In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2019-0601
	:	
Appellee,	:	On Appeal from the
	:	Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
DAVID HACKETT,	:	
	:	Court of Appeals
Appellant.	:	Case No. 17 MA 106

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

STEPHEN P. HARDWICK (0062932)
Assistant Public Defender
Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, OH 43215
(t) 614-466-5394
(f) 614-644-0708
stephen.hardwick@opd.ohio.gov

Counsel for Appellant
David Hackett

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

PAUL J. GAINS (0020323)
Mahoning County Prosecutor
RALPH M. RIVERA* (0082063)
Assistant Prosecutor
Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.

Youngstown, OH 44503
(t) 330-740-2330
(f) 330-740-2008
rrivera@mahoningcountyoh.gov

Counsel for Appellee
State of Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTRODUCTION

After the State charged David Hackett with one count of aggravated murder, one count of rape, and two counts of kidnapping, Hackett chose to represent himself. *State v. Hackett*, 2019-Ohio-1091, ¶20 (7th Dist. 2019) ("App. Op."). The trial court nonetheless appointed "standby counsel" for Hackett—a lawyer who, while not representing Hackett, would attend the trial and be ready to step up to represent Hackett if necessary. But Hackett wanted more: he wanted standby counsel to serve as an advisor or shadow counsel, helping him along the way, explaining basic courtroom procedures to him, and more. The trial court declined to permit this, noting that this Court had already rejected a right to "co-counsel" or "hybrid representation." *See State v. Martin*, 103 Ohio St. 3d 385, 2004-Ohio-5471, ¶31 (citation omitted). This appeal—much like the appeals in *State v. Jones*, No. 2019-0395 and *State v. Hundley*, No. 2018-0901—asks whether the trial court's limitations on standby counsel violated Hackett's right to counsel under the Sixth Amendment.

The answer is "no." The right to counsel and the right to self-representation "are independent of each other and may not be asserted simultaneously." *Id.* at ¶32 (citation omitted). While the Sixth Amendment confers a right to be represented by counsel at trial, the defendant who waives that right cannot claim a residual constitutional right to standby counsel at all—certainly there is no right to have standby counsel that provides some minimum level of assistance. To be sure, once "the right to counsel is properly

waived, trial courts are *permitted* to appoint standby counsel." *Id.* ¶28 (emphasis added). But nothing in the Constitution *requires* standby counsel. That conclusion, in addition to comporting with decisions from this Court, reflects the consensus view of federal circuit courts and state supreme courts around the country. *Wilson v. Parker*, 515 F.3d 682, 696–97 (6th Cir. 2008); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997); *United States v. Singleton*, 107 F.3d 1091, 1100–03 (4th Cir. 1997); *United States v. Gigax*, 605 F.2d 507, 517 (10th Cir. 1979); *United States v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996); *Locks v. Sumner*, 703 F.2d 403, 407–08 (9th Cir. 1983); *State v. Gunther*, 278 Neb. 173, 177–79 (2009); *People v. Dennany*, 445 Mich. 412, 440–43 (1994); *People v. Mirenda*, 57 N.Y.2d 261, 264 (1982). The only *constitutional* limit on standby counsel is that they must not become *so* active that they violate the right of self-representation. *McKaskle v. Wiggins*, 465 U.S. 168 (1984)

Hackett offers no sound basis for creating a new constitutional right to "active" standby counsel. He misreads this Court's case law to find such a constitutional right where none exists, conflating what he suggests is better practice with a constitutional command. If more guidelines for standby counsel would be useful, that should be done by rule, not through the creation of a constitutional right. The Court should affirm.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in protecting Ohio's Constitution against misconstruction, and here, no sound doctrinal basis exists for a right to advisory counsel *after* a valid waiver of the Sixth Amendment right to counsel.

The Attorney General is also interested in the effective administration of justice in Ohio courts. This case could have serious, negative consequences for this interest. Finding a right to standby counsel would risk interference with the defendant's right to self-representation: if standby counsel does too much, the defendant can claim interference with self-representation. But under Hackett's proposal, if standby counsel does too little, the defendant can claim ineffective assistance of standby counsel.

