[J-66-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

PUBLIC DEFENDER'S OFFICE OF VENANGO COUNTY,	:	No. 16 WM 2005
	:	
	:	Petition for Writ of Prohibition.
Petitioner	:	
	:	
v.	:	
	:	
VENANGO COUNTY COURT OF COMMON PLEAS,	:	
	:	
Respondent	:	ARGUED: May 18, 2005

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: MARCH 24, 2006**

The Majority holds that the order below, which involuntarily drafted the Venango County Public Defender to serve as free standby counsel for a non-indigent criminal defendant who elected to represent himself *pro se*, is reviewable via the Public Defender's Petition for a Writ of Prohibition, notwithstanding that the case is moot, and that the Writ was inappropriately invoked in a case where there is no allegation that the trial court acted either without jurisdiction or beyond its authority. On the merits of the question, the Majority approves of the appointment order below by deeming it an "entirely appropriate" exercise of the trial court's authority and "an eminently reasonable compromise" on the "unique" facts presented. I respectfully disagree with both the Majority's decision to entertain this Petition and its analysis of the propriety of the lower court's appointing free counsel to an ineligible defendant. Moreover, I believe that we should refer this matter to the Criminal Procedural

Rules Committee to analyze Pa.R.Crim.P. 121 and 122 and consider revisions that would make clear that it is inappropriate to automatically appoint taxpayer-subsidized counsel to ineligible, non-indigent defendants whenever they waive their right to counsel.

I. PROPRIETY OF THE WRIT OF PROHIBITION TO REVIEW A ROUTINE ORDER APPOINTING STANDBY COUNSEL

The Majority's ultimate mandate consists of a denial of the request for a Writ of Prohibition, which is inevitable because defendant Robert Bettelli has already been tried and convicted with the Public Defender serving involuntarily as his court-appointed standby counsel; thus, it is far too late to prohibit the appointment which is at "issue" here. The Majority's ineffectual mandate, thus, is but the epilogue to a purely advisory opinion. The Majority recognizes that the instant litigation is moot, but it nevertheless holds that the standby counsel appointment order falls within the "capable of repetition yet evading review" exception to mootness. In so holding, the Majority rejects out of hand the cogent argument forwarded by the Administrative Office of Pennsylvania Courts ("AOPC") that, if a similar instance of forced representation were to recur, the Public Defender could seek redress through non-extraordinary means -- *i.e.*, either by seeking review as of right under the collateral order doctrine, see Pa. R.A.P. 313, or by seeking a permissive interlocutory appeal. See Pa.R.A.P. 312 & Chapter 13. The Majority believes that these normal avenues of appellate review are unavailable as a result of Pa.R.Crim.P. 600. The Majority states that:

> Pursuant to Pa.R.Crim.P. 600, a trial must commence 365 days from the date on which the complaint is filed, if the defendant has been released on bail. See Pa.R.Crim.P. 600(A)(3). Likewise, the Rule requires an incarcerated defendant be tried within 180 days. See Pa.R.Crim.P. 600(E). Under either of the scenarios suggested by the AOPC, a defendant's constitutional right to a speedy trial would be implicated and, thus, whether a certified appeal and/or interlocutory appeal were sought by the public defender, as distinct from any defendant, regarding the appointment as

> standby counsel at the request of the Commonwealth, the adjudication of the appeal could presumably result in the loss of the prosecution. Thus, it does not appear that trial could be delayed while an appeal of the issue was being pursued without the potential of a hampered prosecution and, if, conversely, the trial was conducted, we would face the same mootness argument made herein. Thus, we conclude that the issue is one that is capable of repetition, yet likely to evade review.

Majority slip op. at 8 (footnote omitted). The Majority concludes that, in light of the constitutional speedy trial concerns it perceives *sua sponte*, "the only jurisprudentially sound way" that this sort of issue could be reviewed is in the context of a Writ of Prohibition. Id. at 9.[1]

The Majority misconstrues Rule 600 in two respects. First, with all due respect, the Majority is mistaken in suggesting that Rule 600 concerns necessarily implicate a defendant's constitutional speedy trial rights.

