Louisiana Law Review

Volume 62 | Number 4
Essays in Honor of William D. Hawkland - Unifying Commercial Law in the 20th Century: Understanding the Impulse and Assessing the Effort - Symposium
Summer 2002

The Pro Se Dilemma: Can Too Many Rights Make a Wrong?

Shawn A. Carter

The *Pro Se* Dilemma: Can Too Many Rights Make a Wrong?

"Americans have many rights, but not enough lefts."
Guillermo Lozada[1]

These are my grandfather's words, spoken to me so that I might be grateful for the unearned benefits of the citizenship that was my birthright. These words embody his belief that rights and duties are inseparable, that no one should take more than he gives. He could never understand how the same constitution that granted him unparalleled opportunity could also tolerate flag burning,[2] hate speech,[3] and public advocacy of violent and criminal behavior.[4] Therefore, he often questioned the social cost of giving people so many rights. His concerns reflect those of the courts, whose task it is to balance personal liberties with the societal goals that offset them.

In the criminal setting, there are many liberties granted to an accused.[5] One such liberty, the defendant's Sixth Amendment right to waive assistance of counsel and proceed *pro se*, has already been held by the Supreme Court to outweigh the government's interests in protecting the defendant from the prosecutorial process.[6] However, when a defendant proceeds *pro se* in a death penalty case, the government's interests in fairly imposing the death penalty adds more weight to its interests in protecting the defendant. Because the defendant's life is at stake, his choice to proceed *pro se* complicates the difficult task of balancing his autonomy interests with the government's interests in maintaining the fairness and integrity of the trial.

In *United States v. Len Davis*,[7] the Fifth Circuit had to decide whether to allow the defendant, Len Davis, to proceed *pro se* during the sentencing phase of his capital murder case. Due to Davis's unique trial strategy, whereby he would risk his life for the acquittal he sought, the government's interest in avoiding an arbitrary

---

1. Guillermo Lozada, now an American citizen, is a Mexican immigrant. He is currently living in Houston, Texas.

2. *See* Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989); United States v. Eichman, 496 U.S. 310, 110 S.Ct. 2404 (1990).

3. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992).

4. *See* Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969).

5. Most of these are contained in the Bill of Rights, specifically, Amendments Four, Five, Six, Seven, and Eight.

6. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

7. United States v. Len Davis, No. 01-30656, slip op. *7 (5th Cir. July 17, 2001).

imposition of the death penalty was uncommonly strong. Len Davis believed that legal errors had occurred in his first trial and that the district and appellate courts would take his case more seriously if he was facing a death sentence. Therefore, to elicit a higher level of scrutiny, he chose to help the prosecution obtain a death sentence by not presenting mitigating evidence, nor any other defense, during the penalty phase of his capital trial.[8] In order to avoid a blind imposition of the death penalty, the trial judge appointed counsel to present mitigating evidence. However, with one last candle to blow out before making his final death wish, Len Davis filed an interlocutory appeal with the Fifth Circuit, whereupon his *pro se* right was reinstated.

As this case demonstrates, the government's interest in maintaining the integrity of the trial and the fairness of the death penalty may conflict with the defendant's interest in proceeding *pro se*. In general, the court must allow the defendant to proceed *pro se* in all but the rarest cases.[9] At the same time, however, the court's power to control the scope and maintain the integrity of the trial must not be unduly compromised. Though these interests are competing, they are not mutually exclusive. In other words, although a defendant's choice to proceed *pro se* may be damaging to his case, the court does not necessarily compromise the government's interests by honoring his decision, however misguided it may be. Thus, the central question in *United States v. Len Davis* was whether Len Davis's risky trial strategy required a departure from the general rule that a defendant should be allowed to proceed *pro se* during his criminal trial. Although the Fifth Circuit reached the correct conclusion—that the trial judge should not have revoked Davis's *pro se* right—it did not adequately address the novel issues with which it was presented: (1) whether Davis's conviction cut off his *pro se* right, (2) whether Davis's *pro se* strategy of foregoing the presentation of mitigating evidence was precluded by the Eighth Amendment bar against arbitrary and

---

8. In his appellate brief to the Fifth Circuit, Davis's counsel wrote: "[b]elieving that legal errors that led to his conviction will be examined more scrupulously if he has a death sentence facing him, Mr. Davis made the strategic decision that he does not want to put on mitigating evidence in an effort to convince the jury that he should not die." Len Davis originally intended to present a "residual doubt" defense, whereby he would argue his innocence before the jury in order to raise doubts in their minds as to his guilt, thereby eliciting a more lenient sentence. However, Len Davis ultimately decided to forego presenting any defense at all. United States v. Len Davis, 150 F. Supp. 2d 918, 920 (E.D. La. 2001).

