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Constitutional Law—CRIMINAL PROCEDURE—INDEPENDENT RIGHT OF SELF-REPRESENTATION IN SIXTH AMENDMENT PERMITS DEFENDANT TO ACT AS OWN LAWYER AT STATE CRIMINAL TRIALS

Faretta v. California, 422 U.S. 806 (1975)

Due process of law¹ requires that the state fully afford a defendant his sixth amendment right to counsel² before a valid conviction can be obtained in a criminal prosecution.³ The aid of a lawyer is commonly recognized as a necessity because of the complexity and gravity of a criminal trial.⁴ Fundamental fairness in the guilt-determining process⁵ can only be achieved if the defendant shows

¹ U.S. CONST. amends. V, XIV, § 1.

² U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

³ The Supreme Court has announced and expanded the constitutional right of a criminal defendant to have the assistance of counsel during the past forty years. *Powell v. Alabama*, 287 U.S. 45 (1932), broke ground when the Court asserted that "in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . ." *Id.* at 71. Six years later, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court required that defendants be afforded counsel in all criminal cases in federal courts. The decision set forth guidelines for determining whether defendants had validly waived their right to counsel. *Betts v. Brady*, 316 U.S. 455 (1942), halted the expansion of the constitutional right to counsel when the Court held that the fourteenth amendment does not incorporate the specific guarantees of the sixth amendment. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), however, the Court held that all indigent criminal defendants must be offered a lawyer in state proceedings in order to comport with due process of law.

Most recently, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), announced that counsel must be made available to any criminal defendant whenever there is a possibility that the sentence will be imprisonment. For a general discussion of the pervasiveness of the right to counsel, see W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: THE MODERN INTERPRETATION* 211 (1974).

⁴ As one commentator has observed:

The average defendant lacks the knowledge and skill to prepare his own defense adequately. Thus, if he waives appointment of counsel, he may without realizing it waive other rights as well or at least may fail to take advantage of available procedures.

I L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT* 89 (1965). See note 7 *infra*.

⁵ Professor Kadish has expounded the thesis that one of the basic objectives of criminal procedure is to ensure the reliability and integrity of the prosecution against the accused. In this regard he has stated:

It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired . . . If there is any consideration basic to all civilized procedures it is this. . . .

Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957). This jurisprudential approach is further articulated in Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1 (1974).

that he "knowingly and intelligently"⁶ waived his constitutional right to the benefit of legal assistance.⁷ As a result, there is a presumption against the waiver of counsel's assistance at all critical stages of prosecution.⁸

A related issue emerging from the waiver of counsel cases is whether a criminal defendant has the constitutional right to conduct his own defense.⁹ Courts have considered this question, but have disagreed in their resolution and analysis of the problem. At one pole is *United States v. Plattner*,¹⁰ representing the view of four federal circuits¹¹ and at least four states,¹² which held that the sixth

⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

⁷ Justice Sutherland emphasized the value of the assistance of counsel in *Powell v. Alabama*, 287 U.S. 45 (1932):

[The accused] 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69 (emphasis added).

⁸ In articulating guidelines for courts to use in determining whether a defendant has waived his right to counsel, the *Johnson* Court observed "that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." 304 U.S. at 464 (footnote omitted), quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1936); accord, *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948); *Glasser v. United States*, 315 U.S. 60, 70 (1942). *Von Moltke* emphasized that "the strong presumption against waiver of the constitutional right to counsel" requires the trial judge to "investigate as long and as thoroughly as the circumstances of the case before him demand" in order to discharge his duty of safeguarding the constitutional rights of the defendant. 332 U.S. at 723-24 (1948).

The circumstances under which the offer and waiver of the assistance of counsel are made are noted by Silverstein:

It is now established that, in circumstances where the defendant is entitled to appointed counsel, he is entitled to have the appointment offered to him in an effective and intelligible way. The things that are said, the tone of voice, the atmosphere of the courtroom or other place where the offer is made, whether the defendant is given a written explanation of his rights or told orally, whether by the judge, the prosecutor, the defender, or a court official; all the matters and perhaps others affect the defendant's decision to accept the offer of counsel or to reject it.

1 L. SILVERSTEIN, *supra* note 4, at 89.

⁹ See generally Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); see text accompanying notes 41-74 *infra*.

¹⁰ 330 F.2d 271 (2d Cir. 1964); see text accompanying notes 50-54 *infra*.

¹¹ See *United States v. Rosenthal*, 470 F.2d 837, 844 (2d Cir.), cert. denied, 412 U.S. 909 (1972); *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir.), cert. denied, 396 U.S. 1021 (1969); *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969), cert. denied, 397 U.S. 1048 (1970); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970); cf. *Butler v. United States*, 317 F.2d 249 (8th Cir.), cert. denied, 375 U.S. 838 (1963).

¹² See *State v. Capetta*, 316 So. 2d 749 (Fla.), cert. denied, 394 U.S. 1008 (1968) (*pro se* right based on state and federal constitutions); *Wake v. Barker*, 514 S.W.2d 692 (Ky. 1974) (historical background of sixth amendment right to counsel not a basis for invalidating right of self-representation); *People v. Henley*, 382 Mich. 143, 169 N.W.2d 299 (1969), on remand, 26

amendment implicitly grants the right of self-representation¹³ in criminal proceedings. At the other pole is *People v. Sharp*,¹⁴ in which the California Supreme Court concluded that neither the federal nor state constitutions confer the right to conduct one's defense *pro se*. Although the *Sharp* approach is followed directly in only one state,¹⁵ and one federal circuit,¹⁶ at least six states,¹⁷ and two circuits,¹⁸ have reached a similar result by holding that the right of self-representation is not absolute.

The Supreme Court resolved this uncertainty in *Faretta v. California*.¹⁹ In a 6-3 decision, the Court adopted the rationale of *Plattner* and held that there is an independent constitutional right of self-representation. *Faretta* thus recognized that a criminal defendant's right of free choice requires the coexistence²⁰ of the constitutional rights of effective assistance of counsel and self-representation at trial in criminal cases.

Mich. App. 15, 182 N.W.2d 19 (1970) (*Plattner* followed); *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972) (*Plattner* followed); *State v. Verna*, 9 Ore. App. 620, 498 P.2d 793 (1972); cf. *State v. Reese*, 527 P.2d 508 (Ariz. 1974) (state constitution confers right of self-representation); *Krist v. Caldwell*, 230 Ga. 536, 198 S.E.2d 161 (1973) (sixth amendment right to counsel and right to represent oneself at trial are opposite sides of same coin) (dictum); *State v. Thomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960) (*pro se* right rooted in state constitution and statute).

Some states have recognized the *pro se* right but do not offer a rationale for its existence. The decisions simply make blanket statements without authority. See *Jones v. State*, 50 Ala. App. 541, 280 So. 2d 801, cert. denied, 291 Ala. 785, 280 So. 2d 803 (1973); *Phillips v. State*, 162 Ark. 541, 258 S.W. 403 (1924); *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969); *Placencia v. State*, 256 Ind. 314, 268 N.E.2d 613 (1971); *Cummings v. Warden*, 243 Md. 702, 221 A.2d 908 (1966); *State v. Huber*, 275 Minn. 475, 148 N.W.2d 137 (1967); *State v. Bratton*, 187 Neb. 460, 191 N.W.2d 612 (1971). Arguably, these state decisions are in harmony with *Plattner*. Although the cases do not acknowledge the connection between the right of self-representation and the sixth amendment, these courts do view the right as fundamental.

¹³ "Self-representation" will be used interchangeably in this Note with *pro se*; the latter term means "for himself." BLACK'S LAW DICTIONARY 1364 (4th ed. 1968).

¹⁴ 7 Cal. 3d 448, 103 Cal. Rptr. 223, 499 P.2d 489 (1972), cert. denied, 410 U.S. 944 (1973); see text accompanying notes 71-74 *infra*.

¹⁵ See *State v. Frizzell*, 273 So. 2d 831 (La. 1973).

¹⁶ See *United States ex rel. Soto v. United States*, 504 F.2d 1339 (3d Cir. 1974); text accompanying notes 61-65 *infra*.

¹⁷ See, e.g., *People v. Lindsey*, 17 Ill. App. 3d 137, 308 N.E.2d 111 (Ill. App. 1974); *State v. Kelly*, 210 Kan. 192, 499 P.2d 1040 (1972); *State v. Slicker*, 342 S.W.2d 946 (Mo. 1961); *State v. Davis*, 45 N.J. 195, 212 A.2d 19 (1965), appeal after remand, 50 N.J. 16, 231 A.2d 793, cert. denied, 389 U.S. 1054 (1967); *People v. McIntyre*, 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974); *McCann v. Maxwell*, 174 Ohio St. 282, 189 N.E.2d 143 (1963).

¹⁸ See *Van Nattan v. United States*, 357 F.2d 161, 164 (10th Cir. 1966) (right to represent oneself is conferred by federal statute); accord, *United States v. Dougherty*, 473 F.2d 1113, 1121-22 (D.C. Cir. 1972) (refused to reach constitutional issue).

¹⁹ 422 U.S. 806 (1975).

²⁰ *Id.* at 806, 834. See notes 118-26 and accompanying text *infra*.