> Rule 1100 was adopted by this Court on June 8, 1973 in an attempt to give "practical effect to the United States Supreme Court's observation that state courts could, pursuant to their supervisory powers, establish 'fixed time period[s] within which cases must normally be brought.'" Commonwealth v. Hamilton, 449 Pa. 297, 302, 297 A.2d 127, 130 (1972) (quoting Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The United States Supreme Court has, however, continued to eschew the rigidity of such an approach to the Sixth Amendment's right to a speedy trial, preferring instead a totality of the circumstances review. U.S. v. MacDonald, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978); Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). As we noted in [Commonwealth v.] Crowley, [466 A.2d 1009, 1012 n. 5 (Pa. 1983)]:
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>> In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court held that it is impossible to determine with precision when a state has

[1] The Public Defender does not argue that the AOPC's argument respecting mootness fails because of Rule 600; instead, the Majority invokes Rule 600 without the benefit of briefing from either party. That the Majority's analysis of the effect of Rule 600 plainly is erroneous illustrates the danger inherent in such *sua sponte* endeavors.

> denied a defendant's Sixth Amendment right to a speedy trial. The Barker Court identified four factors to be considered in determining a Sixth Amendment speedy trial violation: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his rights; and (4) prejudice to the defendant.

Commonwealth v. Terfinko, 474 A.2d 275, 278-79 (Pa. 1984).[2] [3] Accord Crowley, 466 A.2d at 1012 ("We adopted Rule 1100 pursuant to our supervisory powers to reduce the backlog of criminal cases in Common Pleas and to provide an objective standard for protection of [a] defendant's speedy trial rights.") (citing cases). A violation of Rule 600 simply does not establish per se a constitutional violation; for example, the windfall of a discharge may result from a technical violation of Rule 600 in the absence of any demonstrable prejudice, and thus, notwithstanding any constitutional implications.

The more important error in the Majority's reading, however, consists in its assumption that any collateral or permissive appeal pursued by the Public Defender in its capacity as court-appointed standby counsel, which might occasion a delay in the defendant's trial beyond Rule 600's technical run date, would warrant a Rule 600 windfall in the form of a discharge or, as the Majority calls it, "loss of the prosecution." Majority slip op. at 8-9. As this Court observed in Crowley, 466 A.2d at 1012, "[t]he administrative mandate of Rule 1100 [now Rule 600] certainly was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth." Consistently with Crowley's observation, the plain language of Rule 600(G), which the Majority does not

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[2] Former Criminal Rule 1100 was renumbered Rule 600 in March 2000. Pa.R.Crim.P. 600, Note.

[3] The Hamilton Court discussed the practical difficulties inherent in the constitutional standard, examined the benefits of adopting a supervisory rule which would fix certain time limits for bringing cases to trial, and referred the matter to the Criminal Procedural Rules Committee to consider such a rule. The result of the referral was the adoption of what is now Rule 600.

discuss, makes clear that a discharge is not available unless the delay could have been avoided by the Commonwealth through the exercise of due diligence. Rule 600 (G) reads:

> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated.
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> * * *
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> If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain.

Pa.R.Crim.P. 600 (G).

In a situation like the instant one, the defendant's court-appointed standby counsel, not the Commonwealth, is the party seeking interlocutory or certified review. To the extent that such review would occasion a delay in the commencement of trial, that defense delay is a circumstance beyond the control of the Commonwealth, which accordingly does not implicate the Commonwealth's due diligence. Because this scenario, if repeated, would not implicate Rule 600, the Majority's holding that the "capable of repetition yet evading review" exception to the mootness doctrine applies is clearly erroneous in my opinion.

