UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 3 Article 17

4-1-1970

Criminal Procedure -- Right To Defend Pro Se

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In *Seale v. Hoffman*,[1] the defendant Seale, one of eight charged in a much-publicized Chicago trial[2] with conspiring to violate the recently-adopted federal antiriot act,[3] sought injunctive relief and a declaratory judgment to test the constitutionality of those proceedings. One of Seale's primary contentions was that he was denied his constitutional right to appear and to defend *pro se* in his trial. The federal district court dismissed the complaint on its own motion on the ground that the action should properly have been brought to a higher court on appeal or in a mandamus proceeding because a district court is without authority to review the rulings and procedures of another federal trial court.[4]

Moreover, the court concluded that Seale's claim of a right to defend himself, under the circumstances, raised no constitutional issue conferring jurisdiction over the subject matter. Seale, it was noted, had been represented by an attorney who had cross-examined sixteen government witnesses on his behalf, Seale had exhibited gross contempt of court, and he had been on trial on a charge of considerable legal complexity. As the right of a criminal defendant to dismiss his counsel during trial in order to appear *pro se* is qualified by the trial court's discretionary assessment of the extent of potential disruption, delay, confusion of the jury, and prejudice to the defendant, the denial of Seale's request was not erroneous.[5]

Seale's asserted right to defend *pro se* is by no means novel. The right of a criminally accused *not* to have a lawyer pre-dates the Bill of Rights.[6] Currently, the right to defend *pro se* in the federal courts is guaranteed by congressional statute. Section 1654 of title twenty-eight of the United States Code provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."[7] Thirty-seven states provide constitutionally for the right to appear *pro se*; some allow the accused the right to be heard, or to defend, in person *and* by counsel,[8] others grant the right for a defendant to defend in person *or* by

[1] 306 F. Supp. 330 (N.D. Ill. 1969).
[2] United States v. Dellinger, — F. Supp. — (N.D. Ill. 1970).
[3] 18 U.S.C.A. §§ 2101, 2102 (Supp. 1970).
[4] 306 F. Supp. at 331-32.
[5] *Id.* at 332.
[6] *See* United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).
[7] 28 U.S.C. § 1654 (1964).
[8] ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 13;

counsel,[9] and the remainder provide the right for an accused to defend either by himself, by counsel, *or* both.[10] Statutes guarantee the right in other states.[11]

The Supreme Court has considered the right of a criminally accused to defend *pro se*, but in an indirect and somewhat equivocal fashion. *Adams v. United States ex rel. McCann*[12] seemingly held the right to be of constitutional stature:

> The right to assistance of counsel and the correlative right to dispense wth a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice . . . . Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant . . . .[13]

Speaking in a different case, the Court later held:

> Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt . . . . the Constitution . . . does not require that under all circumstances counsel be forced upon a defendant.[14]

The Court's position in the above case seems to indicate that concepts of due process and assistance of counsel allow, but do not positively confer, the right to defend *pro se*. In yet another case the Court intimated that the right is basically statutory.[15]

COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 9; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 2, § 9; IND. CONST. art. 1, § 13; KY. CONST. Bill of Rights, § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEV. CONST. art. 1, § 8; N.H. CONST. Bill of Rights, art. 15; N.M. CONST. art. 2, § 14; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; WIS. CONST. art. 1, § 7. *See* LA. CONST. art. 1, § 9.

[9] KAN. CONST. Bill of Rights, § 10; MASS. CONST. pt. 1, art. 12; NEB. CONST. art. 1, § 11; WASH. CONST. art. 1, § 22.

[10] ALA. CONST. art. 1, § 6; FLA. CONST. Declaration of Rights, § 11; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 18; TEX. CONST. art. 1, § 10.

[11] *E.g.*, N.C. GEN. STAT. § 1-11 (1969).

[12] 317 U.S. 269 (1942).

[13] *Id.* at 279.

[14] Carter v. Illinois, 329 U.S. 173, 174-75 (1946).

