle all cases that come their way for a flat fee.[163] In such scenarios, there is "a built-in conflict of interest" because of the attorney's incentive to spend more time on cases earning them money in their private practice.[164] Other defendants choose to plead to crimes they did not commit or to charges that are beyond the scope of their crime for fear that a conviction will lead to substantially longer jail time.[165] As former Attorney General Janet Reno put it, "a good lawyer is the best defense against wrongful conviction."[166] In the minds of many indigent defendants, however, a "good lawyer" is hardly an option.[167] Under that pretense, the decision to go pro se seems to stem more from fear and the need to resist the pressure to plead rather than one based on true reflection. At a minimum, by going pro se, some indigent defendants will evade the pressure to plead.

III. MAKING THE DECISION TO PROCEED PRO SE

There are a host of reasons why some criminal defendants choose self-representation. For many indigent defendants, however, the decision hinges on their distrust of the legal system, which cannot be helped by the increasing deterioration of the criminal defense system. Moreover, being poor only intensifies the "feelings of alienation and powerlessness" when facing criminal prosecution.[168] Other indigent defendants may choose pro se representation for strategic reasons, perhaps persuaded by the ability to cross-examine their accusers, hopes of establishing a "better rapport with jurors," and the chance to

162. *Frontline*, *supra* note 143.

163. *Id.*

164. *Id.*

165. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

166. U.S. DEPT. OF JUSTICE, REDEFINING LEADERSHIP FOR EQUAL JUSTICE: A CONFERENCE REPORT, at vi (2000) (quoting Janet Reno, U.S. Att'y Gen., Remarks at the National Symposium on Indigent Defense (June 29, 2000)).

167. Bright, *Neither Equal Nor Just*, *supra* note 71, at 784–85.

168. Kenneth P. Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 20 (2002).

bargain for "greater latitude in allowed behavior and questioning than would be given a defense attorney."[169]

Yet it is my contention that a vast majority of indigent defendants, while perhaps influenced by some of these motives, choose to go pro se because they believe it is the only viable option to escape the pressure to plead, and the only way to present a formidable defense. The story of Tyrone Jackson is indicative of the situation faced by many indigent defendants who are forced to choose between acquiescence to unsatisfactory indigent defense counsel and self-representation.

A. Inside the Mind of the Pro Se Defendant: Interview with Tyrone Jackson

Federal prosecutors indicted Tyrone Jackson on January 8, 2008, for charges that, if convicted, could result in him spending the next 20 years to his natural life in a federal penitentiary.[170] Mr. Jackson was assigned a federal public defender, who he considered to be a "nice guy" and who he conceded was probably an "excellent attorney."[171] Yet Mr. Jackson opted for pro se representation; largely because he felt his attorney failed to appreciate the gravity of *his* situation.[172] Admitting to having been arrested on an average of four to five times a year, which he dismissed as commonplace for African–American men where he comes from, this was by far the most serious charge he ever faced.[173]

For Mr. Jackson, a lack of trust was at the heart of his decision to elect pro se representation.[174] He ultimately waived his right to counsel and elected to represent himself, not because he felt he was more equipped to handle his case, but rather, because he felt he had no choice in order to fairly present his case to a jury.[175] He did so in an attempt to circumvent the same old routine by which indigent criminal defendants like him were convicted.[176] Mr. Jackson referred

169. Douglas R. Morris & Richard L. Frierson, *Pro Se Competence in the Aftermath of* Indiana v. Edwards, 36 J. AM. ACAD. PSYCHIATRY LAW. 551, 553 (2008).

170. Interview with Jackson, *supra* note 1.

171. *Id.*

172. *Id*.

173. *Id*.

174. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1462 (2005) (footnote omitted):

> For indigent defendants the development of robust communicative relationships with counsel is difficult if not impossible. In overburdened state courts, it is not uncommon for a defendant to meet his public defender, hear about the deal, and decide what to do—all in the span of less than an hour and within the confines of a court lock-up or hallway while waiting to go into court.