Even aside from the disqualifying mootness issue, it is readily apparent that a Writ of Prohibition should not be deemed available to review a challenge to a pretrial order appointing standby counsel in a criminal case. The Majority inexplicably dismisses the AOPC's foundational argument on this point without ever discussing the nature and purpose of this extraordinary Writ. See Capital Cities Media, Inc. v. Toole, 483 A.2d 1339, 1341 (Pa. 1984) (consideration of nature and purpose of Writ of Prohibition is essential in discussing its propriety). Similarly, the Public Defender never discusses what is required under the Writ of Prohibition. The classic expression of the nature and purpose of the Writ

is found in Mr. Justice (later Chief Justice) Horace Stern's opinion for the Court in Carpentertown Coal & Coke Co v. Laird, 61 A.2d 426 (Pa. 1948):

> Prohibition is a common law writ of extremely ancient origin[.] … Its principal purpose is to prevent an inferior judicial tribunal from assuming a jurisdiction with which it is not legally vested in cases where damage and injustice would otherwise be likely to follow from such action. It does not seek relief from any alleged wrong threatened by an adverse party; indeed it is not a proceeding between private litigants at all but solely between two courts, a superior an[d] an inferior, being the means by which the former exercises superintendance [sic] over the latter and keeps it within the limits of its rightful powers and jurisdiction.
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> The writ of prohibition is one which, like all other prerogative writs, is to be used only with great caution and forebearance and as an extraordinary remedy in cases of extreme necessity to secure order and regularity in judicial proceedings if none of the ordinary remedies provided by law is applicable or adequate to afford relief. It is a writ which is not of absolute right but rests largely in the sound discretion of the court. It will never be granted where there is a complete and effective remedy by appeal, certiorari, writ of error, injunction, or otherwise … .

Id. at 428, 430.[4] This Court has extended the classic scope of the Writ "to encompass situations in which an inferior court, which has jurisdiction, exceeds its authority in adjudicating the case. This latter situation has been termed an 'abuse of jurisdiction.'" Capital Cities, 483 A.2d at 1342. Accord Commonwealth v. Vartan, 733 A.2d 1258, 1262-63 (Pa. 1999). The Capital Cities case thus summarized the governing test for the Writ as follows:

> The criteria for granting a writ of prohibition are satisfied by meeting a two-pronged test derived from the language of Carpentertown Coal, supra.

[4] This Court's common law power to issue the Writ has since been recognized in the Judicial Code. 42 Pa. C.S. § 721(2).

> … First, it must be established that there is no adequate remedy at law to afford relief; second, there must be extreme necessity for the relief requested to secure order and regularity in judicial proceedings. …
>
> Thus, the writ of prohibition under Pennsylvania law is an extraordinary remedy invoked to restrain courts and quasi-judicial bodies from usurping jurisdiction which they do not possess or exceeding the established limits in the exercise of their jurisdiction. The writ is not one of right but rather rests with the sound discretion of the appellate court. A writ will issue only upon a showing of extreme necessity and the absence of any available remedy at law. Where relief may be sought through ordinary avenues of judicial review, the writ will not lie.

483 A.2d at 1342-43 (citations omitted).

This run-of-the-mill court appointment dispute, which the Majority takes pains to emphasize turns upon its "unique," "narrow" facts, does not implicate the concerns that would warrant resort to the extraordinary Writ. Indeed, resort to the Writ is inappropriate under both prongs of the Carpentertown Coal test: (1) as I have noted in discussing mootness, other appellate remedies exist in the ordinary course; and (2) the abuse of lower court jurisdiction which creates the "extreme necessity" to issue the Writ is not remotely implicated. Indeed, as to the second prong, the Public Defender does not argue that the trial court in this case lacked jurisdiction, or "usurped" its established authority, in issuing its appointment order. To the contrary, the Defender candidly admits that its appointment in this case was fully authorized by this Court's Rules of Criminal Procedure. Rather than challenging jurisdiction, the gravamen of the Public Defender's complaint is merely that the trial court's Rules-based discretionary appointment authority "clash[es] with the discretion granted the Public Defender" under the Public Defender Act. The Public Defender then notes that there is a dearth of appellate case law interpreting the Public Defender's authority and that is why it has sought extraordinary review here.