I

HISTORICAL BACKGROUND OF SELF-REPRESENTATION
IN THE UNITED STATES

The concept that a criminal defendant has a right to represent himself at trial can be traced to attitudes and practices existing during the colonial period.²¹ In legal matters, the colonists were self-reliant²² and distrustful of lawyers.²³ Accordingly, colonial constitutions contained provisions expressly permitting "all persons of all persuasions [to] . . . freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves . . ." ²⁴

²¹ See, e.g., *Faretta v. California*, 422 U.S. 806, 821-32 & nn. 16-44; note 94 *infra*.

Legal scholars differ on the extent to which English practices have influenced American constitutional development. See W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 14 (1955). One commentator has emphasized that it is a fallacy to conclude that colonial law "was essentially the common law of England, brought over to the extent applicable to colonial condition." L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 30 (1975), citing G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 4 ff. (1960). In fact, many American practices were reactions against English procedures. It has been observed that, "[an] English deficiency—the failure in certain circumstances to give a prisoner under capital accusation the benefit of counsel for his defence—was supplied in the American Constitution by the guarantee of counsel in all cases." C. STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* 232 (2d ed. 1927) (footnote omitted).

²² See L. FRIEDMAN, *supra* note 21, at 134 (1973); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 123 (1930).

²³ See L. FRIEDMAN, *supra* note 21, at 81, 265. For a discussion of the basis of this hostility toward the bar, see *id.* at 82 and R. POUND, *supra* note 22, at 157.

²⁴ PA. FRAME OF GOV'T OF 1682, *LAWS AGREED UPON IN ENGLAND VI*, cited in I B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 140 (1972) [hereinafter cited as SCHWARTZ]. The Pennsylvania constitution is both the clearest assertion of the right of an individual to represent himself, and a reaction against the Star Chamber practice of compelled counsel. Requiring the "assistance of" counsel was also prohibited in the Carolinas and New Jersey. See *FUNDAMENTAL CONSTITUTIONS OF CAROLINA* § 70 (1669), and *CONCESSIONS AND AGREEMENTS OF W.N.J.*, ch. XXII (1677) in SCHWARTZ 118, 129. Other pre-revolutionary constitutions recognize the right either to represent oneself or to be assisted by a friend in criminal trials. See *MASS. BODY OF LIBERTIES* 26 (1641), and *CONCESSIONS AND AGREEMENTS OF W.N.J.*, ch. XXII, (1677), in SCHWARTZ 74, 129.

Colonial constitutions drafted in 1776 vary in their language concerning self-representation and the right to counsel. Maryland, New York and New Jersey provided that the defendant "shall be allowed counsel". See *MD. DECLARATION OF RIGHTS*, art. XIX (1776), and *N.Y. CONST.*, art. XXXIV (1776), in SCHWARTZ 282, 310; *cf.*, *N.J. CONST.*, art. XVI (1776), in SCHWARTZ 260. This language was later adopted in the sixth amendment. The constitutions of Pennsylvania, Vermont and New Hampshire provided that the accused has "the right to be heard by himself and his counsel." See *PA. DECLARATION OF RIGHTS*, art. IX (1776), and *VT. DECLARATION OF RIGHTS*, art X (1776) in SCHWARTZ 265, 323; *cf.* *N.H. BILL OF RIGHTS*, art XV (1783), in SCHWARTZ 377. *THE JUDICIARY ACT OF 1789* contains similar wording. See note 32 *infra*. Only the Georgia Constitution explicitly speaks of the "inherent privilege of every free man, the liberty to plead his own cause." See *GA. CONST.*, art. LVIII (1677) in SCHWARTZ 300. Five states, Connecticut, Massachusetts, North Carolina, South Carolina, and Virginia, do not mention counsel and self-representation in their post-revolutionary constitutions.

American colonial practices in this area evolved from the history of the legal profession and criminal procedure in England, where, with rare exception, an accused did not have a right to the assistance of counsel as we know it today.²⁵ The courts of the King compelled the defendant to represent himself, permitting counsel only in prosecutions for high treason²⁶ or for minor offenses.²⁷ In the notorious Star Chamber, the defendant was required to have counsel but the assistance afforded to the accused was illusory.²⁸

²⁵ It was a very ancient principle that no counsel was allowed to persons charged with treason or felony against the Crown; counsel were allowed in an appeal as this was brought by a private person and not by the Crown. A slight relaxation was made in the late fifteenth century when it became general to allow counsel to argue points of law, which at that time were generally objections to the indictment. The origin of the rule seems to have been the fact that counsel was hardly necessary. . . . [I]n Bracton's day [the thirteenth century] the court took charge of the proceedings, and viewed indictors, prosecutors, jury and prisoner with impartial distrust. There was little that required expert knowledge until indictments became technical documents, and when that point was reached, counsel for arguing them was allowed almost at once. When the use of witnesses was more clearly understood, and a technique of examining them developed, the situation was again materially altered, and the prisoner was at a disadvantage in attempting to cross-examine when the case for the prosecution was sprung upon him, and his own defence still unprepared. This time the law did not bring its own corrective, and made little attempt for a long time to meet the changed circumstances.

T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 434-35 (footnote omitted) (5th ed. 1956). See also 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 192 (2d ed. 1937).

These historical reasons for prohibiting counsel did not exist in the American colonies, so criminal lawyers did practice in many colonial courts. See W. BEANEY, *supra* note 21, at 14-18. Even the practice of appointing counsel in some cases took root in the colonies. See, e.g., *id.*; W. NELSON, *AMERICANIZATION OF THE COMMON LAW*, 226-27 n.140 (1975) (discussing extent of this practice in Massachusetts). Although the American courts did not follow the English practice of limiting the assistance of counsel in criminal cases, the common law left an important legacy to early American criminal law that influenced the criminal lawyer's role. Like its British counterpart, American criminal law was administered locally, often by non-professionals. See L. FRIEDMAN, *supra* note 21, at 37-40, 44-45. Consequently, criminal law remained rudimentary in its substance and relatively simple in its procedure. See S. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 353-74 (1969). As a result, although counsel might have proved helpful, justice did not require it. Hence, the practice of self-representation could continue.

²⁶ In 1696 a revolutionary bill was passed by Parliament allowing the assistance of counsel to persons on trial for high treason—offenses against the royal family or the government. 7 & 8 Will. 3, c. 3 (1696). This protection was not expanded in England until 1836, long after the colonial period, when another Act of Parliament granted the accused the right to counsel in felony cases. 6 & 7 Will. 4, c. 114 (1836). See T. NORTON, *THE CONSTITUTION OF THE UNITED STATES* 220 (1922); *SOURCES OF OUR LIBERTIES* 252-53 (R. Perry ed. 1972).

²⁷ Minor offenses, or misdemeanors, included libel, perjury, and battery. It has been suggested that counsel was permitted because the state had little interest in these cases. W. BEANEY, *supra* note 21, at 8.

²⁸ The Star Chamber was the only tribunal that required the accused to have counsel. However, this assistance was not for the benefit of the defendant, but rather served as a means of coercing a confession. The prisoner was expected to admit his guilt and a variety of devices were used to achieve this end. For example, upon being served an indictment, the defendant was required to return an answer signed by his counsel. If the answer was false or offended the Crown, the attorney was subject to rehue, suspension, fine, or imprisonment. As a result,

Therefore, the English experience with counsel was slight. Consequently, the colonists' memory of the Star Chamber practices coupled with their belief in the abilities of the individual²⁹ and their scorn of lawyers resulted in the practice of self-representation. This was not only custom,³⁰ but also a necessity because of the shortage of lawyers.³¹

The codification of this practice of self-representation in this country can be traced to the Judiciary Act of 1789.³² One day after George Washington signed the statute into law, the Bill of Rights was introduced in Congress.³³ Language specifically guaranteeing a right of self-representation is noticeably absent from the sixth amendment which has been characterized as "a compact statement of the rights necessary to a *full* defense."³⁴ The drafting of the sixth amendment certainly was not meant to preclude the prevalent colonial practice, but it also could not anticipate the changes in the character of the American legal system and the legal profession during the subsequent two hundred years. The significance of this

counsel was careful about what he signed and often did not defend his client with much enthusiasm. Moreover, the Star Chamber viewed an unsigned answer, regardless of the reason, as a confession. As a consequence, the role of counsel in the Star Chamber did not promote the idea that assistance of counsel would be beneficial. W. HOLDSWORTH, *supra* note 25, at 178-79 (2d ed. 1937); 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 341 (1883).

²⁹ This is exemplified by the advantageous *pro se* defense. Through his demeanor, questions, and interactions with the witnesses, the defendant offered evidence that the court had no other means of obtaining. However, this strategy lost its value when the rules of evidence changed and permitted a party to testify on his own behalf. *Cf.* W. HOLDSWORTH, *supra* note 25, at 192-95; E. JENKS, *A SHORT HISTORY OF ENGLISH LAW* 343-44 (1912). For a discussion of the contemporary analogue, see Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1505-07 (1971) [hereinafter cited as *Self-Representation*].

³⁰ Custom generally took the form of a localized and non-professional system of criminal law. In Massachusetts, for example, most criminal matters were tried before Justices of the Peace appointed for each county. Like most other judges in the county, these judges were laymen. *See* W. NELSON, *supra* note 25, at 15, 32-33 (1975). *But see* E. POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS* 438-39 (1966) (counsel appointed in some important cases). Additionally, most of the colonies allowed counsel at criminal trials. *See* note 25, *supra*.

