Chapter 35

Ineffective Assistance of Counsel

§ 35:1 The right to effective assistance of counsel

The Sixth Amendment guarantees, in both state and federal prosecutions, that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] This right extends to both retained and appointed counsel and is examined using the same standards.[2] The violation of this Sixth Amendment right to the effective assistance of counsel may constitute grounds for federal habeas corpus relief.[3]

In *U.S. v. Cronic*,[4] the Supreme Court reiterated the importance of counsel for criminal defendants: "Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person

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[Section 35:1]

[1]U.S. Const. Amend. VI; *see Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009). Commentary on the right to effective assistance of counsel, as guaranteed by the Sixth Amendment, is voluminous. For a sampling of recent scholarship, see Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 Cornell L. Rev. 679 (2007); Rigg, The T-Rex Without Teeth: Evolving *Strickland v. Washington* and the Test for Ineffective Assistance of Counsel, 35 Pepp. L. Rev. 77 (2007); Klaren and Rosenberg, Splitting Hairs in Ineffective Assistance of Counsel Cases: An Essay on How Ineffective Assistance of Counsel Doctrine Undermines the Prohibition Against Executing the Mentally Retarded, 31 Am. J. Crim. L. 339 (2004).

[2]*Mickens v. Taylor*, 535 U.S. 162, 168 n.2, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) ("we have already rejected the notion that the Sixth Amendment draws such a distinction" between retained and appointed counsel); *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) ("A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel[.]").

[3]*Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4]*U.S. v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

on trial are secured."[5] But the right to effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[6] Thus, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."[7]

§ 35:2 Proceedings where there is a constitutional right to counsel

A litigant may assert a Sixth Amendment challenge to the effectiveness of his attorney's representation only with respect to those proceedings in which the litigant had a federal constitutional right to counsel. If the petitioner had no federal constitutional right to counsel in the challenged state or federal proceeding, counsel's ineffectiveness is not cognizable in federal habeas corpus; the fact that the litigant had either a federal statutory[1] or state-law right[2] to counsel in the challenged proceeding is not, by itself, sufficient to invoke the remedy of federal habeas corpus. Thus, the first step in deciding whether the litigant is entitled to federal habeas corpus relief based on the alleged ineffectiveness of counsel is to determine whether the litigant had a Sixth Amendment right to counsel in the proceeding in which the alleged ineffective representation occurred.[3]

The Sixth Amendment right to counsel does not attach until a

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[5]*U.S. v. Cronic*, 466 U.S. 648, 653, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (footnote omitted) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)).

[6]*U.S. v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[7]*U.S. v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[Section 35:2]

[1]*Rouse v. Lee*, 339 F.3d 238, 250 (4th Cir. 2003) ("Rouse did have a statutory right to counsel, see 21 U.S.C.A. § 848(q)(4) (West 1999), but there can only be constitutional ineffective assistance of counsel where there is a constitutional right to counsel[.]").

[2]Some states provide a separate and independent right to the effective assistance of counsel in state court proceedings. *See, e.g.*, Cal. Const. Art. I, § 15; N.Y. Const. Art. I, § 6. But subject to several narrow exceptions, the violation of a state law right does not constitute grounds for federal habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S. Ct. 475, 116 L. Ed. 2d 385, 33 Fed. R. Evid. Serv. 305 (1991) ("we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"); *see, supra*, § 6:3.

[3]In addition to the Sixth Amendment, the Due Process Clause provides the right to appointment of counsel in various types of non-criminal proceedings. In *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011), the Supreme Court held, in the context of a civil contempt proceeding

prosecution is "commenced."[4] For purposes of the right to counsel, the Court has "pegged commencement to the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[5] "The rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' "[6] The Supreme Court recently reaffirmed that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[7] And it is immaterial, the Court said, whether a prosecutor is aware of that initial proceeding or involved in its conduct.[8]

"Once attachment occurs, the accused is at least entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." A defendant, however, is not entitled to the assistance of appointed counsel as soon as the Sixth Amendment right attaches. Rather, "the term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel."[9] On the other hand, counsel must be appointed within a reasonable time after attach-

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involving an indigent noncustodial parent who was subject to a child support order, that the parent was entitled either to counsel or "alternative procedures." These alternative procedures, according to the Court, could include notice to the defendant that his ability to pay is a critical issue in the civil contempt proceeding, providing the defendant with a form (or the equivalent) designed to elicit information regarding the defendant's finances, an opportunity to respond to questions regarding his financial condition at the hearing, or an express finding by the court that the defendant has the ability to pay. 131 S.Ct. at 2518–20.