I do not doubt the seriousness of the issue for purposes of the Public Defender seeking to understand the line between its authority and that of the court. However, this is

not an extraordinary circumstance calling for a Writ of Prohibition. The Public Defender's own pleadings make clear that it believes that the court acted in accordance with the Criminal Rules; its dispute is with the Rules themselves, which it believes are in conflict with the discretionary prerogatives reserved under the Public Defender Act. The Writ does not exist so that anytime a party wants to "prohibit" a trial judge from doing something, this Court will step in and remonstrate that judge. Rather, it exists for genuine instances of abuse affecting so fundamental a matter as the lower court's jurisdiction or power. Here, the Public Defender never acknowledges the controlling, high standard, much less does it try to satisfy the standard. The AOPC is absolutely correct that this is not an instance implicating the Writ of Prohibition.

Moreover, even if the Writ could be tortured to extend to this sort of dispute as a general matter, this case does not merit review because the "clash" in authority the Public Defender perceives is illusory. As the AOPC again correctly notes, the Rules themselves resolve the purported conflict. Criminal Rule 1101, which governs "Suspension of Acts of Assembly," specifically and unambiguously provides that the Public Defender Act is suspended "insofar as the Act is inconsistent with Rule 122." It is Rule 122, of course, which authorizes the trial courts to appoint counsel, irrespective of indigency or other concerns, when "the interests of justice so require."

In a system of scarce judicial resources, any case taken out of order and reviewed in "extraordinary" fashion forces the cases of other litigants, who have proceeded in the ordinary course, to the backburner. To ensure a rational and fair system of access to appellate justice, those who seek extraordinary treatment must be held to the standards which govern the manner of review they invoke. At a minimum, the petitioner (and this Court) should indicate a familiarity with the standard. In this case, because the Public Defender's pleadings establish no factual or legal predicate for issuing the Writ, we should simply dismiss the Petition without reaching the merits. The Majority's determination

otherwise will only serve to encourage future abuses of the Writ and to clutter this Court's already-overburdened docket to the detriment of other litigants.

II. THE MERITS

Although I would not reach the merits, since the Majority does so, and in a fashion with which I respectfully disagree, I offer my dissenting view. I have several concerns with the Majority's approval of the trial court's drafting of the Public Defender as taxpayer-financed standby counsel for a financially ineligible criminal defendant. First, the Majority does not make clear the governing standard of review. Second, the Majority's ultimate approval of the appointment order is based upon a finding that it was an "entirely appropriate" decision reflecting "an eminently reasonable compromise" given the "unique" and "narrow" facts here. Majority slip op. at 10-12. In my view, there was no "compromise" attempted or achieved here; instead, the trial court candidly admitted that it always appoints standby counsel in cases where the defendant is proceeding *pro se* and it saw no reason to distinguish between the Public Defender and private counsel in following its fixed approach. Third, because the Majority fails to enunciate the proper review standard and the actual basis for the trial court's decision, it fails to address a more difficult and important issue concerning the proper interpretation of this Court's Rules, which appear to authorize -- but certainly do not require -- the appointment of taxpayer-financed standby counsel to non-indigent criminal defendants in certain cases.