³¹ *See* L. FRIEDMAN, *supra* note 21, at 81; Note, *Law in Colonial New York: The Legal System of 1691*, 80 HARV. L. REV. 1757, 1770-71 (1961) (New York Bar had only 15 to 20 lawyers in 1691).

³² Section 35 of the JUDICIARY ACT states:

[I]n all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92.

³³ 422 U.S. at 831.

³⁴ *Id.* at 818 (emphasis added).

omission is the crux of the constitutional issue.³⁵ It is of particular importance in those jurisdictions where neither the state constitution nor a statute confers the right of self-representation.

In its modern form, the Judiciary Act grants all criminal defendants the right to conduct their own defense in federal courts.³⁶ In addition, the constitutions of at least thirty-seven states have provisions conferring this right.³⁷ These provisions fall into two categories. The first type duplicates the language of the federal act;³⁸ the second type does not generally require the defendant to choose between self-representation and the assistance of counsel, because both are permitted.³⁹ However, judicial construction has altered the apparent meaning of the constitutional provisions.⁴⁰

Both state and federal courts have faced the problem of adjudicating the scope of the right of a criminal defendant who seeks to conduct his own defense.⁴¹ The self-representation issue has always

³⁵ *Id.* at 818-19, 831-32, 850-51. Justice Blackmun discussed the problem in his forceful dissenting opinion:

The Sixth Amendment expressly constitutionalized the right to assistance of counsel but remained conspicuously silent on any right of self-representation. The Court believes that this silence of the Sixth Amendment as to the latter right is evidence of the Framers' belief that the right was so obvious and fundamental that it did not need to be included "in so many words" in order to be protected by the Amendment. I believe it is at least equally plausible to conclude that the Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language.

Id. at 850. See also *Self-Representation*, *supra* note 29, at 1489.

³⁶ The statute provides:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 1654 (1970) (emphasis added).

³⁷ See notes 38-39 *infra*.

³⁸ See, e.g., KAN. CONST. § 10; MASS. CONST. pt. 1, art. 12; NEB. CONST. art. 1, § 11.

³⁹ See, e.g., ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2 § 10; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 13; KY. CONST. § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 2, § 24; NEV. CONST. art. 1, § 8; 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; R.I. CONST. art. 1, § 10; S.C. CONST. art. 1, § 14; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1 § 9; UTAH CONST. art. 1, § 12; VT. CONST. c.1, art. 10; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7; WYO. CONST., art. 1, § 10. These states grant the accused the right to be heard, or to defend in person *and* by counsel. Other states grant the defendant the right to defend either by himself, by counsel, or both. See, e.g., ALA. CONST. art. 1, § 6; FLA. CONST. art. 1, § 16; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 18; TEX. CONST. art. 1, § 10.

⁴⁰ See text accompanying notes 71-74 *infra*.

⁴¹ See notes 10-12, 14-18 and accompanying text *supra*. Although data on the number of criminal defendants choosing to represent themselves at trial in state courts is unavailable, it may be inferred that most seek the assistance of counsel. One indicia is the general experience of the federal courts: an exhaustive survey of *pro se* litigants revealed that they comprise 20%

encompassed the full spectrum of crimes,⁴² but the "political" trials⁴³ of the last decade brought the issue into national focus. Equally diverse are the reasons defendants have given for wanting to proceed *pro se*.⁴⁴ Consequently, courts facing the question have dealt with a complex array of factors. The rules formulated by the courts are an attempt to accommodate the needs of both defendants and judges.⁴⁵

When faced with addressing the constitutional question, state and federal courts had little Supreme Court precedent upon which to rely. The Court had focused on the scope of the right to the

of the annual caseload in these courts. See Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 157 (1972). Another indicia is the increasing number of defendants using lawyers under the CRIMINAL JUSTICE ACT OF 1964, 18 U.S.C. § 3006A (Supp. IV, 1974), amending 18 U.S.C. § 3006A (1970). See 1969 ADMIN. OFFICE OF THE U.S. COURTS, ANN. REP. 11-34, and Appendix on Payments made under the Criminal Justice Act, cited in *Self-Representation*, *supra* note 29, at 1479 n.5; U.S. GEN. ACCOUNTING OFFICE, ADMINISTRATION OF THE CRIMINAL JUSTICE ACT BY THE U.S. COURTS AND THE D.C. SUPERIOR COURT 3 (1974). However, the last months of 1975 saw increasing numbers of criminal defendants representing themselves. See N.Y. Times, Dec. 9, 1975, 1, at 13, col. 1. Most notable was Lynette "Squeaky" Froume, who was convicted of attempting to assassinate President Ford. *Id.* For a discussion of her conduct at trial, see TIME, Nov. 10, 1975, at 43, and *id.* Nov. 17, 1975, at 62.

⁴² See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (burglary and destruction of private property); *United States v. Pike*, 439 F.2d 695 (9th Cir. 1971) (failure to submit to induction); *United States v. Warner*, 428 F.2d 730 (8th Cir. 1970), *cert. denied*, 400 U.S. 930 (1970) (fraudulent preparation of federal income tax forms); *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972) (rape); *State v. Verna*, 9 Ore. App. 629, 498 P.2d 793 (1972) (kidnap of former wife).

⁴³ See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *Seale v. Hoffman*, 306 F. Supp. 330 (N.D. Ill. 1969), *rev'd on other grounds sub. nom.* *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). Viewed as an arm of the system they distrust, court-appointed counsel is often rejected by defendants in "political" trials. See T. HAYDEN, TRIAL 99 (1970); *Self-Representation*, *supra* note 29, at 1498-1507.

⁴⁴ Basic assumptions about the value of assistance by counsel are challenged when a defendant insists on self-representation. This is highlighted in those cases where the defendant entertains the belief that he will be more effective than a lawyer because he is more familiar with the facts (see e.g., *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1950); *United States ex rel. Davis v. McMann*, 386 F.2d 611, 620 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968)), or because he wishes to evoke the jury's sympathy (see, e.g., *Commonwealth v. Helwig*, 184 Pa. Super. 370, 378, 134 A.2d 694, 698 (1957); *People v. Chessman*, 38 Cal.2d 166, 178, 238 P.2d 1001, 1008 (1951), *cert. denied*, 343 U.S. 915 (1952)). This is also true when a defendant lacks confidence in his attorney. See, e.g., *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970).

The JOURNAL OF CRIMINAL LAW & CRIMINOLOGY conducted a survey of Illinois trial judges to assess their experience with *pro se* defendants. Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240, 248-49 (1973). This appears to be the only published survey that focuses on the attitude of trial judges and prosecutors. The survey also examines the treatment and success at trial of such defendants. In addition to those reasons already discussed, five judges believed that the choice of the typical litigant "was an expression of his egotism or, . . . the result of the defendant's 'belief in his superior intellect [and the] general stupidity of the court and attorneys . . .'" *Id.* at 248.

⁴⁵ See notes 10-15 *supra*.

assistance of counsel and the standards for ascertaining whether a valid waiver had been made.⁴⁶ As a result, only occasional dicta mentioned the *pro se* defense.⁴⁷ Even the decision containing the best discussion of the issue, *Adams v. United States ex rel. McCann*,⁴⁸ does not make a clear distinction between the rights and privileges of criminal defendants necessary to an understanding of the constitutional issue.⁴⁹

The earliest definitive judicial pronouncement of the constitutional right of self-representation came in the 1964 case of *United States v. Plattner*.⁵⁰ The issue arose when the defendant appealed the district court's determination that he had to be represented by counsel in a *coram nobis* proceeding because of his inadequate legal background.⁵¹ Without Plattner's knowledge or consent, the district judge assigned a legal aid lawyer. The defendant, believing he would be more successful if he presented his own case, sought to waive this assistance.⁵² Relying on *Adams*,⁵³ the Second Circuit reversed the district court's ruling, and held that Plattner should have

⁴⁶ See notes 3-8 *supra*.

⁴⁷ For example, *Price v. Johnston*, 334 U.S. 266 (1948), dealt with a prisoner who wished to appear personally in the oral argument of his habeas corpus petition because he believed "the case is of such a nature that only he himself can adequately discuss the facts and issues." *Id.* at 280. In permitting the prisoner to appear on his own behalf, the Court contrasted its decision with the "constitutional prerogative of being present in person at each significant stage of a felony prosecution . . . [and] his recognized *privilege* of conducting his own defense at trial." *Id.* at 285 (emphasis added).

Cases discussing standards for waiving the right to counsel have also provided dicta. In *Carter v. Illinois*, 329 U.S. 173 (1946), the Court said: "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 . . . Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." *Id.* at 174-75; *accord*, *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1947).

In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court stated that "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation reasonably substantial, to the fullness of his opportunity to defend against the charge." No one can be substituted to exercise these faculties for him." *Id.* at 105 (alleged murderer does not have right to join the jury in viewing the scene of the crime).

⁴⁸ 317 U.S. 269 (1942). *Adams* dealt with the standards for waiving a jury trial in a felony case in which the defendant represented himself. The Court adopted the "knowingly and intelligently" language employed in the right-to-counsel cases and added dicta pertaining to *pro se* defendants like *Adams*.

⁴⁹ See *id.* at 279-80. Although the Court stated that "[t]he right to the assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms" (*id.* at 279), it stopped short of calling self-representation a "right" by referring to the defendant's "privileges." *Id.* at 280. Throughout the case, the only right explicitly recognized is the right to counsel.

⁵⁰ 330 F.2d 271 (2d Cir. 1964).