[4]*McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991); *see also Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Kirby v. Illinois*, 406 U.S. 682, 688–89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

[5]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008).

[6]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 194, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (plurality opinion)).

[7]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 213, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (internal quotation marks omitted).

[8]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198–99, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008).

[9]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 213–14, 128 S. Ct. 2578,

ment to allow for adequate representation at any critical stage before trial, as well as at trial itself."[10]

The right to counsel extends to all critical stages of the criminal process[11] and through the first appeal. In deciding what qualifies as a "critical stage," courts have "recognized that the period from arraignment to trial [i]s 'perhaps the most critical period of the proceedings.' "[12] A "critical stage" is any proceeding "between an individual and agents of the State (whether formal or informal, in court or out, . . .)" that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[13] The Court has emphasized that the determination requires "an analysis 'whether potential substantial prejudice to defendant's rights inhered in the . . . confrontation and the ability of counsel to help avoid that prejudice.' "[14] If the defendant is denied the right to counsel at a "critical stage" of trial, there is *per se* prejudice and reversal is automatic.[15]

Although the Court has not laid out "a comprehensive and final

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171 L. Ed. 2d 366 (2008) (Alito, J., concurring).

The Court in *Rothgery* strongly suggested that where a first appearance involves no more than making an ex parte probable cause determination, giving notice of the charges, and setting bail, that first appearance does not constitute a "critical stage" requiring counsel. The right to counsel attaches at the first appearance "to allow for adequate representation at any critical stage before trial, as well as the trial itself." The question of whether attachment of the right to counsel occurs at a particular event is distinct from the question of whether that event is a "critical stage" of the prosecution at which an accused is entitled to assistance.

[10]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 212, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008).

[11]*Iowa v. Tovar*, 541 U.S. 77, 80–81, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004); *Michigan v. Harvey*, 494 U.S. 344, 357, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).

[12]*U.S. v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (quoting *Powell v. State of Ala.*, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932)).

[13]*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 212 n.16, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (internal quotation marks omitted) *Van v. Jones*, 475 F.3d 292, 312–13, 2007 FED App. 0019P (6th Cir. 2007) (a critical stage is one where significant consequences might result from the absence of counsel at the stage of the criminal proceedings); *U.S. v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (a "critical stage" is any "trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice").

[14]*Coleman v. Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (alteration in original) (quoting *U.S. v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)); *see also Bell v. Cone*, 535 U.S. 685, 695–96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

[15]*See*, *infra*, § 35:25.

one-line definition of 'critical stage,' "[16] it has indentified several factors. Specifically, the Court has stated that a critical stage is (1) "a step of a criminal proceeding . . . that h[olds] significant consequences for the accused";[17] (2) where "[a]vailable defenses may be [ ] irretrievably lost";[18] (3) "where rights are preserved or lost";[19] (4) where counsel's presence is "necessary to mount a meaningful defence,"[20] (5) where "potential substantial prejudice to defendant's rights inheres in the . . . confrontation and [where] counsel [can] help avoid that prejudice,[21] and (6) any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[22] These descriptions have been distilled into a three-factor test for determining what constitutes a critical stage, any one of which may be sufficient to make a proceeding a critical stage: whether the failure to pursue strategies or remedies results in a loss of significant rights, whether counsel would be useful in helping the defendant understand the legal issues, and whether the proceeding tests the merits of the defendant's case.[23]

Among the stages of a prosecution deemed "critical" for Sixth Amendment purposes include the arraignment,[24] a post-

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[16]*Van v. Jones*, 475 F.3d 292, 312, 2007 FED App. 0019P (6th Cir. 2007).

[17]*Bell v. Cone*, 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

[18]*Hamilton v. State of Ala.*, 368 U.S. 52, 53, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961).