175. Interview with Jackson, *supra* note 1.

176. *Id.*

to the criminal justice process as "a dance" in which everyone (the defense attorney, prosecutor, and judge) knows the routine, except the defendant.[177]

So rather than allowing the prosecutor to present the "same case, with the same witnesses . . . that he presented last week" and allowing an appointed defense attorney to argue that another "black client with dreadlocks wasn't a drug dealer," Mr. Jackson decided he had a better shot of convincing a jury of his innocence if he conducted his own defense.[178] In doing so, he hoped to dispel any stereotypes jurors may have had about him because of his appearance and implore them to consider his case as if they were in his shoes. Yet not all indigent defendants exhibit this level of perseverance when facing status quo, unsatisfactory representation and subsequent imprisonment. Many lie down and accept their fate as decided by indigent defense counsel, who does not necessarily have their best interests in mind.[179]

Mr. Jackson vehemently rejecting any sort of plea bargain. What concerned him most was that his attorney never even asked him his side of the story prior to advising him to plead guilty for a lesser sentence: "He never even asked me if I was innocent or guilty."[180] According to Mr. Jackson, his attorney's attitude was, "They say that you did A, B, and C . . . that they [are] gonna bring in Susie, Bobby, and Johnny, and that they're all going to testify to this."[181] This indicated to Mr. Jackson that his attorney "saw it the way they [the prosecutors] see it."[182] Mr. Jackson recalled, "Well, when I started to tell him I was innocent, the melancholy face come on . . . like 'everybody tells me this.'"[183] So, according to Mr. Jackson, his attorney's attitude was

177. *Id.* ("They have a system; it's like a dance, and they all know the routine and I don't. He [the public defender] comes in, because he goes before this judge on a regular basis, and goes, 'This is what I say, this is what you say, this is what the prosecutor says.'") *See, e.g.*, *Frontline*, *supra* note 143. Indigent defendants feel pressure to plead out in a crowded courtroom when represented by public defenders. *Id.* ("Everyone knows the answers to the questions and everyone knows that if you answer the questions incorrectly, the whole thing will blow up and the judge will yell at you and you might not get the bargain that you're going to get.").

178. Interview with Jackson, *supra* note 1; *see* Faretta v. California, 422 U.S. 806, 834 (1976) ("[I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense."). For a discussion of the predicament face by other indigent defendants, see Natapoff, *supra* note 174.

179. *See* Bright, *Neither Equal Nor Just*, *supra* note 61, at 793 (describing why indigent defendants might not contest inadequate or unfavorable representation).

180. *See* Interview with Flynn & Curran, *supra* note 131. It is ironic that this legal construct—the attorney seeking to avoid suborning perjury—coupled with wanting to have the option of putting the defendant on the stand actually favors the defendant's interests. Unaware of this, Mr. Jackson regards the fact that his attorney never asked him whether he was innocent or guilty as a sign that he did not care about him, when, in fact, he was not asked in order to protect him.

181. Interview with Jackson, *supra* note 1.

182. *Id.*

183. *Id.*

"basically . . . just plead out."[184] Uncompromising in professing his innocence, Mr. Jackson decided he had to go pro se in order to "fight" for himself.[185]

Unlike most indigent defendants who routinely attempt to fire their appointed attorneys prior to making the decision to go pro se,[186] Mr. Jackson dismissed the possibility of asking the court for another attorney.[187] He recognized that, in his situation, another appointed attorney would likely result in the same level of dissatisfaction. When asked if he considered another attorney, Mr. Jackson responded, "I thought about another lawyer, but I'm in jail with 14–15 people in the cell that are complaining the same way about their attorney that I am. Out of those people, maybe 3–4 different attorney names came up, so we all had basically had the same attorney."[188] Rather than look like a "pest," Mr. Jackson opted for pro se representation.[189]

B. Fundamental Distrust of Indigent Defense Counsel

Rodney Holmes, standby counsel for Mr. Jackson during his trial and a highly respected criminal defense attorney, acknowledged that a vast majority of criminal defendants realize their ineptness in formulating a defense for their cases.[190] Yet, he attributes the pro se willingness of some indigent defendants to their "fundamental distrust" of the government.[191] Mr. Holmes believes this distrust derives from the greater presence that law enforcement officials maintain in lower class areas, namely due to the correlative higher crimes rates.[192] He notes that those choosing to go pro se typically have greater abilities—such as the ability to read and analyze cases. Does this make them more equipped than lawyers with extensive legal training? Probably not. But then why go pro se?[193]

Another source of distrust for appointed defense counsel is the indigent defendants' misunderstanding of the inner workings of the criminal justice system. This culminates with the notion that everyone involved is working to

184. *Id.*

185. *Id.*

186. *See* Hashimoto, *supra* note 10, at 429 (noting that nearly half of all pro se defendants in the Federal Docketing Database sought the appointment of new counsel at least once prior to making a motion to proceed pro se).