⁵¹ *Id.* at 273.

⁵² *Id.*

⁵³ *Id.* at 275.

been permitted to proceed *pro se* since this right arises "out of the Federal Constitution and [is] not the mere product of legislation or judicial decision."⁵⁴

Although the Sixth,⁵⁵ Seventh,⁵⁶ and Ninth⁵⁷ Circuits have also adopted this position, the Third,⁵⁸ Eighth,⁵⁹ and District of Columbia⁶⁰ Circuits have rejected it. The Third Circuit decision of *United States ex rel. Soto v. United States*⁶¹ is characteristic of the latter group.⁶² As in *Plattner*, the petitioner claimed that the trial judge

⁵⁴ *Id.* at 273 (emphasis added). The rationale of the decision was that the Framers' inclusion of a right to counsel provision in the sixth amendment was

not intended to limit in any way the absolute and primary right to conduct one's own defense *in propria persona*. Nor is the existence of this right made doubtful by the circumstances that the now all but universal requirement of the assignment of counsel to indigent defendants is the development of a later generation and more enlightened views. Indeed, and strangely enough, there would probably have been no denial of Plattner's right to act *pro se* had the Court not been so accustomed in these recent years to assign Legal Aid counsel or other lawyers to defend those indigent defendants"

Id. at 274 (footnotes omitted).

⁵⁵ See, e.g., *United States v. Sternman*, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

⁵⁶ See, e.g., *Lowe v. United States*, 418 F.2d 100 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970).

⁵⁷ See, e.g., *Arnold v. United States*, 414 F.2d 1056 (9th Cir. 1969).

⁵⁸ See, e.g., *United States ex rel. Soto v. United States*, 504 F.2d 1339 (3d Cir. 1974). See text accompanying notes 61-65 *infra*.

⁵⁹ See, e.g., *Butler v. United States*, 317 F.2d 249 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963).

⁶⁰ See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). In this case, five of the nine defendants sought to waive their court-appointed counsel in order to proceed *pro se* in their trial for burglary and malicious destruction of property. Because of the political nature of the trial (the crimes arose from an anti-Vietnam War protest), the district court held that a fair trial could only be assured if all the defendants were represented by counsel. The District of Columbia Circuit reversed on the ground that 28 U.S.C. § 1654 (1970) creates an unqualified right, not subject to the discretion of the trial court. The opinion, however, avoided reaching the constitutional issue, even though it was raised by the parties. *Id.* at 1122.

The *Dougherty* case provides an excellent analysis of the statutory basis of the *pro se* right and extensively marshalls authority in its discussion of the sources of that right. The case has further significance because it discusses the effect of a defendant's disruptive behavior at trial on his right to proceed *pro se*.

⁶¹ 504 F.2d 1339 (3d Cir. 1974).

⁶² At least two circuits, the Fifth and the Tenth, have refused to follow *Plattner*. They, however, do not follow the *Soto* rationale either. For example, in *Van Nattan v. United States*, 357 F.2d 161 (10th Cir. 1966), the defendant appealed his conviction for unlawfully entering a federally insured bank with the intent to commit a felony under 18 U.S.C. § 2113(a) (1970). In seeking reversal, he argued that the assistance of a court-appointed counsel was forced upon him in violation of his sixth amendment rights. The Tenth Circuit employed a two-step analysis. First, relying upon 28 U.S.C. § 1654 and Rule 44 of the FED. R. CRIM. PRO., mandating assignment of counsel, it refused to adopt the *Plattner* approach, concluding that the right of self-representation was only statutory. *Id.* at 163-64. Second, the court found that Van Nattan had not intelligently waived his right to counsel, and therefore could not assert the statutory right. *Id.*

committed reversible error by assigning counsel and failing to inform him of his right to defend *pro se*. The court concluded that as self-representation is statutory and not a constitutional right, trial judges have no duty to inform defendants that they may represent themselves.⁶³ In contrast to the *Plattner* court's view that the right to defend *pro se* is a correlative of the right to assistance of counsel,⁶⁴ *Soto* found that it "is only tangentially related to procuring a fair trial".⁶⁵

The disagreement among the courts of appeals is dwarfed by the range of state court decisions.⁶⁶ These opinions have dealt with permutations of statutory and state constitutional schemes,⁶⁷ in addi-

Although trial judges have broad discretion in determining whether the statutory right of self-representation may be exercised, the *Van Nattan* decision is significant because it outlined an additional rationale denying the right to proceed *pro se*. It suggests that courts should not focus on the defendant's efforts to assert the § 1654 right, but instead requires judges to analyze the facts in order to ascertain whether the accused made a valid waiver of the right to counsel. As a result of the presumption against the waiver (see note 8 *supra*), few defendants will meet the *Van Nattan* standard. *Cf.*, *Seale v. Hoffman*, 306 F. Supp. 330 (N.D. Ill. 1969) *rev'd on other grounds sub. nom.* *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943).

The position of the Fifth Circuit is not clear. In *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965), the court specifically declined to address the constitutional issue. When the case reached the court of appeals, it had already gone through a complex procedural path in *Juelich's* attempts to appeal his murder conviction. Judge Rives found that the district court correctly exercised its discretion when it denied *Juelich's* motions to represent himself or to assist court-appointed counsel. The court recognized that the Fifth Circuit and other jurisdictions had previously recognized that defending *pro se* is a constitutionally protected right, but refused to afford *Juelich* the right as the proceeding was already beyond trial. *Id.* at 31-32.

By contrast, the often cited case of *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959), held that a mentally competent unrepresented defendant who was required to accept inexperienced and incompetent counsel was denied due process of law. The case was cited by *Juelich* for the proposition that the Fifth Circuit recognizes a right of self-representation. An analysis of *MacKenna*, however, reveals that it also holds that a criminal defendant has the right to effective assistance of counsel. Consequently, a conservative reading of these Fifth Circuit opinions leads one to conclude that the right of self-representation is available only when required in the interest of justice. This interpretation vests discretion in the trial judge for determining the availability of the *pro se* right.

⁶³ 504 F.2d at 1341. The distinction between a constitutional and a statutory right has significant procedural consequences. For example, a statutory right is deemed waived if not exercised, and there is generally no duty on the part of the trial judge to affirmatively offer it to the defendant. *Id.* at 1344. Furthermore, if a statutory right is not exercised, the defendant must demonstrate prejudice in order to have his conviction reversed. *Id.* See also *Brown v. United States*, 264 F.2d 363, 365-66 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959); Comment, *Jury Nullification and The Pro Se Defense: The Impact of Dougherty v. United States*, 21 KANSAS L. REV. 47, 63-64 (1972); Note, *The Right to Defend Pro Se In Criminal Proceedings*, 1973 WASH. U.L.Q. 679, 705-07.

⁶⁴ 330 F.2d at 275.

⁶⁵ 504 F.2d at 1343.

⁶⁶ See notes 12, 14-15 & 17 *supra*.

⁶⁷ *Id.* Compare CAL. PENAL CODE §§ 686, 686.1, 859 (West 1954) construed in *People v. Sharp*, 7 Cal. 3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1972), *cert. denied*, 410 U.S. 944 (1973),

tion to analyzing the sixth amendment. *State v. Verna*⁶⁸ is a good example of those cases finding the right of self-determination rooted in both state and federal constitutions. The Oregon Court of Appeals faced the issue of whether the trial court committed reversible error by failing to honor the defendant's intelligent and competently asserted election to proceed *pro se*. The court construed the relevant provision of the state constitution⁶⁹ as conferring a right of self-representation, and expanded the scope of its holding by citing *Plattner* for the proposition that the right also arises out of the sixth amendment.⁷⁰

Another approach is illustrated by *People v. Sharp*,⁷¹ which construed the sixth amendment and sections of the California constitution and penal code. As in *United States v. Plattner*, the trial court denied the defendant's motion to proceed *pro se* because it was clear that an attorney would be better qualified to conduct the defense.⁷² *Sharp* appealed the conviction on several grounds; most significantly, he claimed that the court committed prejudicial error in denying his constitutional right to self-representation. In arriving at its decision, the California Supreme Court unanimously asserted:

In almost 200 years of constitutional interpretation and construction the [United States] Supreme Court has not on any occasion held that the right of self-representation in a criminal trial is constitutionally compelled.

.....

. . . Therefore, we cannot confer upon the right of self-representation . . . a status which is automatically fundamental to a fair trial.⁷³

The *Sharp* decision does not differ substantially from *Soto* in its rationale. *Sharp*, however, is noteworthy because the California constitutional provision⁷⁴ was analogous to the section of the Oregon provision construed in *Verna*.

The inconsistent results reached by the courts presented sufficient confusion to warrant a resolution of the issue. In 1974 the Supreme Court granted certiorari⁷⁵ to an unreported case, *People v.*

with S.D. CODE 34.2905(1) (1960), as amended, S.D. COMPILED LAWS ANN. § 23-2-7 (1967), construed in *State v. Thomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960) and MICH. STAT. ANN. § 28.854 (1972 Rev'd), construed in *People v. Henley*, 382 Mich. 143, 169 N.W.2d 299 (1969).

⁶⁸ 9 Ore. App. 620, 498 P.2d 793 (1972).

⁶⁹ ORE. CONST. art 1, § 11.

⁷⁰ 9 Ore. App. at 625, 498 P.2d at 796.

⁷¹ 7 Cal. 3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1972), cert. denied, 410 U.S. 944 (1973).