[19]*White v. State of Md.*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963).

[20]*U.S. v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

[21]*Coleman v. Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (internal quotation marks omitted).

[22]*Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967).

[23]*U.S. v. Benford*, 574 F.3d 1228, 1232 (9th Cir. 2009); *see also Van v. Jones*, 475 F.3d 292, 312–13, 2007 FED App. 0019P (6th Cir. 2007) ("Deciding whether a particular part of a criminal proceeding holds consequences, is necessary to mount a meaningful defense, or contains potential substantial prejudice to rights demands an inquiry into the possibility of consequences. If those consequences are possible but not certain, how do we answer if they are adequately possible without undertaking an analysis that resembles an inquiry for prejudice? For example, if the absence of counsel at a consolidation hearing can be counteracted by a subsequent motion to sever, isn't the potential for adverse consequences thereby radically diminished or eliminated? At the same time, isn't that really an inquiry into whether the consequences are likely enough to have visited prejudice on the defendant's case? This is very similar to the kind of inquiry we are not supposed to undertake when fundamental protections are at stake and a defendant's lawyer simply wasn't there[.]").

[24]*Hamilton v. State of Ala.*, 368 U.S. 52, 53–55, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961).

indictment identification lineup,[25] a pretrial custodial interrogation,[26] a pretrial motion to suppress evidence,[27] sentencing[28] or resentencing,[29] a court-ordered psychiatric examination to determine competency to stand trial and future dangerousness,[30] entry of a plea,[31] withdrawal of a plea,[32] motion for new trial made during the post-trial, pre-appeal time period,[33] and the process of plea bargaining and period of defendant's potential cooperation with the government.[34] On the other hand, critical

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[25]*U.S. v. Wade*, 388 U.S. 218, 236–37, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

[26]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[27]*U.S. v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004); *Henderson v. Frank*, 155 F.3d 159, 166 (3d Cir. 1998).

[28]*Mempa v. Rhay*, 389 U.S. 128, 137, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *see also Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (reaffirming that sentencing is a critical stage).

[29]*Hall v. Moore*, 253 F.3d 624, 627 (11th Cir. 2001). But there is no Sixth Amendment right to counsel when the "resentencing is purely a ministerial act, with no discretion given to the sentencing judge." *Hall*, 253 F.3d at 627 (holding that when a resentencing is purely a ministerial act, with no discretion given to the sentencing judge, the absence of counsel is not prejudicial). Likewise, there is no right to counsel at a hearing on the execution of a previously imposed sentence where the defendant is not "in danger of losing any rights by appearing without counsel." *Jackson v. Miller*, 260 F.3d 769, 776–77 (7th Cir. 2001) (holding that, unlike a hearing to impose sentence or consider deferred sentence, a defendant does not have a right to counsel at a hearing on a request to execute the sentence).

[30]*Estelle v. Smith*, 451 U.S. 454, 457–59, 470–71, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

[31]*Boyd v. Waymart*, 579 F.3d 330, 350 (3d Cir. 2009); *U.S. v. Fuller*, 941 F.2d 993, 995 (9th Cir. 1991) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 309 (1948)); *Stano v. Dugger*, 921 F.2d 1125, 1140 (11th Cir. 1991).

[32]*U.S. v. Sanchez-Barreto*, 93 F.3d 17, 20 (1st Cir. 1996); *U.S. v. Garrett*, 90 F.3d 210, 212 (7th Cir. 1996); *U.S. v. White*, 659 F.2d 231, 233 (D.C. Cir. 1981); *U.S. v. Crowley*, 529 F.2d 1066, 1069 (3d Cir. 1976).

[33]*Rodgers v. Marshall*, 678 F.3d 1149, 1159 (9th Cir. 2012), cert. granted, judgment rev'd on other grounds, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013); *McAfee v. Thaler*, 630 F.3d 383, 391 (5th Cir. 2011); *Kitchen v. U.S.*, 227 F.3d 1014, 1019 (7th Cir. 2000); *Williams v. Turpin*, 87 F.3d 1204, 1210 n.5 (11th Cir. 1996); *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir. 1995); *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989); *see also Baker v. Kaiser*, 929 F.2d 1495, 1499 (10th Cir. 1991) (holding that the period between the termination of trial and the beginning of an appeal is a critical stage); *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (same).