The relevant facts are straightforward. The trial court made clear in its opinion that it did not dispute the Public Defender's assessment that defendant Bettelli was financially ineligible for the Defender's services, or indeed for appointment of any taxpayer-financed counsel. The court realized that Bettelli was gainfully employed as an over-the-road truck driver, and that Bettelli had been dilatory in retaining the services of counsel. Trial ct. slip op. at 6. Moreover, Bettelli had validly waived his right to counsel and was prepared to

proceed *pro se* -- as was his constitutional right; see Commonwealth v. Starr, 664 A.2d 1326, 1334 (Pa. 1995) ("A criminal defendant has a long-recognized constitutional right to dispense with counsel and to defend himself before the court."); Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, (1975) (right of criminally accused to conduct his own defense is implicit in Sixth Amendment) -- if he were unable (or, as apparent in this case, unwilling) to retain the services of counsel. The trial court decided to test Bettelli's dilatoriness by (in the court's words) "forc[ing] the defendant to trial" in the hopes that the prospect of an imminent and unavoidable trial date would convince him to hire counsel. That hope did not pan out, however, and as the trial approached, the court elected not to grant further continuances to the defense. Instead, the court ordered the matter to trial with Bettelli representing himself and the Public Defender appointed, ten days before trial, as free standby counsel.

In its opinion, the trial court made it perfectly clear that it appointed the Public Defender in this case not because it was "balancing" any competing interests it perceived, but rather because that was the court's practice in all cases where the defendant elected to proceed *pro se*: "this judge, in every case where a defendant is representing himself *pro se*, has always appointed standby counsel." Trial ct. slip op. at 4-5.[5] The court explained that

[5] The trial court noted that it was aware that the Commonwealth requested the appointment of standby counsel because of a concern specific to the case, *i.e.*, the prospect of Bettelli, acting *pro se*, questioning the child victim. However, the court made clear that it did not appoint standby counsel because of this concern, but rather because it was the court's practice to do so in all cases of self-representation. It should be noted that the Commonwealth's apparent belief that a defendant exercising his constitutional right to self-representation could be forced to allow standby counsel to conduct an examination is mistaken -- at least absent disruption or some other concern sufficient to override the defendant's constitutional right of self-representation. See McKaskle v. Wiggins, 465 U.S. 168, 178, 104 S.Ct. 944, 951 (1984). Thus, the reason proffered by the Commonwealth would not warrant appointing standby counsel.

it viewed this blanket approach as authorized by Criminal Rule 122(c), which permits the trial court to assign counsel to the defendant on its own motion "whenever the interests of justice require it," without any requirement of indigency[6] and Rule 121(d), which provides that, in cases where the defendant's waiver of counsel is accepted, "standby counsel may be appointed by the court." The court also noted that, in this case, the seriousness of the charges warranted application of its blanket approach. Having explained why it believed appointment of taxpayer-financed standby counsel was appropriate, the court then explained why it appointed the Public Defender rather than private counsel. In the court's view, the Public Defender stood on the same footing "as any other (criminal) lawyer," and "the convenience of the court in this case" outweighed the Public Defender's interest in not devoting its limited resources to representation of a financially ineligible defendant. Id. at 5-6.

Turning first to the standard of review question, since the court relied upon Rules 121 and 122, those Rules are the proper starting point. Rule 121 permits, but does not require, the appointment of standby counsel in cases, such as this one, where the defendant has waived his right to counsel. The Rule is silent on the question of indigency; thus, it draws no distinction between those *pro se* defendants who are indigent and those who can afford to retain counsel, nor does it suggest a manner of recouping public moneys in a case where standby counsel is appointed for the benefit of a defendant who is financially able to retain his own lawyer. The Comment to the Rule, which is not binding,[7] states that, at least in court (*i.e.*, non-summary) cases "it is generally advisable that standby

[6] Rule 122 was later amended on April 28, 2005, with an effective date of August 1, 2005.

[7] Although useful tools for interpretation, the Comments to the Rules have not been officially adopted by this Court; thus, this Court is not bound by the Comments. See Commonwealth v. Lockridge, 810 A.2d 1191, 1196 (Pa. 2002); Commonwealth v. Martin, 388 A.2d 1361, 1363 (Pa. 1978); Steinert v. Galasso, 69 A.2d 841, 844 (Pa.1950).

counsel be appointed to attend the proceedings and be available to the defendant for consultation and advise." Pa.R.Crim.P. 121, Comment. The Comment then cites with approval to a case where the *pro se* defendant was disruptive, see Commonwealth v. Africa, 353 A.2d 855, 864 (Pa. 1976), and also notes that long or complicated trials, or trials involving multiple defendants, are instances where appointing standby counsel is advisable. Pa.R.Crim.P. 121, Comment.