This imposes a duty on trial courts to find just the "right level" of standby counsel activity, with a constitutional violation looming in *both* directions if the court is later found to have strayed from the "just right" path. That would undoubtedly strain trial courts in trying to find that balance. And it would lead to unwarranted reversals. Rather than create those problems in an already challenging area, the Court should keep standby counsel within the discretion of trial courts, as an optional tool to ensure the effective administration of justice.

STATEMENT OF THE CASE AND FACTS

1. The State indicted David Hackett on one count of aggravated murder, one count of rape, and two counts of kidnapping. App. Op. ¶19. He pleaded not guilty, and the trial court initially appointed counsel to represent Hackett. *Id.* ¶20. Hackett decided to waive his right to counsel and represent himself. *Id.* The trial court held a hearing on that waiver on the trial's intended start date, January 18, 2017. *Id.*

The trial court engaged in a colloquy, as Criminal Rule 44(A) requires, to ensure that Hackett's waiver was "knowing, intelligent, and voluntary." Crim. Rule 44(A). *Id.* The trial court warned Hackett against self-representation: "I cannot advise you strongly enough that I would discourage any individual from representing themselves." Hearing Tr., Jan. 18, 2017 at 15. The court warned him that he would face challenges without knowing procedural rules, telling him "you're still going to be bound by those same rules," "you may be unable to proceed and present a defense because you don't know how to present it," and "I'm not able to give you advice." *Id.* at 11. The court told Hackett that giving up counsel meant not being able to later claim ineffective assistance of counsel. *Id.* at 12.

The court also told Hackett that it would appoint his existing counsel, Louis DeFabio, as standby counsel, and described DeFabio's limited role. The court said it would "appoint Attorney DeFabio as stand-by counsel so that," if Hackett later realized that self-representation was a mistake, DeFabio could "pick up" the representation. *Id.*

at 16. The court further warned that even if DeFabio were to "jump in at that point," "he may be unable to repair any damage that you may have done acting as your own attorney without knowing the rules of evidence or the rules of procedure." *Id.* at 17. After Hackett affirmed that he understood all that, the trial court granted Hackett's request and appointed DeFabio to serve as standby counsel. App. Op. ¶20. The trial court then continued the trial, moving the start date from January 18 to May 30. *Id.*

During the interim, Hackett moved for standby counsel to "actively assist" him—he wanted standby counsel to advise him and advocate for him in several ways, and not just to stand by to serve as counsel if Hackett ceased representing himself. *See* App. Op. ¶21; Hackett's Pro Se Motion to Request Full Assistance of Standby Counsel Be Ordered (filed March 31, 2017, Dkt. 165). More precisely, Hackett wanted "full assistance" from standby counsel: he asked that standby counsel "actively assist" him "in navigating courtroom protocol and procedure, including evidentiary and constitutional matters related to admitting or objecting to the admission of evidence." Pro Se Motion at 3. Hackett wanted counsel "to advocate on the record with respect to procedural matters as long as standby counsel's actions neither undercut the reality nor the perception of Defendant's control of his defense." *Id.* Hackett even insisted that "standby counsel must sit at table to ensure compliance with the basic rules of procedure." *Id.* Hackett combined these specific requests with an acknowledgement that he was "not entitled to hybrid counsel." *Id.*

The trial court denied the motion, explaining to Hackett that the role of standby counsel does not include hybrid representation. *Id.* ¶21. The court reiterated that DeFabio would not serve as co-counsel in any way, but would remain on standby. The court said that "I again am going to encourage you to change your mind" about self-representation. Hearing Tr., April 13, 2017 at 4. The court noted that if Hackett waited until mid-trial started to "realize" he was "in over [his] head" and to change course, it would be too late for a continuance, and counsel would pick up at that point. *Id.* Hackett persisted in representing himself, however. After the court rejected Hackett's request for active standby counsel, Hackett signed a written waiver of counsel on April 13, 2017. App. Op. ¶21.

The case proceeded to trial, where the State proved its case. *Id.* ¶22. Hackett was found guilty on all counts and the Court of Common Pleas sentenced him to life in prison without the possibility of parole. *Id.* ¶22.