⁷² *Id.* at 452-53, 103 Cal. Rptr. at 234-35, 499 P.2d at 490-91.

⁷³ *Id.* at 457, 460, 103 Cal. Rptr. at 238, 241, 499 P.2d at 494, 497.

⁷⁴ CALIF. CONST. art. 1, § 13.

⁷⁵ 415 U.S. 975 (1974).

Faretta,⁷⁶ which duplicated the rationale and approximated the fact pattern of *Sharp*.

II

Faretta v. California

Almost half a century ago Charles Evans Hughes wrote:

[T]he protection both of the rights of the individual and of those of society rests not so often on formulas, as to which there may be agreement, but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct.⁷⁷

*Faretta v. California*⁷⁸ represents the Court's continuing effort to make an accommodation between the rights of the criminal defendant as an individual and society's mandate for efficient criminal adjudication machinery.

Procedural safeguards that are geared towards preserving the integrity of criminal proceedings have encountered much criticism.⁷⁹ However, they have also been hailed as the hallmark of the American legal system. As Justice Brennan once observed, "respect for the individual . . . is the lifeblood of the law."⁸⁰

When Anthony Faretta moved to represent himself in a prosecution for grand theft in the Los Angeles Superior Court,⁸¹ the court initially granted permission.⁸² However, before trial,⁸³ the judge reversed his decision on two grounds. First, the defendant's

⁷⁶ 2d Crim. No. 22722 (Cal. Ct. App., 2d App. Dist., Div. 2, filed June 26, 1973). For a copy of the unreported opinion, see Petition for Certiorari, Appendix at 25, *Faretta v. California*, 402 U.S. 806 (1975).

⁷⁷ C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 165-66 (1928).

⁷⁸ 422 U.S. 806 (1975).

⁷⁹ See *People v. Defore*, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-88 (Cardozo, J., dissenting), cert. denied, 270 U.S. 657 (1926); M. SHAPIRO & R. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 649 (4th ed. 1975); Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying all Those Terrible Things About It?*, 10 CALIF. W.L. REV. 196, 206-07 (1973).

⁸⁰ *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring), cited in *Faretta v. California*, 422 U.S. 806, 834 (1975).

⁸¹ 422 U.S. at 807. Faretta sought to represent himself because he believed that the public defender's office was "loaded down with . . . a heavy case load." *Id.*

⁸² In granting Faretta's motion, the judge informed the defendant:

You are going to follow the procedure. You are going to have to ask the questions right. . . . We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules.

Id. at 808 n.2. The Supreme Court characterized this "preliminary ruling" as an acceptance of the defendant's waiver of the right to counsel. *Id.* at 808.

⁸³ The superior court judge, on his own motion, held a hearing to assess Faretta's ability to conduct his own defense. *Id.*

demeanor and answers to specific legal questions⁸⁴ indicated that Faretta did not intelligently and knowingly waive his right to counsel. Second, the trial judge concluded that under the rule of *People v. Sharp*,⁸⁵ the *pro se* defense is a privilege, and not a fundamental constitutional right.⁸⁶ It was therefore within the discretion of the court to appoint a public defender to represent Faretta at trial.⁸⁷

The majority in *Faretta*,⁸⁸ speaking through Mr. Justice Stewart, considered the case in terms of the voluntary and competent election of an accused seeking to make a procedural choice during his trial.⁸⁹ Graphically framing the issue, the Court questioned "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."⁹⁰ In responding, the Court held that the sixth amendment implicitly grants a defendant the constitutional right to represent himself.⁹¹

In reaching its decision, the Court considered the intent of the Framers of the Constitution against a backdrop of English criminal

⁸⁴ The questions concerned the hearsay rule and California law governing the challenge of potential jurors. *Id.*

⁸⁵ 7 Cal. 3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1972), *cert. denied*, 410 U.S. 944 (1973). See text accompanying notes 71-74 *supra*.

⁸⁶ 7 Cal. 3d 460-61, 103 Cal. Rptr. 240-41, 499 P.2d at 496-97.

⁸⁷ Faretta subsequently requested leave to act as co-counsel, moved to have counsel of his choice, and to have a lawyer other than the public defender appointed. All of these motions were rejected. *Id.* at 810 & n.5. The petitioner argued that the right of self-representation is necessitated by the fact that a defendant does not have the right to choose counsel. See Petitioner's Brief at 21-23, *Faretta v. California*, 422 U.S. 806 (1975). The Court ignored this issue.

⁸⁸ The remaining members of the "Warren Court," Justices Brennan, Stewart, Douglas, Marshall, and White, joined by Justice Powell, comprised the *Faretta* majority.

⁸⁹ The opinion begins with a recital of dicta from *Adams v. United States ex. rel. McCann*, 317 U.S. 269 (1942), *Carter v. Illinois*, 329 U.S. 173 (1946), *Snyder v. Massachusetts*, 291 U.S. 97 (1934), and *Price v. Johnston*, 334 U.S. 266 (1948). See note 47 *supra*. These cases are marshalled for their language acknowledging the right to appear on one's own behalf. See 422 U.S. at 814-17. However, it is better to view them as authority for the majority's "right of free Choice" analysis. See text accompanying notes 103-05 *infra*. *Adams* and *Snyder* exemplify successful arguments of defendants winning the opportunity to make choices affecting the course of their trial: *Adams* involved the right to waive a jury trial, and *Snyder* upheld the right of a defendant to be present at a critical stage of the proceedings against him—a visit by the jury to the scene of the crime. *Carter* is cited because of its approval of the *Adams* dicta. Ironically, *Carter* held that Illinois could constitutionally accept a defendant's waiver of counsel and his subsequent guilty plea.

Price is cited because of its language contrasting the absence of an absolute right to argue one's appeal with the "recognized privilege of conducting [one's] own defense at the trial." 334 U.S. at 285 (emphasis added). The words "rights" and "privileges" are used imprecisely throughout these opinions, thereby diminishing their value as authority.

⁹⁰ 422 U.S. at 807.

⁹¹ *Id.* at 834.

procedure and American colonial history.⁹² Although the historical record is inconclusive,⁹³ the Court inferred that, in drafting the explicit sixth amendment right to counsel, the Framers did not intend to eliminate "the long-respected right of self-representation."⁹⁴ The Court supported its position by asserting that there would have been some debate in Congress⁹⁵ if the sixth amendment was intended to change "centuries of consistent history"⁹⁶ of self-representation.

Although it considered the dicta of *Adams v. United States ex rel. McCann* controlling, the majority did not come to grips with the strong dicta of *Singer v. United States*,⁹⁷ adopted by the dissent,⁹⁸ and generally recognized as a major obstacle to the recognition of a constitutional *pro se* right.⁹⁹ Central to the *Singer* decision, which involved the waiver of another sixth amendment right—the right to a jury trial—was the assertion that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."¹⁰⁰ The *Sharp* court considered this language dispositive when it concluded that "the right to waive a constitutional protection is not itself necessarily a right of constitutional dimensions."¹⁰¹

⁹² *Id.* at 821-32. The majority opinion asserted that "[t]he right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged." *Id.* at 818.

⁹³ See notes 23-24, 27 & 35 *supra*. The briefs of the parties reflect varied interpretations of the historical record. See Brief for Petitioner 33-34; Brief for Respondent 17-31; Petitioner's Reply Brief 1-4, *Faretta v. California*, 422 U.S. 806 (1975). Case law analyzing colonial history and English jurisprudence has reached different conclusions. Compare *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964), with *People v. Sharp*, 7 Cal. 3d 448, 454, 103 Cal. Rptr. 233, 236, 499 P.2d 489, 492 (1972). Commentators have also disagreed in their interpretation of history relating to the sixth amendment. See Note, *supra* note 63, at 685; Grano, *supra* note 9, at 1192-93; *Self-Representation*, *supra* note 29, at 1487; W. BEANEY, *supra* note 21, at 24.

⁹⁴ 422 U.S. at 832.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 380 U.S. 24 (1965).

⁹⁸ 422 U.S. at 841 n.4, 847. The dissenters correctly assert that *Singer* stands for the proposition that even though there is a constitutional right to a jury trial which may be waived, it does not follow that there is an absolute constitutional right to be tried by a judge sitting alone. Furthermore, the *Singer* court stated that "it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations . . ." 380 U.S. at 35.

The application of *Singer* to the self-representation issue suggests that even though an accused may waive his constitutional right to counsel, waiver does not necessarily imply the right of self-representation. Moreover, it follows from *Singer* that the trial court is vested with discretion to accept or reject the waiver of explicit sixth amendment rights. *Id.*

⁹⁹ See, e.g., *Self-Representation*, *supra* note 29, at 1488; 24 HASTINGS L.J. 431, 438-39 (1973).

¹⁰⁰ 380 U.S. at 34-35.

¹⁰¹ 7 Cal. 3d at 455, 103 Cal. Rptr. at 237, 499 P.2d at 493.