[34]*Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *U.S. v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003); *U.S. v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998) (per curiam).

stages do not include pre-trial status conferences,[35] bench conferences in the middle of trial concerning the status or competency of a prosecution witness,[36] a routine post-conviction pre-sentence interview,[37] some types of ex parte communications between the judge and the prosecutor,[38] the taking of handwriting exemplars,[39] the scientific analyses of evidence such as "fingerprints, [a] blood sample, clothing, hair and the like,"[40] or events "that t[ake] place long before the commencement of any prosecution whatever."[41]

Criminal defendants also have a constitutional right to the effective assistance of counsel for all direct appeals the state grants as of right.[42] But criminal defendants have no constitutional right

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[35]*U.S. v. Benford*, 574 F.3d 1228, 1232–33 (9th Cir. 2009).

[36]*Hereford v. Warren*, 536 F.3d 523, 530 (6th Cir. 2008).

[37]*U.S. v. Smith*, 929 F.2d 1453, 1458 n.2 (10th Cir. 1991) ("[A] routine post-conviction pre-sentence interview is not a 'critical stage' of the proceedings at which a defendant has a Sixth Amendment right to be represented by counsel[.]") (quoting *U.S. v. Rogers*, 899 F.2d 917, 919–20 n.7 (10th Cir. 1990), opinion withdrawn and superseded, 921 F.2d 975 (10th Cir. 1990); *accord U.S. v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992); *U.S. v. Hicks*, 948 F.2d 877, 885–86 (4th Cir. 1991); *U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990); *U.S. v. Jackson*, 886 F.2d 838, 844–45, 28 Fed. R. Evid. Serv. 1141 (7th Cir. 1989); *Baumann v. U.S.*, 692 F.2d 565, 578 (9th Cir. 1982).

[38]*Compare U.S. v. Carmichael*, 232 F.3d 510, 517, 54 Fed. R. Evid. Serv. 1400, 2000 FED App. 0372P (6th Cir. 2000) (ex parte discussions between prosecutor and judge concerning the contents of Title III wiretap transcripts not a critical stage) *with* 232 F.3d at 523 (Keith, J., dissenting), *and with U.S. v. Minsky*, 963 F.2d 870 (6th Cir. 1992) (implying that ex parte discussion between judge and prosecutor as part of *in camera* review of FBI investigation forms is a critical stage).

[39]*Gilbert v. California*, 388 U.S. 263, 267, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967).

[40]*U.S. v. Wade*, 388 U.S. 218, 227–28, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *see also South Dakota v. Neville*, 459 U.S. 553, 559, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983); *Schmerber v. California*, 384 U.S. 757, 765–66, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *see also McNeal v. Adams*, 623 F.3d 1283, 1289 (9th Cir. 2010) (hearing on motion to compel DNA sample not a critical stage of prosecution for sexual battery); *U.S. v. Lewis*, 483 F.3d 871, 874 (8th Cir. 2007) (same).

[41]*Kirby v. Illinois*, 406 U.S. 682, 690, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

[42]*Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

In *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005), the Supreme Court held that the Due Process and Equal Protection Clauses required the appointment of counsel for indigent defendants, convicted based on their pleas, who were seeking first-tier appellate review in the Michigan Court of Appeals. Michigan law had provided that leave to appeal was required where a defendant was convicted based on a guilty or *nolo contendere* plea. There was no right to counsel under Michigan law in this circumstance, and most indigent defendants convicted on a plea were required to proceed *pro*

to counsel on discretionary appeals[43] or for filing post-appeal motions for new trial.[44] Nor do criminal defendants have a right to counsel to file a certiorari petition in the United States Supreme Court.[45] There is also no constitutional right to counsel in state or federal collateral proceedings,[46] although in death penalty cases an indigent defendant has a statutory right to federally appointed counsel in post-trial habeas corpus proceedings, including subsequent state clemency proceedings.[47] Even if the collateral attack is consolidated with the direct appeal, the right to effective assistance applies only to the direct appeal portion of the proceeding.[48] Moreover, ineffective representation during state postconviction proceedings will not constitute an independent violation of the Sixth Amendment even where state collateral review was the first place that the petitioner was able to present a challenge to his conviction.[49]

Defendants have a Sixth Amendment right to conduct their

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se in seeking leave to appeal to the intermediate appellate court. The Supreme Court reached its conclusion that these defendants had a right to counsel based on the fact that the state appellate court, in ruling on an application for leave to appeal, looked to the merits of the appellant's claims, and the fact that indigent defendants pursuing first-tier review in the court of appeals were generally ill-equipped to represent themselves.