187. Interview with Jackson, *supra* note 1.

188. *Id*.

189. *Id*.

190. Interview with Rodney Holmes, Criminal Defense Attorney (Standby counsel appointed by the court for Tyrone Jackson), in Saint Louis, Mo. (Nov. 26, 2008).

191. *Id.*

192. *Id*.

193. This is essentially the focal point of this Comment. Despite the recognition by many indigent defendants regarding their ineptitude to conduct their defense, they are still willing to do so because of the undesirable alternatives.

"get them." For all the shortcomings of indigent defense systems in the United States, either in the form of public defender offices or private attorneys retained by the courts, such lawyers are often competent and willing to passionately advocate for indigent defendants' rights. Further, courts have the advantage of knowing competent attorneys in the area best-suited to handle indigent defense cases. Yet the "bad apple" spoils the bunch adage applies to evaluating indigent defense counsel as a whole. Even still, such defendants may fail to grasp how a court-appointed attorney is not necessarily a public defender,[194] and many even refuse to recognize a public defender as an actual attorney.[195] The following displays the state of confusion that exists:

> Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is 'processing' and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court." "No. I had a public defender."[196]

Another defendant at the federal courthouse in East St. Louis, Illinois, during the summer of 2008 also chose to represent himself.[197] Kevin Cooper, who was facing federal drug trafficking charges, elected to go pro se after he saw his court-appointed attorney laughing with the prosecutor prior to a preliminary hearing for his trial.[198] Mr. Cooper's court-appointed counsel was a former prosecutor-turned-defense attorney, and Mr. Cooper allegedly did not trust him because of his prior work in the prosecutor's office.[199] This perceived closeness between the prosecution and defense illustrates another root of the distrust criminal defendants, particularly those familiar with the system, may develop over time. It also shows the misunderstanding criminal defendants have of the lawyer's ethical obligations to his or her clients.

Mr. Cooper was likely influenced by his successful experience defending himself against an ill-conceived attempted murder charge in state court several

194. Interview with Holmes, *supra* note 190. Mr. Holmes discussed other cases in which he was appointed by the court to represent indigent criminal defendants. He noted that many of them assumed because his services as appointed counsel came at no expense, he probably was not a very good lawyer. In fact, he commands substantial fees from his private clients due to his outstanding reputation as a criminal defense attorney.

195. Schulhofer & Friedman, *supra* note 141, at 86.

196. *Id*. *See also* Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971)).

197. This is based on the author's experience in the district court during the trial.

198. Interview with George Norwood, Assistant United States Attorney for the Southern District of Illinois, in Fairview Heights, Ill. (November 25, 2008) [hereinafter Interview with Norwood].

199. *Id.*

years prior to his federal drug case.[200] Rather than resulting in a no-charge due to self-defense, or at best, a charge of assault, prosecutors charged Mr. Cooper with attempted murder.[201] Mr. Cooper's optimism following his original win in state court also derives from the notion that widely-publicized incidents of self-representation make pro se representation the popular thing to do.[202] As more and more indigent defendants choose self-representation, it is reasonably foreseeable that an avalanche of pro se defendants will result from pro se fairy tales disseminated through city streets and prison halls. To combat this, it would behoove trial courts to take their waiver of counsel duties more seriously in order to ward off the inevitable headaches from an onslaught of indigent pro se defendants flooding their courtrooms.

IV. WHERE DO WE GO FROM HERE?

Throughout this Comment, I have proposed several solutions aimed at alleviating concerns of those wishing to see indigent criminal defendants acquiesce to counsel, and believe that courts should respect the free will of defendants opting self-representation. In addition, I believe every jurisdiction should produce some sort of handbook for indigent defendants contemplating self-representation, for example: "The Indigent Criminal Defendant Guide to Choosing a Mode of Defense." Much like a "Patient's Bill of Rights" between doctors and patients in the healthcare setting, this handbook would include a document to be signed by both client and attorney, detailing what each expects from the case. For instance, there may be a clause that reads, "As client, I am entitled to provide my input into how my case should best be handled." Or even, from the lawyer's standpoint, "I will do all in my power to fulfill the wishes of you, my client, in zealously advocating your case."