[15] Price v. Johnson, 334 U.S. 266, 285-86 (1948).

Relying upon *Adams* several federal appellate courts have held that the right is constitutionally protected, either by the sixth amendment as correlative to right to counsel,[16] or as implicit in both the fifth and sixth amendments,[17] or by the fifth amendment's due process clause alone.[18] Further support for the constitutional position has been found in section thirty-five of the Judiciary Act of 1789, which states that parties might "plead and manage their own causes personally."[19] Because this Act predated the sixth amendment, it has been asserted that the sixth amendment was intended to include the guarantee to defend *pro se* as well as to enjoy assistance of counsel.[20] However, the more prevalent position, both federal and state, holds that although the Constitution *allows* the criminally accused the right to manage and conduct his defense personally, nevertheless "the right is statutory in character and does not rise to the dignity of one conferred and guaranteed by the Constitution."[21]

One problem that arises because of a finding that the right is a constitutional one concerns the proper disposition by an appellate court of a case in which that right had been denied. Before *Chapman v. California*,[22]

[16] Juelich v. United States, 342 F.2d 29 (5th Cir. 1965).

[17] United States v. Plattner, 330 F.2d 271 (2d Cir. 1964).

[18] MacKenna v. Ellis, 263 F.2d 35 (5th Cir. 1959) (*semble*).

[19] 1 Stat. 73, 92 (1789). The substantial equivalent of that statute is currently 28 U.S.C. § 1654 (1964).

[20] United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).

[21] Brown v. United States, 264 F.2d 363, 365 (D.C. Cir. 1959). This position seems buttressed by analogy to the right to jury trial. Clearly, the right to jury trial and the right to counsel are similar in that in given situations one might reasonably elect to his advantage not to exercise his constitutional privilege. Indeed, in Duncan v. Louisiana, 391 U.S. 145 (1967), holding the right to jury trial for non-petty crimes binding upon the states, the Court acknowledged that a "jury trial has 'its weaknesses and the potential for misuse.'" *Id.* at 156. Nonetheless, it was early held on both federal and state levels that a defendant could not waive his right to jury trial. *E.g.*, Low v. United States, 169 F. 86 (6th Cir. 1909); Cancemi v. People, 18 N.Y. 128 (1858).

In 1930 it was held that a defendant could waive jury trial consistent with the United States Constitution (Patton v. United States, 281 U.S. 276 (1930)), but it was much later before most states decided that a waiver was possible under their constitutions. *E.g.*, People v. Spegal, 5 Ill. 2d 211, 125 N.E.2d 468 (1955); People v. Carroll, 7 Misc. 2d 581, 161 N.Y.S.2d 339 (King County Ct. 1957). In Singer v. United States, 380 U.S. 24 (1965), an undivided Court rejected the claim that the right to waive a jury trial is guaranteed by the Constitution and found it "difficult to understand how the petitioner can submit . . . that to compel a defendant . . . to undergo a jury trial against his will is contrary to . . . due process." *Id.* at 36. Indeed, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35.

[22] 386 U.S. 18 (1967).

which announced a reasonable-doubt test for harmless constitutional error, the breach would have required automatic reversal regardless of the absence of prejudice to the defendant.[23] It could be argued that, despite *Chapman*, automatic reversal is still necessary since the degree of prejudice suffered by the defendant through a denial of this right could be estimated only inferentially and rarely, if ever, proved harmless beyond reasonable doubt.[24] Presumably this result need not follow were the right of non-constitutional origin.[25] It is not unreasonable to expect that courts might more narrowly define the circumstances in which one might appear *pro se* in order to minimize the possibility that defendants, afforded effective assistance of counsel, would receive the windfall of a new trial by proving a denial of the right while not proving any prejudice.[26]

Another problem suggested by the constitutional position is waiver. If the right to defend *pro se* is a constitutional one "correlative" to that of assistance of counsel, it could be contended that it too would require competent and intelligent waiver.[27] To the extent that an intelligent waiver means that the defendant was at least cognizant of his right, the requirement would violate the admonition of one court that "if notice of the right [to defend *pro se*] had to be given, the task of administering the overriding constitutional policy in favor of granting a lawyer to every person accused of a serious crime would become unduly treacherous."[28]

A final problem with the constitutional position concerns one of logic. No doubt a creditable argument could be advanced that the right to defend oneself is inherent in the concept of due process.[29] But the argu-

[23] *See, e.g.*, United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964).