Perhaps the *Faretta* Court felt that its historical justification of the self-representation right was sufficient to overcome the analytical problems posed by *Sharp*. And in a moment of self-reflection, the majority acknowledged that the right to counsel and the right of self-representation might be contradictory.¹⁰² The Court, however, concluded that although recent case law mandates that all criminal defendants be afforded a lawyer before a conviction will be deemed valid, there exists

a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.¹⁰³

Therefore, the majority analyzed the problem in terms of its conception of fundamental American values. It concluded that a criminal defendant's right of free choice has priority over the government's interest in the administration of justice. As long as the accused can show that he is aware of the personal consequences of his choice, he may exercise his constitutional right of self-representation.¹⁰⁴

Led by Chief Justice Burger, the strict constructionists clearly demonstrated their constitutional methodology and philosophy¹⁰⁵ in two forceful dissenting opinions.¹⁰⁶ Rather than consider the rights of the individual, the dissenters questioned whether "the interests of justice"¹⁰⁷ require the right of self-representation. Chief Justice Burger asserted that the Supreme Court has an obligation to assess the impact of new constitutional rights on the criminal justice system. He then suggested that the right of self-representation will add to the "congestion in the courts and that the quality of justice will suffer."¹⁰⁸

Beginning with an analysis of the language of the sixth amendment, Justices Burger and Blackmun each reasoned that there is no

¹⁰² 422 U.S. at 832.

¹⁰³ *Id.* at 817.

¹⁰⁴ The majority asserted:

Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.

Id. at 834.

¹⁰⁵ *Cf.*, Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 321; L. LEVY, *AGAINST THE LAW* 25-35 (1974).

¹⁰⁶ Justice Blackmun wrote the second dissenting opinion. *Id.* at 846-50. Justice Rehnquist concurred in both dissents.

¹⁰⁷ 422 U.S. at 807 n.1.

¹⁰⁸ *Id.* at 845.

independent basis in the Constitution for detecting the existence of the right of self-representation.¹⁰⁹ Rather, they found that the right-to-counsel cases manifest an opposite conclusion: that the "spirit and the logic" of the sixth amendment require that all criminal defendants receive the fullest possible defense.¹¹⁰ Thus, according to the dissents, a fair trial is best achieved when the accused exercises his fundamental right to counsel.¹¹¹ In the alternative, a valid waiver should only be accepted when, in the exercise of discretion, the trial judge, finds that the accused is able to conduct his own defense and is fully aware of the consequences.¹¹²

The dissenters also rejected the majority's method of historical analysis. Justices Burger and Blackmun both argued persuasively that the majority opinion failed to prove that the Framers intended a constitutional right of self-representation.¹¹³ Justice Blackmun,

¹⁰⁹ *Id.* at 837-40, 846-49.

¹¹⁰ *Id.* at 840.

¹¹¹ This is also the position of the National Advisory Commission on Criminal Justice Standards and Goals. In Standard 13.1 they asserted:

Defendants should be discouraged from conducting their own defense in criminal prosecutions. No defendant should be permitted to defend himself if there is a basis for believing that:

1. The defendant will not be able to deal effectively with the legal or factual issues likely to be raised;
2. The defendant's self-representation is likely to impede the reasonably expeditious processing of the case; or
3. The defendant's conduct is likely to be disruptive of trial process.

NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 253 (1973).

¹¹² Although the dissenters superficially appear to evaluate the problem in terms of the best alternative for the individual defendant, their result reveals a primary concern for the best interests of the criminal justice system. Moreover, contrasting those interests balanced by the majority and the dissenters in reaching their conclusions further supports this point. For the majority, the considerations are the right of free choice or the unjust conviction. 422 U.S. at 834. The dissent, however, balanced the possibility of unjust convictions with the interests of the state. *Id.* at 851. This latter position is indicated in Chief Justice Burger's opinion when he states:

In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense. . . . *True freedom of choice and society's interest in seeing that justice is achieved* can be vindicated only if the trial court retains discretion to . . . insist that the accused be tried according to the Constitution.

Id. at 840. (emphasis added).

Justice Blackmun echoes this position in asserting: "I cannot agree to such a drastic curtailment of the interest of the State in seeing that justice is done in a real and objective sense." *Id.* at 851.

¹¹³ *Id.* at 843-45, 850-51. The dissenters, therefore, base their reasoning on a strict reading of the Constitution. They pay particular attention to the right to counsel expressly granted by the sixth amendment and the due process clause. In evaluating the self-representation problem, the dissenters reason that a case-by-case determination of each defendant's attempt to defend *pro se* is the best means of affording a fair trial and achieving due process of law.

however, went further when he demonstrated that the use of history is wholly inappropriate.¹¹⁴ He theorized that regardless of the genesis of the sixth amendment, contemporary notions of fundamental fairness in criminal justice adjudication must prevail in constitutional analyses.¹¹⁵ Moreover, he argued that the customary practice of self-representation by colonial Americans has no bearing on the existence of a constitutional right of self-representation in 1975 because of changes in criminal procedure.

The conclusion of Justice Blackmun's dissenting opinion poses serious questions about the impact of this new constitutional right on criminal procedure.¹¹⁶ Thus, the dissent's analysis, with its stress on the practical aspects of the administration of justice, is characteristic of the Burger-Blackmun-Rehnquist approach to constitutional issues.¹¹⁷ It focused on the interests of society, the other party affected by the free choices of criminal defendants.

III

PROCEDURAL RAMIFICATIONS OF THE CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION

A. *Hybrid Representation*

In recognizing the constitutional dimensions of the right of criminal defendants to represent themselves at trial, the Supreme Court has diminished the exclusiveness of the explicit sixth amend-

¹¹⁴ *Id.* at 850-51.

¹¹⁵ *Id.* at 851. He reasoned that the majority's recognition of the constitutional right of self-representation creates "obvious dangers of unjust convictions in order to protect the individual defendant's right of free choice." *Id.* Such a possibility, argued Justice Blackmun, countervenes the right of a fair trial. *Id.* This echoes Justice Burger's assertion that "[t]he system of criminal justice should not be available as an instrument of self-destruction." *Id.* at 840.

¹¹⁶ Some of the questions include:

Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? . . . How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error?

Id. at 852.

¹¹⁷ See generally Lamb, *The Making of A Chief Justice: Warren Burger on Criminal Procedure 1956-1969*, 60 CORNELL L. REV. 743 (1975). This concern with the pragmatic aspects of the criminal justice system has been vigorously attacked:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

ment right to counsel.¹¹⁸ Unless the Court subsequently recognizes a hybrid right where the defendant may proceed *pro se*, with an attorney assisting as co-counsel, an election between the rights of self-representation and the assistance of counsel will probably have to be made. Pre-*Faretta* case law does not present a clear analysis of the problems inherent in proceeding in this manner.¹¹⁹ *Faretta*, however, does alter the perspective on the co-counsel problem because the Court recognized that two constitutional rights are asserted and/or waived. Instead of questioning only whether the defendant may appear in the capacity of counsel with his attorney, the inquiry is more complex. First, there are constitutional questions: What is the scope of the waiver of counsel's assistance when the defendant exercises the *pro se* right? If the right of self-representation is asserted, has the trial court necessarily recognized the waiver of the assistance of counsel, and consequently, co-counsel? Because the Court has not resolved the practical procedural problems of asserting and waiving these rights,¹²⁰ the constitutional dimensions of the co-counsel hybrid¹²¹ are unclear. Second, statutory provisions

¹¹⁸ The Court has thus recognized that the basic thesis of the right-to-counsel decisions—that the assistance of a lawyer is essential to assure a fair trial—is not without exceptions. *Faretta's* brief emphasized that the scheme for assigning counsel in California resulted in deficient representation for many defendants. California's Code of Criminal Procedure does not grant indigent defendants the right to counsel of their choice. Moreover, California law will not overturn a conviction on the grounds of ineffective assistance of counsel unless the quality of representation was so poor as to render the trial a sham. See Brief for Petitioner at 21-28, *Faretta v. California*, 422 U.S. 806; *Faretta v. California*, 422 U.S. 806, 812. Therefore, the right of self-representation was the necessary remedy for the inadequate legal services. Although the majority's language of "the right of free choice" is the basis of its holding, the problem of providing adequate representation seems to be the real issue involved.

¹¹⁹ Although there have been circumstances where defendants sought the assistance of counsel and also wanted to present the case themselves there is little precedent in this area. Nevertheless, the discernible standard for permitting co-counsel is whether or not the "interests of justice" require it. See *Overholser v. DeMarcos*, 149 F.2d 23, 26 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). Angela Davis, who was charged with conspiring to provide weapons to black militants held in the Marin County, California Civic Center, was also permitted to appear as co-counsel at her trial. See *Self-Representation*, *supra* note 29, at 1506 (discussion of her successful arguments to appear as co-counsel). For a discussion of Texas law on this point, see *Webb v. State*, 533 S.W.2d 780, 784 n.2 (Tex. Crim. App. 1976), a case decided after *Faretta*.

¹²⁰ See text accompanying notes 127-35 *infra*.

¹²¹ Several cases rejecting the right to proceed *pro se* and retain a co-counsel have been decided since the *Faretta* decision. *United States v. Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975); *People v. Windham*, — Cal. App. 3d —, 129 Cal. Rptr. 828, 833-34 (1976); *Callahan v. State*, — Md. App. —, 354 A.2d 191, 194-95 (1976). See also *United States v. Hinderman*, 528 F.2d 100 (8th Cir. 1976) (no constitutional right to have unlicensed attorney represent defendant); *United States v. Lang*, 527 F.2d 1264 (4th Cir. 1975) (no constitutional right for defendant to appear as co-counsel if right to counsel is asserted); *United States v. Corrigan*, 401 F. Supp. 795 (D. Wyo. 1975) (no constitutional right for other lay counsel to represent defendant).

must be considered. The federal statute, 28 U.S.C. § 1654,¹²² has been construed to require an election between being represented by counsel or proceeding *pro se*.¹²³ Relying on *Faretta's* "right of free choice" language, a court could construe this statute to permit a defendant to represent himself with an attorney serving as co-counsel, even though the statute is worded disjunctively. In addition, *Faretta* does not address the constitutionality of proceeding *pro se* with the assistance of co-counsel in state courts. State statutory and constitutional provisions are diverse¹²⁴ and have been inconsistently construed;¹²⁵ therefore, it can be expected that application of *Faretta* will be equally inconsistent.