[43]*Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

[44]*U.S. v. Tajeddini*, 945 F.2d 458, 470 (1st Cir. 1991) (abrogated on other grounds by, Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)); *U.S. v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975); *U.S. v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973).

[45]*Miller v. Keeney*, 882 F.2d 1428, 1432–33 (9th Cir. 1989).

[46]*Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

[47]18 U.S.C.A. § 3599(a), (e).

[48]*Lowe-Bey v. Groose*, 28 F.3d 816, 820 (8th Cir. 1994).

[49]*Martinez v. Schriro*, 623 F.3d 731, 739–40 (9th Cir. 2010), rev'd on other grounds, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) ("We conclude that there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim[.]"); *Williams v. Martinez*, 586 F.3d 995, 1001 (D.C. Cir. 2009) ("Although criminal defendants enjoy a due process right to the effective assistance of counsel during their first appeal as of right, . . . the Supreme Court has made clear that defendants lack a constitutional entitlement to effective assistance of counsel in state collateral proceedings[.]"); *Wooten v. Norris*, 578 F.3d 767, 778 (8th Cir. 2009) ("There is no right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution in collateral, post-conviction, state-court proceedings, and as such, the failures or infirmities of counsel at this stage generally are not attributable to the state[.]").

own defense.[50] But before allowing a defendant to represent himself, the "trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary."[51] A defendant's waiver of counsel must also be unequivocal, timely, and not for purposes of delay.[52] That said, an accused can waive his right to counsel by conduct.[53] Moreover, the right to self-representation is not absolute. Specifically, there is no right of self-representation on direct appeal in a criminal case.[54] And a court may appoint standby counsel over a self-represented defendant's objection.[55] Furthermore, the right may be denied if the defendant abuses "the dignity of the courtroom,"[56] fails to comply with "relevant rules of procedural and substantive law,"[57] or engages in "serious and obstructionist misconduct."[58] Also, a defendant's self-representation right may be denied if he lacks the mental

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[50]*Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[51]*Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

[52]*Munkus v. Furlong*, 170 F.3d 980, 984 (10th Cir. 1999); *U.S. v. Schaff*, 948 F.2d 501, 503, 34 Fed. R. Evid. Serv. 448 (9th Cir. 1991); *see also Woods v. Sinclair*, 655 F.3d 886, 898–99 (9th Cir. 2011), cert. granted, judgment vacated on other grounds, 132 S. Ct. 1819, 182 L. Ed. 2d 612 (2012) (state court was not objectively unreasonable in concluding that petitioner was not denied his right to represent himself at trial; although petitioner twice informed the court that he opposed any continuance of the trial date and indicated that he was able to proceed *pro se*, these statements did not constitute unequivocal requests for self-representation).

[53]*McGhee v. Dittmann*, 794 F.3d 761, 770–71 (7th Cir. 2015) (state court's determination that petitioner did not clearly and unequivocally communicate a desire for self-representation under *Faretta* was not unreasonable even though petitioner demanded to discharge his attorney, stated that he was going to "speak up" for himself and could not be expected to do nothing in his own defense, and requested "to speak like everybody else"); *U.S. v. Sanchez-Garcia*, 685 F.3d 745, 752 (8th Cir. 2012) (even though petitioner stated that he was not representing himself, he necessarily chose self-representation where he repeatedly rejected all options except self-representation and was warned of the consequences of self-representation); see also *King v. Bobby*, 433 F.3d 483, 492–93, 2006 FED App. 0006P (6th Cir. 2006); *U.S. v. Hoskins*, 243 F.3d 407, 410 (7th Cir. 2001); *U.S. v. Irorere*, 228 F.3d 816, 826–27 (7th Cir. 2000).