2. Hackett appealed to the Seventh District Court of Appeals, which affirmed unanimously. Although Hackett sought relief on multiple grounds, just one is relevant here: Hackett claimed that he was denied his Sixth Amendment right to assistance of counsel when the trial court limited the role of standby counsel.

Hackett argued that the trial court wrongly limited his standby counsel's role during trial. App. Op. ¶44. According to Hackett, the trial court prevented standby counsel from participating in "any capacity" unless Hackett opted out of his right to

proceed *pro se*. *Id.* Hackett recognized that he was not entitled to "hybrid representation," but maintained that assistance of standby counsel still entitled him to explanations of basic courtroom procedures, which the trial court denied him. *Id.*

The Seventh District rejected this claim, concluding that the trial court did not improperly limit standby counsel's role for three reasons. First, the record did not show that the trial court prevented Hackett from having discussions with standby counsel "during breaks." *Id.* ¶61. Second, the Seventh District noted that Hackett never asked for a recess to consult with standby counsel. *Id.* Third, the court also recognized that Hackett "did not have much trouble introducing evidence and questioning witnesses." *Id.*

3. Hackett then turned to this Court. His jurisdictional memorandum raised four propositions of law. The Court accepted the appeal, but *only* as to the fourth proposition. That proposition asserted that the trial court unconstitutionally deprived Hackett of his right to counsel by limiting "the role of standby counsel." Memorandum in Support of Jurisdiction at i, 14. The Court denied review of the other propositions.

ARGUMENT

Amicus Attorney General's Proposition of Law:

> *When a criminal defendant validly waives his right to counsel and proceeds to represent himself, he has no constitutional right to "standby counsel," and if standby counsel is appointed, the defendant has no right to "full assistance" or any particular degree of activity or performance from standby counsel.*

Hackett argues that a defendant is denied the "Sixth Amendment right to counsel when a trial court incorrectly limits the role of standby counsel." Hackett Br. at 13. He is wrong: the Sixth Amendment confers no right to standby counsel, and so courts cannot violate the Sixth Amendment by limiting standby counsel's role.

A. A defendant who elects to represent himself waives his Sixth Amendment right to counsel, and thus has no Sixth Amendment right to standby counsel.

1. The Sixth Amendment of the United States Constitution, and Section 10, Article I of the Ohio Constitution, protect the right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." The Ohio Constitution similarly provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Ohio Const., Art. I, §10. The two provisions mean the same thing with respect to the issues raised in this case: Hackett does not argue that the Ohio Constitution provides any rights in addition to those conferred by the Sixth Amendment, and the case law suggests the same. *See State v. Wade*, 2004-Ohio-3974, ¶19 (10th Dist.) (noting Sixth Amendment right to counsel and explaining that "Section 10, Article

I, Ohio Constitution provides the same guarantee"). Thus, this brief refers to both simply as "the Sixth Amendment."

The Sixth Amendment "'as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.'" *Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 389 (Scalia, J., dissenting)). It was thus a negative right that prohibited the government from *barring* the use of counsel—it did not obligate the government to *provide* counsel to those who wanted it. But the Supreme Court of the United States long ago abandoned the original meaning, reading the Sixth Amendment "to require not only a right to counsel at taxpayers' expense, but a right to *effective* counsel." *Id.; see also Strickland v. Washington*, 466 U.S. 668 (1984).

Of course, nothing requires a defendant to take advantage of the right to counsel. To the contrary, the right to assistance of counsel logically includes a "correlative right to dispense with a lawyer's help." *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 279 (1942). "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-20 (1975). This Court has likewise explained that "a defendant in a state criminal trial has an independent constitutional right to self-representation," and that

he "may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson*, 45 Ohio St. 2d 366, syl. ¶1 (1976) (citation omitted).

While the courts have acknowledged a right of self-representation, courts have also dealt with the practical reality that self-representation is not usually in the defendant's best interest. To help allay that concern, *Faretta* suggested in a footnote that a court may wish to appoint "standby counsel" to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 834 n. 46. Critically, however, *Faretta* does not require standby counsel as a matter of constitutional law; it says that States "may" wish to assign standby counsel in criminal trials. *Id.* Similarly, this Court has recognized that, "[o]nce the right to counsel is properly waived, trial courts are *permitted* to appoint standby counsel to assist the otherwise pro se defendant." *State v. Martin*, 103 Ohio St. 3d 385, 2004-Ohio-5471, ¶28 (emphasis added).