It also remains for the Supreme Court to articulate the boundaries of the *pro se* defendant's right to have the assistance of standby counsel. Advisory counsel has been used in the past when the trial judge has doubted the ability of the *pro se* defendant to present his case or where the accused could not receive a fair trial without counsel's assistance.¹²⁶ When a defendant waives his right to counsel, only presentation of the defense by an attorney at trial is waived. Therefore, a defendant conceivably may consult a lawyer, seated with him at the table, and not overstep the bounds of the asserted right of self-representation. Moreover, *Faretta* explicitly states that it is appropriate for a state to compel a defendant to accept standby counsel, "even over objection by the accused [in order] to aid . . . [him] if and when . . . [he] requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."¹²⁷

¹²² See *United States v. Montgomery*, 529 F.2d 1404 (10th Cir. 1976); see note 36 *supra*.

¹²³ *Brasier v. Jeary*, 256 F.2d 474 (8th Cir.), *cert. denied*, 358 U.S. 867, *rehearing denied*, 358 U.S. 923 (1958).

¹²⁴ See notes 38-39 & 67 *supra*.

¹²⁵ See text accompanying notes 68-70 *supra*.

¹²⁶ See *Self-Representation*, *supra* note 29, at 1510. In his concurring opinion in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), Chief Justice Burger asserted that assigning advisory standby counsel is in the best interest of the *pro se* defendant:

Here the accused was acting as his own counsel but had a court-appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised—as so many do—to have such "standby counsel" to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such "standby counsel" to protect the rights of accused persons "foolishly trying to defend themselves". . . .

Id. at 467-68. Because of his misconduct during his trial, *Mayberry* was convicted for criminal contempt. Commentators have also recommended hybrid representation by using advisory counsel and lawyers as co-counsel. See Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 940 (1972); 24 HASTINGS L.J. 431, 451 (1973); Note, *supra* note 63, at 703.

¹²⁷ 422 U.S. at 834-35 n.46, *citing* *United States v. Dougherty*, 473 F.2d 1113, 1124-25

B. *Time for Asserting the Pro Se Right*

Faretta does not establish concrete guidelines for the defendant who wishes to exercise the right of self-representation. The opinion does reiterate the "knowingly and intelligently" standard¹²⁸ which must be demonstrated in order to effect a valid waiver of counsel. However, a discussion of the specific steps which defendants must take is noticeably absent. Nor is there mention of the duties of trial judges, prosecutors, or court-appointed counsel. *Faretta* specifically addresses only the pre-trial assertion of the right to proceed *pro se*. The controversial problem of permitting a defendant who has retained counsel, to dispense with such assistance and represent himself once the trial has begun,¹²⁹ is not discussed at all.¹³⁰

C. *Waiver*

The manner in which a defendant may waive the *pro se* right if he exercises his right to counsel is also unclear.¹³¹ *United States v. Plattner*, however, established guidelines on these procedural points,¹³² and there is nothing in *Faretta* to suggest that they are

(D.C. Cir. 1972). Although discussion of standby counsel is limited to a footnote, and focuses on a fact pattern involving a potentially disruptive defendant, there is nothing in *Faretta* to exclude liberal use of standby counsel. Cases decided since *Faretta*, in which courts approve or require standby counsel, include *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975); *Stapp v. Estelle*, 524 F.2d 447 (5th Cir. 1975); *United States v. Corrigan*, 401 F. Supp. 795, 800 (D. Wyo. 1975); *Thomas v. Superior Court*, 54 Cal. App. 3d 1054, 1059-60, 126 Cal. Rptr. 830, 833-34 (1976) (dictum); *People v. Heath*, 35 Ill. App. 3d 880, 882, 342 N.E.2d 452, 456 (1976); *People v. Heidelberg*, 33 Ill. App. 3d 574, 592-93, 338 N.E.2d 56, 70-71 (1975); *Commonwealth v. Africa*, — Pa. —, 353 A.2d 855, 864 (1976).

¹²⁸ See 422 U.S. at 832, citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). Also see *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (plurality opinion of Black, J.). For post-*Faretta* cases treating the standard for assertion of the *pro se* right, see *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750 (2d Cir. 1975); *United States v. Johnson*, 527 F.2d 1104 (4th Cir. 1975); *Demos v. State*, — Ala. —, 329 So. 2d 646 (1976); *People v. McCoy*, 35 Ill. App. 3d 326, 341 N.E.2d 422 (1976); *State v. Renshaw*, 276 Md. 259, 347 A.2d 219 (1975); *Hamilton v. State*, 30 Md. App. 202, 351 A.2d 153 (1976); *State v. Hartman*, — Vt. —, 349 A.2d 223 (1975).

¹²⁹ See Comment, *supra* note 63, at 48-50; Comment, *Defense Pro Se*, 23 U. MIAMI L. REV. 551, 558 (1969).

¹³⁰ But see *People v. Windham*, — Cal. App. 3d —, 129 Cal. Rptr. 828, 831-32 (1976) (court must grant request for self-representation even after trial begins); *State v. Nix*, — La. —, 327 So. 2d 301, 353-54 (1976) (motion to discharge counsel after selection of jury refused).

¹³¹ But see *United States v. Montgomery*, 529 F.2d 1404 (10th Cir. 1976) (plea bargaining of public defender with defendant's consent constituted waiver of *pro se* representation); *State v. Nix*, — La. —, 327 So. 2d 301, 354 (1976) (retention of counsel beyond commencement of trial constituted waiver).

¹³² 330 F.2d at 276. For example, *Plattner* required that a clear record of the defendant's choice to proceed *pro se* be made through a recorded colloquy with the presiding judge; accord, *Hodge v. United States*, 414 F.2d 1040 (9th Cir. 1969). A dissenting judge in *Hodge* stated that the procedure for accepting a waiver should be similar to those steps a trial judge must take

inappropriate. Moreover, the Court lent some aid on this issue by declaring:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that "he knows what he is doing and his choice is made with eyes open."¹³³

It is questionable, however, whether the "eyes are open" standard is appropriate for measuring the validity of an assertion of the *pro se* right.¹³⁴

Faretta implies judges should notify the *pro se* defendant that he will not be afforded special treatment during the trial.¹³⁵ All rules, such as the rules of evidence, must be followed. And since the *pro se* defendant has full responsibility for his defense strategy, Justice Stewart declared that he is precluded from collaterally attacking his conviction on the ground that he had the ineffective assistance of counsel.¹³⁶

before accepting a guilty plea. 414 F.2d at 1054. He added that "the more apparent the stupidity which attends one's insistence upon providing his own juice in which to stew, the more careful should be the trial judge in the required explanation of the factors involved in the attempted waiver." *Id.* at 1054-55. These elements are also discussed in Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 935-38 (1972).

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

¹³⁴ The same standard is used in assessing the validity of a waiver of counsel's assistance. Perhaps, however, a higher standard should be required in electing to proceed *pro se* because the defendant's ability to manage his own defense may affect the outcome of his trial. Although the *Faretta* Court recognizes that legal knowledge is unnecessary for the defendant exercising his right of self-representation (422 U.S. at 835), his ability to conduct his own defense is a matter that the Court did not adequately examine. The level of the defendant's education, intelligence, knowledge of law, and experience with legal proceedings may have significant bearing on the defendant's success. See, e.g., *United States v. Calabro*, 467 F.2d 973 (2d Cir. 1972). These factors, however, are not determinative of whether the defendant may represent himself. *Id.*

A recent New York decision interpreting *Faretta* held that the standard for determining mental capacity to stand trial was the same as that for determining capacity to waive the right to counsel and to elect to proceed *pro se*. *People v. Reason*, 37 N.Y.2d 351, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975). The Second Circuit has also addressed this question. See *United States ex rel. Martinez v. Thomas*, 526 F.2d 750 (2d Cir. 1975); and *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975). In *Konigsberg* the court held that the standard of competence for *pro se* representation is higher than that needed to stand trial. A Maryland court has also decided this question. See *State v. Renshaw*, 276 Md. 259, 347 A.2d 219 (1975) (standard for *pro se* representation different from standard of competency to stand trial).

¹³⁵ See 422 U.S. at 835 (discussing with approval conduct of trial judge). See also *United States v. Plattner*, 330 F.2d at 276; *People v. Heidelberg*, 33 Ill. App. 3d 574, 338 N.E.2d 56 (1975) (prisoner may not expect special treatment while conducting own defense); *In re Brewster*, — N.H. —, 351 A.2d 889 (1975) (rules of procedure identical for those appearing *pro se*). But see *Self-Representation*, *supra* note 29, at 1508.

¹³⁶ *Id.* at 835 n.46.