[54]*Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000).

[55]*McKaskle v. Wiggins*, 465 U.S. 168, 178–179, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

[56]*Faretta v. California*, 422 U.S. 806, 835 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[57]*Faretta v. California*, 422 U.S. 806, 835 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[58]*Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

competency to conduct his trial defense, even if he is adjudged competent to stand trial.[59] A defendant who elects self-representation does not have a constitutional right to the appointment of advisory or standby counsel or any other type of "hybrid" representation.[60] Significantly, "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.' "[61] Even errors by counsel made prior to a defendant's election to represent himself will not constitute a basis for relief if the defendant "could have corrected those errors once he decided to represent himself."[62] Similarly, "[b]y exercising his constitutional right to present his own defense, a defendant necessarily waives his constitutional right to be represented by

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[59]*Indiana v. Edwards*, 554 U.S. 164, 178, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

[60]*McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

[61]*Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *see also McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *accord Simpson v. Battaglia*, 458 F.3d 585, 598 (7th Cir. 2006) ("The deficiencies of which Simpson now complains were products of his self-representation and do not constitute defective assistance of counsel[.]"); *Williams v. Stewart*, 441 F.3d 1030, 1047 n.6 (9th Cir. 2006), opinion amended, 2006 WL 997605 (9th Cir. 2006) ("Williams makes no free-standing claim [sic] ineffectiveness assistance of counsel, nor could he. Having failed to show that his decision to represent himself was involuntary, Williams cannot claim that he was denied the effective assistance of counsel at trial[.]"); *U.S. v. Manjarrez*, 306 F.3d 1175, 1180 (1st Cir. 2002), writ denied, 2010 WL 1486504 (D.R.I. 2010) ("Equally without merit is the defendant's argument on appeal that the trial judge should have terminated his right to proceed *pro se* when it became apparent that he was representing himself poorly. Once a defendant knowingly and intelligently foregoes his right to counsel, he cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel[.]' ") (internal quotation marks omitted); *Tate v. Wood*, 963 F.2d 20, 26 (2d Cir. 1992) ("Petitioner elected to exercise his constitutional right to proceed *pro se* in his own defense . . . and concomitant with the right is the caveat that 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[.]' ") (internal quotation marks omitted); *U.S. v. Roggio*, 863 F.2d 41, 43 (11th Cir. 1989) ("The appellant clearly had a right to represent himself, but in exercising that right he cannot now complain that he received ineffective assistance of counsel at trial").

See also U.S. v. Egwaoje, 335 F.3d 579, 587 (7th Cir. 2003) (defendant who elects to represent himself may not pursue claim on appeal that his own deficiencies in representation violated his due process right to a fair trial); *U.S. v. McDowell*, 814 F.2d 245, 251 (6th Cir. 1987) (rejecting fair-trial claim brought by a criminal defendant who had represented himself at trial); *U.S. v. Benefield*, 942 F.2d 60, 66, 33 Fed. R. Evid. Serv. 1081 (1st Cir. 1991) ("The fact that [the *pro se* defendant] was not a very effective advocate does not mean he was improperly permitted to proceed without the aid of counsel[.]").

[62]*Cook v. Ryan*, 688 F.3d 598, 609 (9th Cir. 2012).

counsel."[63]

Although a defendant has no constitutional right to simultaneously proceed *pro se* and with counsel, district courts have discretion to permit hybrid representation arrangements whereby the defendant takes over some functions of counsel despite being represented. These types of hybrid representation arrangements create significant problems in analyzing the issue of waiver of counsel. Under *Faretta*, a defendant who seeks to represent himself entirely without a lawyer must knowingly and intelligently waive his right to counsel. But lower federal courts analyzing hybrid representation arrangements disagree as to when a defendant's conduct triggers the waiver of his right to counsel.[64] Moreover, circuit courts that have held that a waiver is necessary for hybrid representation disagree about what procedures are required before a defendant's waiver is knowing and intelligent. Some require *Faretta* warnings any time the hybrid-represented defendant waives his right to counsel.[65] Yet other courts do not require these warnings when the defendant has the required knowledge about the dangers of proceeding *pro se* from other sources,[66] or the petitioner did not need assistance from counsel, or a warning from the court about the dangers of proceeding without counsel, in the particular circumstance being

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[63]*Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir. 2008), as amended on denial of reh'g and reh'g en banc, (Feb. 25, 2009).