[24] *See* United States v. Guerra, 334 F.2d 138, 146 n.4 (2d Cir. 1964). The Court in *Chapman* seemingly recognized that certain classes of constitutional error still require automatic reversal and cited Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel) as an example. 386 U.S. at 23 n.8.

[25] *E.g.*, Juelich v. United States, 342 F.2d 29, 33 (5th Cir. 1965); Butler v. United States, 317 F.2d 249, 258 (8th Cir. 1963); Brown v. United States, 264 F.2d 363, 366 (D.C. Cir. 1959).

[26] *See* Brown v. United States, 264 F.2d 363, 366 (D.C. Cir. 1959).

[27] Johnson v. Zerbst, 304 U.S. 458 (1938). At least one court placing the right to defend *pro se* on a constitutional level did so impliedly by requiring that the trial court "by recorded colloquy" apprise the accused of his alternate rights to defend by counsel or *pro se*. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

[28] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965).

[29] At common law the right actively to be represented by counsel was extremely limited; the attorney acted primarily as advisor to the defendant on points of law. Betts v. Brady, 316 U.S. 455 (1942). The heightened stature of the right to be defended by counsel does not necessarily dictate for purposes of due process a

ment that this right is based on the sixth amendment as "correlative" to the right to assistance of counsel produces a questionable corollary itself. After all, to defend *pro se* is, for whatever reason, *not* to defend through counsel. These procedures are related only in that they are antagonistic to each other in the usual situation if the rationale of the numerous cases supporting right to counsel is accepted.[30] Thus, if the right to counsel is indeed "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty"[31] and is binding upon the states[32] as "implicit in the concept of ordered liberty,"[33] it is difficult to conceive how the right to defend *pro se*, necessarily *not* "one of the safeguards," could, by virtue of this opposite relationship alone, be a constitutional right and, moreover, could emanate from the same source, the sixth amendment.[34] As the holdings of the Supreme Court hardly command the finding that the right is constitutional,[35] and as there is little on policy grounds to recommend such a stance, the non-constitutional position is preferable.

Aside from the problem of whether the right to defend *pro se* has a constitutional basis, the case treatment of it has been relatively uniform. The typical statement is that a criminal defendant who is sui juris and mentally competent possesses this right,[36] and it has been termed "in-

corresponding diminution of the privilege to be heard personally, particularly when the element of individual autonomy is weighed in the balance.

[30] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[31] Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[32] See cases cited note 30 *supra*.

[33] Palko v. Connecticut, 302 U.S. 319, 325 (1937). *Quaere* whether the right to defend *pro se* if more extensively held to be a guarantee of the Bill of Rights would be "absorbed" through the fourteenth amendment's due process clause? At least one state court decision already holds that it is. Capetta v. State, 204 So. 2d 913 (Fla. Dist. Ct. App. 1968).

[34] This argument is perhaps unwittingly suggested in Juelich v. United States, 342 F.2d 29 (5th Cir. 1965). Upon denial of a motion to vacate a prior conviction, the defendant alleged as error the denial of his motion to dismiss appointed counsel and to appear *pro se* in the hearing on the motion. Though the court held that the right was constitutionally protected, it was thought inapplicable in this procedural context because a movant under 28 U.S.C. § 2255 (1964) was not within the meaning of the sixth amendment "accused" in a "criminal prosecution." Moreover, recognizing that fifth-amendment due process might make the right to counsel mandatory anyway to insure a "fair and meaningful hearing," the court reasoned that

> In such Fifth Amendment cases, it can hardly be argued that there is any "correlative right to dispense with a lawyer's help" for that would imply the *reductio ad absurdum* that a hearing *not* "fair and meaningful" is a constitutionally protected right. The courts have not yet gone so far.