Rule 122 is the general appointment rule. Rule 122 permits the appointment of counsel, in court cases, only for qualifying defendants "who are without financial resources or who are otherwise unable to employ counsel." However, the Rule provides for exceptional circumstances requiring the court, on its own motion, to appoint counsel to represent a defendant "whenever the interests of justice require it." Thus, the "interests of justice" exception, like the standby counsel rule, does not qualify the power by tying it to the defendant's financial status. Moreover, the Comment to Rule 122 makes clear that the broadness of this appointment power is intentional, as it states that this provision "retains in the issuing authority or judge the power to assign counsel regardless of indigency or other factors when, in the issuing authority or judge's opinion, the interests of justice require it." Pa.R.Crim.P. 122, Comment.

With respect to standby counsel, since the court is merely authorized to appoint counsel, but is not required to do so, Rule 121 must be construed as conferring a discretionary power upon the trial judge. Similarly, the Rule 122(C) appointment power must be construed as discretionary. Although the Rule is written in mandatory terms, the mandate is triggered only when the "interests of justice" so dictate. The question of whether the interests of justice in fact so dictate, of course, must be a matter of discretion. Accordingly, I would hold that this Court's review of the appointment below is confined to determining whether the trial court abused its discretion.

The trial court's candid explanation of the reasons it appointed the Public Defender does not reflect an exercise of discretion but a rote application of a hard-and fast rule; it always appoints standby counsel to defendants who represent themselves. It is not an exercise of discretion to do the same thing in all cases, irrespective of differing factual and legal considerations. Contrary to the Majority's view, such a regimen does not reflect any sort of "reasonable compromise" of competing interests. Moreover, the unilateral practice was justified, in the face of a claim that it overrode the Public Defender's own discretionary authority, on grounds that "the court's convenience" was paramount. This is not a consideration recognized by, or even suggested by, Rules 121 and 122. To the extent the Majority suggests that the ruling here was proper because it was an exercise in balanced decision-making, it does not withstand a record-based review.

The more difficult question -- one which the Majority's disposition avoids -- is whether the trial court's hard-and-fast rule, which it applied to the Public Defender in the circumstances here, may be deemed a proper exercise of its discretion under the Rules, notwithstanding its inflexibility. Put another way: is it proper for a trial court always to appoint standby counsel, even in a case where the defendant validly waived his right to counsel, is ineligible for taxpayer-assisted counsel, and where the appointment is objected to by the Public Defender, who has thereby been forced to divert time and resources away from those who are financially eligible for its services?

I would hold that the trial court abused its discretion. This author, having personally tried a number of cases against self-represented defendants, is well aware of the convenience to the court (and the prosecution) of reining in that election by having standby counsel made available. But the interests of justice dictate that there is more to be considered than convenience. Even in the case of an indigent defendant, who is entitled to taxpayer-provided counsel, once that defendant has validly waived the right to counsel, there is no constitutional entitlement to standby assistance. As a constitutional matter, the

defendant may choose counsel, or he may choose to represent himself. He is not entitled to both choices, and when he chooses self-representation, he should be prepared for the solitary consequences.