[64]*Fiorito v. U.S.*, 821 F.3d 999, 1003–07 (8th Cir. 2016) (district court did not violate petitioner's right to counsel in granting his *pro se* request to withdraw his guilty plea without first conducting a *Faretta* hearing; although the district court considered petitioner's letters requesting to withdraw his guilty plea, petitioner was represented by counsel, who repeatedly advised him not to withdraw his guilty plea, and petitioner made the personal decision to ignore counsel's advice and withdraw his plea), *and Stano v. Dugger*, 921 F.2d 1125, 1147 (11th Cir. 1991) (rejecting claim that defendant was entitled to *Faretta* warnings when he pleaded guilty against the advice of counsel), *and U.S. v. Cromer*, 389 F.3d 662, 682–83, 65 Fed. R. Evid. Serv. 1151, 2004 FED App. 0412P (6th Cir. 2004) ("A defendant who seeks merely to supplement his counsel's representation, as Cromer did here, has failed to avail himself of his right to self-representation and thus failed to waive his right to the assistance of counsel."), *and U.S. v. Leggett*, 81 F.3d 220, 224 (D.C. Cir. 1996) (holding that defendant in a hybrid representation arrangement does not waive his right to counsel unless he makes "an articulate and unmistakable demand . . . to proceed *pro se*"), *with U.S. v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989) (holding that defendant must knowingly and intelligently waive his right to counsel before he assumes any of the "core functions" of counsel).

[65]*U.S. v. Davis*, 269 F.3d 514, 518–20 (5th Cir. 2001); *U.S. v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989).

[66]*U.S. v. Yagow*, 953 F.2d 427, 430, Bankr. L. Rep. (CCH) P 74407 (8th Cir. 1992).

challenged.[67]

§ 35:3 The four categories of Sixth Amendment cases

Speaking broadly, there are four different categories of cases to be considered in determining whether a defendant has been denied the Sixth Amendment right to effective representation by counsel. These categories are " distinguished by the severity of the deprivation and the showing of prejudice required of the defendant in order to succeed on his claim."[1]

The first category encompasses circumstances so severe as to constitute *per se* violations of the Sixth Amendment. These are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[2] The second category involves circumstances where counsel labored under an actual conflict of interest that adversely affected his lawyer's performance (at least in the context of concurrent representations).[3] The third category entails ineffective assistance of counsel that is unrelated to a conflict of interest, and is analyzed under the familiar *Strickland* framework.[4] The last category involves government invasions of the attorney-client relationship.[5] The *Strickland* standard applies in those cases where the following two standards do not. In practice, most ineffective-assistance-of-counsel claims are governed by the *Strickland* standard.[6] Each of these categories is discussed below, beginning with circumstances implicating a *Strickland* analysis.

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[67]*Fiorito v. U.S.*, 821 F.3d 999, 1003–07 (8th Cir. 2016) (holding that a *Faretta* hearing was not required, even if petitioner was unrepresented and proceeded *pro se*, when he sought to withdraw his plea; although a plea withdrawal hearing is a critical stage of the proceedings, petitioner did not need assistance from counsel—or a warning from the court about the dangers of proceeding without counsel—in litigating an adversarial hearing on his request to withdraw because the government agreed that petitioner should be allowed to withdraw his guilty plea, and the district court's decision to grant the motion without an evidentiary hearing obviated the need to warn petitioner about the difficulty of representing himself at such a hearing).

[Section 35:3]

[1]*U.S. v. O'Neil*, 118 F.3d 65, 70 (2d Cir. 1997).

[2]*U.S. v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (citation omitted). *See*, *infra*, §§ 35:20 to 35:29.

[3]*Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481–82, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

[4]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[5]*See, infra*, § 35:33.

[6]*Hodges v. Epps*, 2010 WL 3655851 (N.D. Miss. 2010), aff'd in part, 648