Id. at 31.

[35] See text at notes 12-15 *supra*.

[36] Annot., 77 A.L.R.2d 1233 (1961).

herent,"[37] "unqualified,"[38] and "as basic and fundamental as [the] right to be represented by counsel."[39] Of course, such statements are misleading since defending *pro se* will inevitably involve a waiver of the right to counsel. Therefore, the right is initially curtailed to the extent that the defendant must be capable of effecting a competent and intelligent waiver.[40] This capability cannot alone be inferred from the defendant's capacity to stand trial since there is a recognized distinction between competency to stand trial and competency to defend personally,[41] and "an adjudication by the trial court that an accused is capable of going to trial and aiding his counsel, is not a determination of his competency to act as his own counsel."[42] Thus if it is found that a particular defendant through lack of knowledge or skill is incapable of comprehending legal issues and conducting his own defense, the court must appoint counsel, even over his protests, to prevent judicial deterioration;[43] to this extent, at least, the Constitution does indeed force a lawyer upon a defendant.

Whatever his competency, it is clear that a defendant appearing *pro se* need not possess any particular legal skills.[44] Conversely, in terms of the consequences of defending himself, an accused does so at his peril and acquires as a matter of right no greater privileges or latitude than would an attorney acting for him. Thus a defendant appearing *pro se* does not become a ward or client of the court,[45] nor must the court give the defendant legal advice, explain potential defenses,[46] or advise the defendant of the right to ask instructions,[47] nor generally allow him to proceed differently than would his attorney.[48] The usual caveat holds that such a defendant "assumes for all purposes connected with his case,

[37] Coleman v. Smyth, 166 F. Supp. 934, 937 (E.D. Va. 1958).
[38] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965).
[39] People v. Sinko, 21 Ill. 2d 23, 25-26, 171 N.E.2d 9, 10 (1960).
[40] 23 C.J.S. *Crim. Law* § 979(3) (1961).
[41] *E.g.*, Massey v. Moore, 348 U.S. 105, 108 (1954).
[42] State v. Kolocotronis, — Wash. 2d —, —, 436 P.2d 774, 781 (1968).
[43] *Id. Accord*, People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); McCann v. Maxwell, 174 Ohio St. 282, 189 N.E.2d 143 (1963).
[44] *E.g.*, People v. Linden, 52 Cal. 2d 1, 18, 338 P.2d 397, 405 (1959). Undoubtedly, the fact that the defendant is an attorney is a relevant consideration when the right is evoked before trial as well as during trial. However, even in the latter context, defendant's status is not controlling. *See, e.g.*, Duke v. United States, 255 F.2d 721 (9th Cir. 1958).
[45] Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1949).
[46] Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).
[47] State v. Miller, 292 S.W. 440 (Mo. 1927).
[48] O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken."[49]

Once the obstacles of competency and waiver of counsel are met, the right to defend *pro se* is relatively unqualified, at least if expressly asserted before trial.[50] However, a further limitation is found in the rule that a defendant must make an election to appear either *pro se* or through counsel and if represented, has no right personally to conduct all or any part of the case.[51] The rights in this context are thought alternative and distinct—not correlative. A defendant having made the initial election to proceed in either fashion is not entitled to a hybrid of the two rights.[52]

Illustrative of the distinction is a holding that a defendant appearing personally has no residual right under the sixth amendment for appointment of counsel in an advisory capacity and that the aforementioned section 1654,[53] which states the rights alternatively, is not unconstitutional for this reason.[54] A parallel case on the state level reached a similar conclusion despite the fact that the asserted constitutional guarantee was conjunctive, allowing the right to defend in person *and* by counsel.[55]

Though a court might permit a defendant represented by counsel to participate actively in his trial, the practice has been termed undesirable.[56] Even in jurisdictions in which the state constitution guarantees the right to be heard personally, by counsel, or both, there is no absolute right for a defendant represented by counsel to conduct personally part of his defense, such as addressing the jury or examining witnesses, the matter being one of the court's discretion.[57] The factors held pertinent to this discretionary decision include the potential interference with orderly

[49] People v. Mattson, 51 Cal. 2d 777, 794, 336 P.2d 937, 949 (1959); *accord*, People v. Harmon, 54 Cal. 2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).