Neither first principles nor case law justify reading the Sixth Amendment as *requiring* appointment of standby counsel. Beginning with first principles, defendants who choose to represent themselves *waive* their Sixth Amendment right to counsel. *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *State ex rel. Greene v. Enright*, 63 Ohio St. 3d 729, 731 (1992). But an ineffective-assistance claim entails a *violation* of the Sixth Amendment

right. A defendant who waives a right cannot be heard to complain about its violation. Thus, a defendant that elects to represent himself, and who thereby waives his right to counsel, cannot argue for the violation of his Sixth Amendment right to counsel, standby or otherwise.

Consistent with this, cases from Ohio and around the country reject the notion that there is any Sixth Amendment right to standby counsel. This Court, for example, has held that "the right[s] either to appear *pro se* or to have counsel" are mutually exclusive. *Martin*, 2004-Ohio-5471. ¶¶31–32. In other words, the right to self-representation entails the waiver of the right to counsel, and *vice versa*. *See id.* Thus, the party who chooses to represent himself can no longer assert his now-waived right to counsel. Although *Martin* made this point when disclaiming any right to "hybrid representation"—the situation in which "the defendant and [appointed] counsel act as co-counsel, sharing responsibilities in preparing and conducting trial," *id.* ¶29—the same logic defeats any claim to standby counsel. In the standby-counsel situation, as in the case of hybrid representation, the defendant who waives his right to counsel by proceeding *pro se* cannot simultaneously assert his right to counsel.

This Court's decision in *State v. Obermiller*, 147 Ohio St. 3d 175, 2016-Ohio-1594, bolsters the conclusion that there is no constitutional right to standby counsel. In that case, this Court held that "neither state nor federal jurisprudence requires a court to inform a defendant who seeks to waive counsel of the potential for standby counsel." *Id.*,

¶50. The opposite would be true if there were a Sixth Amendment right to standby counsel. After all, the Sixth Amendment right to counsel obligates courts to secure a knowing and intelligent waiver of the right before allowing defendants to proceed *pro se*. *Gibson*, 45 Ohio St. 2d 366, at syl. ¶1. If the right to counsel included a right to *standby* counsel, then courts would have to obtain a knowing and intelligent waiver of the right to standby counsel too. But *Obermiller* says that no such waiver is required—indeed, the court does not even have to *tell* the defendant about the option to seek standby counsel.

Ohio's appellate courts have addressed the question even more directly, squarely holding that the Sixth Amendment confers no right to have standby counsel at all, or to have standby counsel present at all times. For example, in *State v. Bloodworth*, 2013-Ohio-248, the Ninth District rejected a claim "that the appointment of standby counsel was mandatory," holding that there is no right to standby counsel. *Id.* ¶5 (citing *State v. Gatewood*, 2009-Ohio-5610, ¶46 (2d Dist.) and *State v. Washington*, 2012-Ohio-1531, ¶¶9–10 (8th Dist.)). Along the same lines, the Eighth District has recognized that "a pro se defendant does not have an absolute right to standby counsel." *State v. Hardman*, 2016-Ohio-498, ¶22 (8th Dist.). And the Second District, in *State v. Edmonds*, 2011-Ohio-1282, ¶26, held that no error occurred when standby counsel left the courtroom for long stretches to work in his nearby office, and to be on call if the defendant asked for him. The court reasoned: "If a defendant possesses no Sixth Amendment right to assistance

from stand-by counsel, we question how anything stand-by counsel does or fails to do while acting in that capacity—including leaving the courtroom—could violate a defendant's Sixth Amendment rights." *Id.*

The case law from other courts is consistent with the Ohio case law. For example, the Sixth Circuit has held that, when a defendant "waive[s] his right to counsel, his claim of ineffective assistance of trial counsel necessarily fails." *Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir. 2008). "Logically, a defendant cannot waive his right to counsel and then complain about the quality of his own defense." *Id.* (citations omitted); *see also Gall v. Parker*, 231 F.3d 265, 320 (6th Cir. 2000). Thus, "[t]o the extent [standby counsel] failed to act during trial, [defendant] merely suffered the consequences of his decision to proceed pro se." *Wilson*, 515 F.3d at 697.