There are at least two possible explanations for the majority's lack of specificity in discussing procedural standards for implementing the right. Although the Supreme Court has previously struck down or affirmed criminal procedures and formulated guidelines in the same opinion,¹³⁷ the *Faretta* majority may have believed that the better approach was to reserve discussion to future cases. If *Faretta* stands for the recognition of a new fundamental constitutional right, Justice Blackmun's procedural questions¹³⁸ must be answered. However, the case may also be viewed as a warning to courts that they must let defendants do something they have always been allowed to do—represent themselves. Although the right-to-counsel cases have espoused the theory that representation by a lawyer is essential to a fair trial, resources have not been adequately allocated to assure all defendants such assistance.¹³⁹ Therefore, *Faretta* is a limitation on post-*Gideon* cases insofar as it asserts that "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense."¹⁴⁰ Procedural guidelines are not of primary importance if one reads *Faretta* as a judicial answer to the problems arising out of the right-to-counsel cases.

IV

RETROACTIVITY

The *Faretta* Court did not declare that the decision should receive retroactive application. Nevertheless, within seven months after the opinion was handed down, at least two state courts¹⁴¹ and two federal courts¹⁴² addressed this question.

The Michigan Supreme Court was the first and only court to assert that *Faretta* should be given retroactive effect.¹⁴³ In *People v. Holcomb*,¹⁴⁴ the opinion reasoned that

¹³⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 486 (1966).

¹³⁸ See note 116 *supra*.

¹³⁹ *Id.* at 805.

¹⁴⁰ *Id.* at 834.

¹⁴¹ *People v. McDaniel*, 16 Cal. 3d 156, 127 Cal. Rptr. 467, 545 P.2d 843 (1975); *People v. Holcomb*, 395 Mich. 326, 235 N.W.2d 343 (1976).

¹⁴² *United States v. Montgomery*, 529 F.2d 1404 (10th Cir. 1976); *Houston v. Nelson*, 404 F. Supp. 1108 (C.D. Cal. 1975). The *Montgomery* case is not discussed *infra* as it did not discuss the retroactivity of *Faretta* in state proceedings. The case held that a court that denies a defendant his right to proceed *pro se* under 28 U.S.C. § 1654 (1970) has committed reversible error.

¹⁴³ *People v. Holcomb*, 395 Mich. 326, 235 N.W.2d 343, 347 (1976).

¹⁴⁴ 395 Mich. 326, 235 N.W.2d 343 (1976).

[t]he right to representation at trial, whether by counsel or by the defendant himself, affects the truth and accuracy of the guilt determining process.

To deny retroactive effect to the right to proceed *pro se* on the ground that the right to counsel at trial enhanced the reliability of the fact-finding process while the right to proceed *pro se* inhibits or lessens the probability that the defendant's case will be adequately presented would be to reject the premise of *Faretta*¹⁴⁵

The court did not explicitly employ the test, articulated in several oft-cited Supreme Court cases,¹⁴⁶ for assessing whether a decision should be retroactively applied. Instead the Michigan court emphasized:

In Sixth Amendment terms, the right to proceed *pro se* is not qualitatively different from the right to counsel and accordingly, unless and until the United States Supreme Court limits the application of that right, we will accord it full retroactive effect.¹⁴⁷

The *Holcomb* court therefore ignored the language in *Faretta* clearly recognizing a qualitative difference between the right to counsel and *pro se* representation.¹⁴⁸ By misreading *Faretta*, the Michigan Supreme Court reached a conclusion that is divergent from other cases addressing the same question.

*People v. McDaniel*¹⁴⁹ and *Houston v. Nelson*¹⁵⁰ both explicitly applied the Supreme Court's retroactivity test and concluded that *Faretta* should be applied only prospectively. In *McDaniel*, the California Supreme Court evidenced its discontent with the *pro se* right when it declared:

In considering the first of criteria of retroactivity of the *Faretta* rule, we discover that it is readily apparent that the purpose of the rule is to secure to an accused the personal freedom to

¹⁴⁵ *Id.* at 336, 235 N.W.2d at 347 n.7.

¹⁴⁶ *See, e.g.*, *Halliday v. United States*, 394 U.S. 831 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966). In *Halliday*, the court summarized the test:

In deciding whether to apply newly adopted constitutional rulings retroactively, we have considered three criteria: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice.

394 U.S. at 832. Although the *Holcomb* majority considered the purpose of the new rule, it failed to consider the other two criteria. Moreover, it misunderstood the purpose of *pro se* representation because it did not recognize that the right has nothing to do with the accuracy of the guilt-determining process; in fact, the Supreme Court emphasized that the right of an individual to exercise free choice was at issue in *Faretta* (422 U.S. at 832-34).

¹⁴⁷ 395 Mich. at 336, 235 N.W.2d at 347 n.7.

¹⁴⁸ 422 U.S. at 832-34.

¹⁴⁹ 16 Cal. 3d 156, 127 Cal. Rptr. 467, 545 P.2d 843 (1976).

¹⁵⁰ 404 F. Supp. 1108 (C.D. Cal. 1975).

choose how and by whom he will defend against a criminal charge. It is manifest from . . . the *Faretta* opinion . . . that compliance with the rule is not intended by the majority of the court in *Faretta* to enhance the reliability of the truth-determining or fact-finding process, as the majority anticipate and indeed concede, that such compliance will most likely have the directly opposite effect.¹⁵¹

Both *McDaniel* and *Houston* recognized that California law at the time of the appellant's trials clearly prohibited the right of self-representation.¹⁵² Moreover, the trial courts were justified in their reliance on pre-*Faretta* law. Finally, *McDaniel* and *Houston* emphasized that the retroactive application of *Faretta* could have traumatic effects on the administration of justice.¹⁵³

Courts therefore should follow the sound analysis of *McDaniel*, since both this opinion and *Houston* adequately assessed the ramifications of the retroactive application of *Faretta*. Indeed, some courts have already indicated that *Faretta* has had a traumatic effect on the "administration of justice."¹⁵⁴ Liberal acceptance of standby counsel

¹⁵¹ 16 Cal. 3d at 166, 127 Cal. Rptr. at 473, 545 P.2d at 849.

¹⁵² *Id.* at 167, 127 Cal. Rptr. at 474-75, 545 P.2d at 849-50; 404 F. Supp. at 1115.

¹⁵³ 16 Cal. 3d at 167-68, 127 Cal. Rptr. at 474, 545 P.2d at 850; 404 F. Supp. at 1115. The opinions both posited situations where those convicted under pre-*Faretta* law could readily seek redress. In *Houston v. Nelson*, the court stated: "Any defendant who at one time requested to represent himself on the record in a state court criminal proceeding could file for a new trial and under the rationale of *U.S. v. Price* [474 F.2d 1223 (9th Cir. 1973)], no prejudice need be shown, only an unequivocal demand." 404 F. Supp. at 1115. The California Supreme Court commented:

The final criterion, the effect of retroactive application of the *Faretta* rule upon the administration of justice, surely swings the scales heavily against retroactive application. Such application could require that convicted persons who unsuccessfully sought at trial to assert a right of self-representation be accorded a new trial wherein they might appear *pro se*. As we must assume that in each such instance the right of self-representation was denied because the accused was not competent to so represent himself (see *People v. Sharp*, 7 Cal.3d 448, 461, 103 Cal. Rptr. 233, 499 P.2d 489 (1972)) or did not have an intelligent conception of the consequences of waiving counsel (see *People v. Siegenthaler*, 7 Cal.3d 465, 471, 103 Cal. Rptr. 243, 499 P.2d 499 (1972)), it is manifest that on retrial in the great majority of cases a different result would not be forthcoming. The state would thus be heavily burdened to retry numerous cases with little likelihood that justice would be served in any of them.

16 Cal. 3d at 167-68, 127 Cal. Rptr. at 474, 545 P.2d at 850.

¹⁵⁴ See notes 126-27 and accompanying text. A California court has graphically commented on the decision:

The dragon's teeth sowed by *Faretta* have begun to sprout.

....

Of course, as the dissent in *Faretta* pointed out, the Sixth Amendment doesn't say beans about self-representation, but the majority says that the "structure" of the Amendment so indicates and that, to coin a phrase, is that."

People v. Windham, 58 Cal. App. 3d 570, 572-73, 129 Cal. Rptr. 828, 830 (1976). The case involved a defendant who sought to represent himself for the balance of his testimony, and for the final argument. The trial judge had denied the request without any inquiry as to whether the defendant knew what he was doing. On appeal, Justice Gardner held that under *Faretta*, the trial judge's ruling was reversible error per se. 16 Cal. App. 3d at 576, 129 Cal. Rptr. at 832-33.

and co-counsel shows that courts are attempting to accommodate the basic constitutional right to counsel to the self-representation right. When courts employ these devices, which aid the *pro se* defendants in conducting their defenses, they are in effect proving that the right of self-representation is not intertwined with the truth-determining process.

CONCLUSION

The Supreme Court, in *Faretta v. California*, recognized that the sixth amendment contains both the explicit right to counsel and the implicit right to self-representation. It is a departure from the line of cases holding that a criminal defendant can receive a trial that comports with the requirements of due process of law only if represented by counsel. The *Faretta* court reasoned that a defendant must have the best possible defense at trial, but it must not be at the expense of the free choice of the individual.

The Court, however, did not define the limits of the *pro se* right and failed to articulate procedural standards for its exercise. Therefore, courts, defendants, and lawyers affected by the case will have to rely on older lower court decisions, and interpretations of *Faretta* by state and circuit courts until the Supreme Court again speaks about the right of self-representation.

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