[50] United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965); United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963).

[51] *E.g.*, Egan v. Teets, 251 F.2d 571 (9th Cir. 1957); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Northcott, 209 Cal. 639, 289 P. 634 (1930); People v. Glenn, 96 Cal. App. 2d 859, 216 P.2d 457 (Dist. Ct. App. 1950).

[52] Duke v. United States, 255 F.2d 721 (9th Cir. 1958); State v. Phillip, 261 N.C. 263, 268, 134 S.E.2d 386, 391 (1964).

[53] 28 U.S.C. § 1654 (1964).

[54] Shelton v. United States, 205 F.2d 806 (5th Cir. 1953).

[55] People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).

[56] Brasier v. Jeary, 256 F.2d 474, 478 (8th Cir. 1958).

[57] Thompson v. State, 194 So. 2d 649 (Fla. Dist. Ct. App. 1967); Foster v. State, 148 Tex. Crim. 372, 187 S.W.2d 575 (1945).

trial practice, the capacity of the accused to conduct his defense, and the gravity of the offense.[58]

The position that a defendant represented by counsel should not be entitled to reap the advantages of both rights by alternating between actively participating and passively accepting assistance, with the concomitant disadvantages to the court and prosecution, is probably justified. However, there remains another context in which the exercise of the right to defend *pro se* is similarly cloaked with judicial discretion, but for which the rationale is less evident. The defendant, as in *Seale v. Hoffman*,[59] proceeds to trial with counsel, but at a later date, for reasons sufficient to himself if not the court, seeks to dismiss the attorney and to defend *pro se* for the balance. In this situation the defendant typically finds, as did Seale, that a court formerly willing "that he be allowed to go jail under his own banner if he so desires,"[60] had he clearly asserted the right before trial, is vested with considerable discretionary power to refuse his wishes because "there must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruptions of the proceedings already in progress."[61] In short, if the right to dispense with a lawyer's help is almost absolute when evoked before trial, it is less so thereafter and, regardless of its arguably constitutional dimensions, need not be recognized if doing so would disrupt the court's business.[62]

The potential disruption and the possible prejudice to the defendant's interests if his request is denied are the primary factors to be weighed in this discretionary decision.[63] Applying these principles to *Seale*, the court felt that the defendant's generally contemptuous demeanor and the complexity of the legal issues in his trial militated against a finding of abuse of discretion.[64] But it is interesting to note, regarding the question of

[58] State v. White, 86 N.J. Super. 410, 419, 207 A.2d 178, 183-84 (Super. Ct. 1965).

[59] 306 F. Supp. 330 (N.D. Ill. 1969).

[60] United States *ex rel* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965).

[61] *Id.*

[62] United States v. Private Brands, 250 F.2d 554, 557 (2d Cir. 1957). *Accord*, United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). *But see* United States v. Burkeen, 355 F.2d 241 (6th Cir. 1966); United States v. Johnson, 333 F.2d 1004 (6th Cir. 1964).

[63] United States v. Davis, 260 F. Supp. 1009 (E.D. Tenn. 1966).