Every federal appellate court to have addressed the issue agrees with the Sixth Circuit that "inadequacy of standby counsel's performance … cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment." *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006); *accord United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997); *United States v. Singleton*, 107 F.3d 1091, 1100–03 (4th Cir. 1997); *United States v. Gigax*, 605 F.2d 507, 517 (10th Cir. 1979); *United States v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996); *Locks v. Sumner*, 703 F.2d 403, 407–08 (9th Cir. 1983).

Cases from other States' supreme courts and appellate courts are in accord. For example, the Nebraska Supreme Court has held that "there is no federal Sixth Amend-

ment constitutional right to effective assistance of standby counsel," and no such right under the Nebraska Constitution, either. *State v. Gunther*, 278 Neb. 173, 177–79 (2009); *accord State v. Silva*, 107 Wash. App. 605, 626–27 (Ct. App. 2001). Other high courts agree that there is no constitutional right to standby counsel. *See, e.g.*, *People v. Dennany*, 445 Mich. 412, 440–43 (1994); *People v. Mirenda*, 57 N.Y.2d 261, 264 (1982). Relatedly, both the Illinois and Connecticut Supreme Courts have held that there is no right to hybrid representation, *People v. Pecoraro*, 175 Ill. 2d 294, 333 (1997); *State v. Gethers*, 197 Conn. 369, 382–91 (1985). And Illinois has also rejected a claim that a trial court erred in barring standby counsel from cross-examining witnesses. *People v. Redd*, 173 Ill. 2d 1, 38–9 (1996).

Within this broad consensus, a few cases have identified narrow exceptions to the general rule against the right to standby counsel. None of these exceptions is implicated in this case, however. For example, the Sixth Circuit has said that when the issue is not merely a defendant's waiver of counsel and choice of self-representation, but his *competency* to do so, standby counsel must be present and ready to challenge competence. *United States v. Amir*, 644 F. App'x 398, 400–01 (6th Cir. 2016). Separately, some courts have found that standby counsel, when appointed, may not have an ethical conflict with the defendant. *E.g.*, *Washington v. McDonald*, 143 Wash. 2d 506, 512–13 (2001); *see also Longjaw v. State*, 366 Mont. 472, 475–76 (2012) (noting conflicting authority). And the Second Circuit has suggested that effectiveness standards of the Sixth Amendment

might apply once standby counsel begins serving, in reality, as lead counsel. *Schmidt*, 105 F.3d at 90 ("Perhaps in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, we would consider a claim of ineffective assistance of standby counsel."); *see also Gunther*, 278 Neb. at 178–79 (noting *Schmidt* reservation). Not one of these cases, however, suggests that the Sixth Amendment confers a general right to standby counsel.

Though it is not legally relevant, it is worth noting that the consensus view makes for good policy. Defendants have a constitutional right to represent themselves. And since they must live with the consequences of trial, courts ought to respect that right. But because self-representation is nearly always a bad idea, States wisely choose not to *encourage* self-representation. Mandating standby counsel *would* encourage self-representation, because it would give defendants false confidence in their ability to represent themselves. It is one thing for defendants to take the risk of representing themselves, notwithstanding the "dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835 (citation omitted). It is quite another for the government to adopt policies (such as mandatory standby counsel) that *encourage* such risk taking.

2. The above shows that Hackett had no right to standby counsel at all. It follows from that broader principle that Hackett had no constitutional right to have standby counsel serve as advisory counsel, sit at table, or perform any minimum level of services.

As a doctrinal matter, a defendant cannot exercise his Sixth Amendment right after waiving it. Waiving a right precludes its exercise, and there is no doctrinal basis for locating some "residual right" to standby counsel, or to "active standby counsel," within the Sixth Amendment. When a court decides whether to make standby counsel available, it is exercising judicial policy in hopes of limiting the usual harm of self-representation. It makes little sense to say that the exercise of judicial policy gives rise to a constitutional right that would not otherwise exist. Indeed, such a holding would discourage trial courts from appointing standby counsel at all: Why would a court risk appointing standby counsel, and creating a basis for reversal, if it could instead refuse to appoint standby counsel altogether?