On the other hand, there may be circumstances attending a particular case where the appointment of standby counsel is advisable to vindicate concerns other than the defendant's right to counsel. The cases involving potentially disruptive defendants provide the best example; obviously, a defendant should not be permitted to employ his right of self-representation in a fashion which makes a mockery of the trial, or ensures the waste and expense of a mistrial. See Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499 (1971) (Burger, C.J., concurring); Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998); Commonwealth v. Africa, 353 A.2d 855 (Pa. 1976). Appointment of counsel in that instance may help to forestall a greater, planned injustice. The unique stakes involved in capital cases may also counsel in favor of a blanket rule requiring standby counsel, whether the defendant is indigent or not. See Commonwealth v. Szuchon, 484 A.2d 1365, 1376-77 (Pa. 1984). Moreover, at least where it is an indigent defendant, appointment of taxpayer-financed standby counsel in complex cases, cases where the trial is expected to be lengthy, or cases where there is some indication that the defendant, though competent, is mentally unstable, may further the interests of justice, and with no harm to countervailing interests of the defendant or society, which could be expected to bear the expense of a change in circumstances affecting an indigent defendant.[8]

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[8] In Faretta, the U.S. Supreme Court noted that:

> the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. Of course, a State may -- even over objection by the accused -- appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to

(continued…)

At least in non-capital cases, I would hold that the calculus cannot be the same in an instance where the defendant who has waived his right to counsel is not constitutionally entitled to taxpayer-financed counsel. In that instance, the taxpayers should not so cavalierly be expected to foot the bill for the lawyer the defendant has elected not to hire. In my view, in the case of a defendant who can afford counsel, but has elected not to retain counsel, taxpayer-financed standby assistance should be available only where the defendant has refused to hire standby counsel himself, and there is some specific reason to believe that the failure to appoint standby counsel may cause a greater public financial calamity (such as a mistrial or other significant waste of time and/or resources). In short, the appointment in that instance should exist only to further the public interest, and not the whim or caprice of the defendant. At a minimum, if counsel is to be appointed for a non-indigent defendant at public expense, some mechanism should be put in place to recoup the costs of the appointment.[9]

Although the relevant Rules as written do not draw an affirmative distinction between indigent and non-indigent defendants, the discretionary flexibility built into the Rules required the trial court to give more careful consideration to the distinction once the Public

(…continued)

> represent the accused in the event that termination of the defendant's self-representation is necessary.

422 U.S. at 834 n.46, 95 S.Ct. at 2525, 2541 n.46.

[9] The difficulty in recouping the costs is that the defendant has a constitutional right to represent himself and, such being the case, he should not be charged for an appointment (even a standby appointment) foisted upon him against his will -- at least in the absence of some indication that the threat of disruption on his part clearly warrants the appointment. See Anne Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, 75 N.Y.U. L. REV. 676, 699 (2000) ("A pro se defendant who objects to the appointment of standby counsel should not be required to pay for the service of the attorney").

Defender plainly identified it. It is not a sufficient answer in the face of that argument to say: “we always appoint standby counsel, even to non-indigent defendants who waive counsel.” In my view, that answer was clearly an abuse of discretion. Moreover, there was nothing in the circumstances of this case to suggest that an appointment of standby counsel was necessary to protect the public interest -- *e.g.*, there was no suggestion that Bettelli would seek to disrupt the proceedings or try to force a mistrial. The taxpayers should not be expected to bear the expense of an appointment of standby counsel for this defendant, who was financially able to secure his own counsel, but who elected not to (whether out of parsimony, ill judgment, a fervent desire to represent himself, or obstreperousness), and who affirmatively waived his right to counsel and elected to proceed *pro se*.

Although I am fully comfortable with the interpretation and application of Rules 121 and 122 as I have articulated it above, I believe that a referral of the matter to the Criminal Procedural Rules Committee is appropriate to consider changes to Rules 121 and 122 which would more directly address the best way to balance the concerns where a non-indigent defendant waives his right to counsel. Indeed, there are complexities in the area of standby counsel, well illustrated in a law review article by Professor Anne Poulin. See Poulin, supra note 9.

III. CONCLUSION

I would summarily dismiss the Petition for a Writ of Prohibition. Failing that, the advisory opinion I would issue would disapprove the lower court’s appointment order. In either event, I would refer this matter to the Criminal Procedural Rules Committee. Hence, I respectfully dissent.