[64] Seale v. Hoffman, 306 F. Supp. 330, 332 (N.D. Ill. 1969). Generally speaking, would it ever be possible to find that a defendant had been prejudiced by denying him the right to defend himself? The classic statements argues that

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If

potential prejudice by not allowing the defendant to proceed *pro se*, that Seale's attorney of record was later sentenced to what may be the longest prison sentence for contemptuous behavior ever imposed in an American court.[65]

While *Seale* appears secure on the precedents, the case raises the larger question of the validity of the process by which a right formerly "absolute"[66] becomes subject to the discretion of the court. One explanation is that by proceeding to trial with counsel, appointed or retained, the defendant legally waives his right to later defend *pro se*. While a few cases explicitly take this position,[67] apparently the more prevalent view is that the right is merely "qualified" or "sharply curtailed," not waived, once trial begins.[68] It is certainly arguable, however, that the right has effectively, if not legally, vanished at this point.[69]

Apart from the matter of waiver, the "absolute-discretionary" dichotomy seems to be based on the assumption that there is an additional quantum of trial delay and confusion that would likely result beyond what would be occasioned had the defendant evoked his right to defend per-

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charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

If the defendant were prejudiced by a denial of the right to defend himself, is not the actual source of error more likely to reside in a lack of *effective* counsel than in a denial of the right to defend *pro se*? *See, e.g.*, Von Moltke v. Gilles, 332 U.S. 708 (1948); Glasser v. United States, 315 U.S. 60 (1942). Of course, there may be certain practical advantages to defending *pro se*—for example, the opportunity to make unsworn statements to the jury under the aegis of examination of witnesses without waiver of the immunity against self-incrimination—but it seems clear that these are not legitimate considerations in the sense that a defendant is entitled to such advantages. See text at notes 44-49 *supra*. The cynic might suspect, not unreasonably, that there is no "balancing" (see text at note 61 *supra*) involved at all regarding the discretionary decision of whether to allow a defendant to discharge his attorney and to appear *pro se* since all the factors support its refusal, and that a defendant, having appeared with counsel, has at least de facto waived his right to dispense with a lawyer's help.

[65] News and Observer, Raleigh, N.C., Feb. 18, 1970, at 8, col. 6.

[66] See text at notes 36-39 *supra*.

[67] *E.g.*, People v. Ephraim, 411 Ill. 118, 122-23, 103 N.E.2d 363, 365-66 (1952).

[68] *E.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965).

[69] See note 64 *supra*.

sonally before trial. Clearly this supposition is valid were there an absolute privilege to discharge counsel for purposes of substituting another. Such a privilege might easily be abused and continuances and mistrials made necessary in order not to violate the highly-regarded right to effective counsel.[70] But it is less clear that discharge of one's attorney in order to defend personally would necessarily yield the same result because this right, unencumbered by the constitutional policy attaching to the right to counsel, might be conditioned precisely to that extent rather than disallowed altogether.[71] Should the defendant's attempt to defend personally prove confusing to the jury, the defendant, not the prosecution, likely would be prejudiced. When the court is confronted with an unruly and contemptuous defendant, the contempt power, judiciously exercised, should prove a sufficient tool for preserving order and decorum.

One thing for certain can be said about the "absolute-discretionary" dichotomy. As currently enunciated, it imparts to the right to defend *pro se* an evanescent quality not entirely consistent with the actual and alleged constitutional underpinnings of the right, nor with notions of individual autonomy.

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Evidence—Admissibility of Computer Business Records As an Exception to the Hearsay Rule

Modern businesses have begun increasingly to rely on the electronic digital computer[1] as in integral part of their regular operations.[2] Computers are used to make numerical calculations, to store and process information on business transactions, to keep personnel records, to perform various accounting tasks, and to summarize many types of information needed for management decisions—in short, they are admirable receptacles for all types of traditional business records.

[70] United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[71] *Id.* at 1011-12 (dissenting opinion). *Cf.* United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965); Relerford v. United States, 309 F.2d 706 (9th Cir. 1962); United States v. Arlen, 252 F.2d 491 (2d Cir. 1958); United States v. Paccione, 224 F.2d 801 (2d Cir. 1955).

[1] For a general discussion of the admission of computer business records into evidence, see Annot., 11 A.L.R.3d 1377 (1967). The admission of ordinary business records into evidence is dealt with in Annot., 21 A.L.R.2d 773 (1952).

[2] Freed, *Computer Print-Outs as Evidence*, in 16 AM. JUR. PROOF OF FACTS § 1, at 274 (1965) [hereinafter cited as Freed].