Moreover, requiring the standby counsel to perform such tasks would risk crossing the line into the type of "hybrid representation" that the Court has already rejected. *Martin*, 2004-Ohio-5471, ¶31 (citation omitted). "Hybrid representation differs from standby representation in that the defendant and counsel act as co-counsel, sharing responsibilities in preparing and conducting trial." *Id*. ¶29. And hybrid representation creates serious problems that appointment of standby counsel does not. For example, hybrid representation "poses difficult ethical issues for counsel and management issues for the trial judge when the defendant and his counsel disagree as to how the trial should proceed." *Id*. ¶33. On top of that, it will generally be unclear whether a defendant who asked for hybrid counsel got what he wanted: because there is "no clear

boundary line between hybrid representation and self-representation," *id.* ¶35, it will often be "difficult to ascertain … which parts of a trial have proceeded without counsel and where a waiver [of the right to counsel], if any applies," *id*. ¶35.

In light of these concerns, the Constitution cannot be read as conferring a right to hybrid representation. But the line between self-representation aided by standby counsel and hybrid representation is murky—if it exists at all. Thus, creating a right to the active participation of standby counsel risks creating what amounts to a right to hybrid representation. *Martin*'s rejection of the latter requires rejecting the former.

Finally, if there is a case to be made for mandating standards for standby or advisory counsel, such standards could and should be done by rule, not by manufacturing a constitutional command where none exists. Just as Criminal Rule 44(C) sets a standard for a waiver of counsel, another rule could perhaps define the scope of a trial court's discretion to appoint standby counsel and the roles such counsel can or should perform. Any such rule would, of course, be a matter of policymaking. But policymaking in the drafting of criminal rules is wholly appropriate—it is wholly inappropriate in the context of constitutional interpretation.

* * *

The Sixth Amendment confers no right to standby counsel. It follows that the Sixth Amendment confers no right to have standby counsel perform particular tasks.

B. Hackett's contrary arguments fail because they rely on a constitutional right to assistance of standby counsel where none exists.

Hackett presents no sound reason why the Sixth Amendment guarantees him assistance of standby counsel. And his argument that the trial court abused its discretion and prejudiced him by denying his request for full assistance of standby counsel fails, because it assumes the existence of such a right.

1. *Martin* permits, but does not require, the appointment of standby counsel.

Hackett mistakenly claims that *Martin* gives *pro se* litigants a right to assistance of standby counsel. That misreads *Martin*, which in fact *rejected* the existence of a right to standby counsel. True, *Martin* uses the phrase "the right to representation by counsel or to proceed *pro se with the assistance of standby counsel*." 103 Ohio St.3d 385 at syl. ¶1 (emphasis added). Standing alone, that sentence might seem to support Hackett's view. But the rest of the opinion refutes Hackett's view. For one thing, *Martin* explains that trial courts are "permitted," not required, to appoint standby counsel. *Id.* ¶28. And, as noted above, *Martin's* logic compels the conclusion that there is no right to standby counsel. At the very least, it compels the conclusion that there is no right to *active* standby counsel of the sort Hackett requested, since a right to such standby counsel would amount to a right to hybrid representation—precisely the right that *Martin* held does not exist. *Id*. ¶31. Read in light of that, and in light of the consensus view that the Sixth Amendment confers no right to standby counsel at all, *Martin* is best understood

to mean that defendants have a constitutional right to proceed *pro se*, and that they *may* exercise this right with the assistance of standby counsel if one is appointed. But *Martin* ought not be read to create a *right* to the assistance of standby counsel.

2. The trial court neither abused its discretion nor prejudiced Hackett in denying his request for full assistance of standby counsel.

Hackett claims that the trial court improperly limited Hackett to two options regarding representation: representation by counsel, or self-representation with non-participating standby counsel. Hackett Br. at 19. Hackett says he was deprived of a third option of self-representation with "full assistance" of standby counsel. *Id.* And he argues that the trial court abused its discretion when it failed to allow standby counsel to sit at counsel's table. *Id.*

This argument assumes the existence of a right to standby counsel. But again, there is no such right. Thus, the trial court was free not to appoint standby counsel. Since *that* was within the court's discretion, the court necessarily had the option to appoint standby counsel with a limited role. The trial court did not abuse its discretion by taking an action that was within its discretion.