What will this proposed handbook accomplish? It is a simple document which provides tangible peace of mind to those indigent defendants who feel scorned, mistreated, or left out by the criminal justice system and/or skeptical about the level of representation they will receive from indigent defense counsel. For the lawyer, it will reiterate the codes of professional conduct expected of them when representing their clients. For courts, it might

200. E-mail from Susan Gentle, Attorney at Law (Appointed standby counsel for Mr. Cooper) (Nov. 18, 2008, 07:51:00 CST) (on file with author).

201. Interview with Norwood, *supra* note 198.

202. Such high profile cases include that of Zaccarias Moussaoui, the alleged "twentieth" hijacker of the September 11, 2001 terrorist attacks, who represented himself. Tom Jackman, *Moussaoui Allowed to Defend Himself*, WASH. POST, June 14, 2002, at A1; *see also* Josh White, *Muhammad Takes Over His Own Defense; Judge Advises Against Move, Then Allows It*, WASH. POST, Oct. 21, 2003, at A1 (documenting Washington, D.C. sniper, John Allen Muhammad's initial decision to represent himself during his trial). Interview with Norwood, *supra* note 198 (noting that after Tyrone Jackson's trial, another defendant, who was an acquaintance of Jackson, opted to elect pro se representation).

minimize the number of indigent defendants choosing self-representation by furthering the appearance of justice being served in our system.

Another proposal stems from the idea that indigent defendants should have the right to retain counsel with attorneys when they have established trust from prior cases.[203] Building on this notion, indigent defendants should be presented with a biographical array of five indigent defense attorneys at the outset of their case. After allowing the defendant to analyze each prospective attorney's qualifications, experience, and prior case handlings, he or she may list an order of preferences for the five attorneys. Based on availability of those five, the court may make a good-faith effort to fulfill the defendant's first choice, second choice, and so forth. At a minimum, this will instill trust in the indigent defendant's mind that he has at least some say in who represents him. This may diminish the feelings of resentment toward indigent defense counsel that result when a court says, "This is your attorney, take it or leave it."

Similar such proposals have faced staunch resistance, with those in opposition citing the fear that defendants familiar with the system will monopolize the most competent attorneys. Perhaps this possibility should not be dismissed as a problem, but should serve as a case study for how those attorneys interact with their indigent clients in order to gain their trust. The time has come for innovation in the way we dole out indigent defense counsel. When I proposed this idea and stated the common oppositions to Mr. Jackson, he noted, "there's something right about" those attorneys who indigent defendants prefer, and "maybe [we] need to figure out what's right with them."[204] Taking it a step further, perhaps an incentive system should reward attorneys who foster faith from their indigent clients in order to encourage others to act with the same benevolence. This sort of program, if implemented properly, may pave the way for the sort of meaningful relationship in line with the rallying call by Justice Scalia in *Gonzalez–Lopez*.[205] Over time, such a bold and, admittedly, difficult-to-implement initiative may begin to dissuade would-be indigent pro se defendants from rejecting the assistance of counsel.

During my interview with Mr. Jackson, I spent over two hours talking with him about his plight. Most indigent defense attorneys, strapped by time constraints, do not have that luxury. Mr. Jackson did not know me before our meeting, but I could tell that after talking for a while, he became more and more comfortable. Whether he trusted me, however, I cannot be sure. But I could tell that he appreciated the opportunity to sit down with someone and tell his story. Perhaps providing more law students the opportunity to assist in indigent representation would diminish feelings of despair felt by indigent defendants like Mr. Jackson. Allowing law students to assist on a larger scale

203. Hoeffel, *supra* note 35, at 528.

204. Interview with Jackson, *supra* note 1.

205. United States v. Gonzalez–Lopez, 548 U.S. 140, 148 (2006).

may convey that at least someone is willing to sit down with them and discuss their case. That does not seem like too much to ask.

CONCLUSION

For anything to change the way indigent criminal defendants are treated by our justice system or to alleviate their perceptions of unfairness, however misguided, there must be a whirlwind recognition of the importance of the right to counsel for indigent defendants in criminal proceedings. Policy makers and legislatures, motivated by the whims of their constituencies, likely will not bring about change in the way indigent criminal defendants are treated, either in perception or reality. Because of this, the courts must take the initiative, acting as a parent advising their child with regard to certain courses of action, and providing them with *all* the necessary information to make an intelligent decision as best they can. Few in the legal profession can relate to the plight faced by indigent criminal defendants. Yet I hope that most can now understand the reaction by those defendants who feel scorned by the system, turn their back to the assistance of appointed counsel, and choose self-representation.

MARK C. MILTON∗

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