Under different circumstances, perhaps Hackett might have had an argument that his waiver was invalid because he waived his Sixth Amendment right to counsel based on the mistaken view that standby counsel would actively assist him in representing himself. But he cannot make any such claim in this case. For one thing, the Court declined to accept a proposition of law challenging the validity of Hackett's wav-

ier. More fundamentally, Hackett decided to represent himself, and waived his right to counsel, *after* the trial court made clear that appointed standby counsel would simply be on standby and would not provide the "full assistance" that Hackett sought. Criminal Rule 44(C) sets the requirement for waivers of the right to counsel:

> Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.

Hackett orally waived his right in open court, after the trial court engaged in a lengthy colloquy with Hackett to ensure that he was aware of the risks of self-representation, and that his waiver was "voluntary," "knowing," and "intelligent." *Gibson*, 45 Ohio St. 2d 366 at syl. ¶1. Indeed, the trial court repeatedly warned Hackett of his limited ability to present a desired defense on his own. Hearing Tr., Jan. 18, 2017 at 9-11, 15. The trial court also tried to convince Hackett that he would fare better with the assistance of counsel. *Id*. at 15. Moreover, Hackett signed his written waiver *after* learning that he would not receive the "full assistance" that he sought. *See* App. Op. ¶21. In sum, Hackett cannot plausibly argue that his waiver was predicated on the trial court's mis-leading him about the role standby counsel would play in his case.

In trying to establish an abuse of discretion, Hackett points to a pair of out-of-state cases, one that found a trial court had abused its discretion by failing to appoint standby counsel in a *capital* case, and another that *declined* to require standby counsel in non-capital cases. *People v. Bigelow*, 37 Cal. 3d 731, 743–46 (1984); *State v. Clark*, 722 N.W.

460, 467–68 (Minn. 2006). Hackett argues that these decisions supported the appointment of standby counsel in his case, because this case was complicated and once included capital specifications. Hackett Br. at 21. To the extent those cases establish a right to standby counsel, or a right to *assistance from* standby counsel, they are wrong and contrary to Ohio law. *See Martin*, 2004-Ohio-5471, ¶31. Anyway, these cases do not apply on their own terms. Neither establishes a right to counsel in "complicated" cases. And Hackett's case ceased to be a capital case over a year before he waived his right to counsel.

Hackett also points to an Illinois case that found prejudice based on the lack of standby counsel. Hackett Br. at 21–22. In *People v. Gibson*, 136 Ill. 2d 362 (1990), the trial court, after initially appointing a public defender as standby counsel, withdrew that appointment based on a legally mistaken belief that the Illinois statute governing public defenders would not allow such appointment. *Id.* at 375–76. The Illinois Supreme Court held that the statute *did* allow the appointment, and ultimately reversed. *Id.* In other words, *Gibson* held that the trial court abused its discretion by misinterpreting Illinois law. Indeed, *Gibson* noted the usual rule that standby counsel is not required. *Id.* at 383. And while *Gibson* also said that standby counsel might be required in some cases, "[n]o trial court in Illinois has been reversed for exercising its discretion to not appoint standby counsel." *People v. Hughes*, 2016 IL App (1st) 141131-U, ¶33; 2016 Ill. App. Unpub. LEXIS 1296, **19 (Ct. App. June 24, 2016) (internal quotation marks and citation

omitted). Thus, it appears that in Illinois, as in Ohio, a trial court does not abuse its discretion by denying standby counsel unless it does so based on a legal error.

CONCLUSION

For the above reasons, the Court should affirm the Seventh District's decision.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 10th day of December, 2019, by U.S. mail and e-mail on the following:

STEPHEN P. HARDWICK
Assistant Public Defender
Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, OH 43215
stephen.hardwick@opd.ohio.gov

RALPH M. RIVERA
Assistant Prosecutor
Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503
rrivera@mahoningcountyoh.gov

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General