9. "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. at 2541 n.46.

capricious death sentences, and (3) whether the *pro se* right includes the right to present no defense.

This Note will provide support for the Fifth Circuit's holding by addressing the abovementioned issues. Part I will present the District Court and Fifth Circuit opinions in *United States v. Len Davis*. Part II will involve a discussion of the Supreme Court jurisprudence interpreting the defendant's Sixth Amendment right to proceed *pro se* and the Eighth Amendment prohibition of arbitrary and capricious death sentences. Part III will provide support for the Fifth Circuit's holding by addressing the novel issues of this case. This part will demonstrate that a defendant retains his *pro se* right even after his conviction and that the Eighth Amendment does not preclude a *pro se* defendant from withholding mitigating evidence. This part will also demonstrate that because the court has the resources necessary to protect the government's interests there is no need to infringe on a defendant's right to proceed *pro se*, even though the defendant chooses to withhold mitigating evidence and present no defense at all.

PART I: *UNITED STATES OF AMERICA V. LEN DAVIS*

A. Factual and Procedural Background

In 1995 the government charged Len Davis, a New Orleans police officer, with hiring the murder of Kim Marie Groves, a witness against him in a police brutality complaint.[10] After finding him guilty of civil rights murder, a federal crime in violation of 18 U.S.C. §§ 241 and 242, the jury found that the death sentence was appropriate.[11] In light of this finding, the United States District Court for the Eastern District of Louisiana sentenced Davis to death.[12] On appeal, the United States Court of Appeals for the Fifth Circuit upheld Davis's conviction on two of the three counts with which he was charged, but reversed his death sentence and remanded the case to the District Court for a new penalty trial.[13]

---

10. *Len Davis*, 1995 WL 405707 (E.D. La.).
11. *Id.*
12. *Id.*
13. United States v. Causey, 185 F.3d 407 (5th Cir. 1999), *cert. denied sub nom* Davis v. United States, 530 U.S. 1277, 120 S.Ct. 2747 (2000). The Fifth Circuit, having reversed Davis's conviction for witness tampering, held that because the jury did not make a separate recommendation concerning the proper penalty for each count of his conviction, it was impossible to know whether the jury's penalty recommendations were not influenced by the fact that Davis had received three convictions for which the death penalty could be imposed. Therefore, Davis's death sentence was vacated and his case was remanded for a new sentencing hearing. *Causey*, 185 F.3d at 423.

B. The District Court's Opinion

At the beginning of the penalty trial Davis stated that he wished to proceed *pro se*. In keeping with the Supreme Court's decision in *Faretta v. California*,[14] where the Court held that a criminal defendant has a Sixth Amendment right to voluntarily and intelligently elect to proceed without counsel, Judge Berrigan allowed Davis to proceed *pro se*. However, without objection, she appointed standby counsel, a permissible act of judicial discretion recognized in *Faretta*.[15] Throughout the preliminary stages of the penalty trial, Davis made it clear that he did not intend to offer any evidence mitigating against the death penalty.[16] Before the trial began, Davis filed a request to proceed with hybrid representation,[17] whereby he and his appointed counsel would take turns speaking on his behalf. Though Judge Berrigan originally granted Davis's request, on reconsideration she held that Len Davis had no right to hybrid representation.[18] However, she went further in holding that "Davis does not have a constitutional right to self-representation at the penalty phase of this capital case."[19]

In holding that Davis had no right to proceed *pro se* in the sentencing phase of his capital trial, Judge Berrigan relied on the Supreme Court's language in *Martinez v. Court of Appeals*,[20] wherein the Court declined to extend the *pro se* right to criminal appeals. The Court's holding was based, in part, on the diminishing effect a conviction has on a defendant's autonomy interests.[21] Judge Berrigan reasoned that because Davis had already received three convictions, two of which had already been upheld, his autonomy interests were outweighed by the government's interests in maintaining the fairness and integrity of the trial.[22] Thus, she concluded, the *pro se* right does not exist in a post-conviction sentencing trial.[23]

---

14. 422 U.S. 806, 95 S.Ct. 2525.

15. *Id.* at 834 n.46, 95 S.Ct. at 2541 n.46. The court may appoint standby counsel with or without the consent of the defendant so long as the defendant maintains control over the case and is perceived by the jury to be representing himself. McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984).

16. *Len Davis*, 150 F. Supp. 2d at 920. In a later filing, Davis stated that he would not present any defense at all during the penalty trial. *Id.* at 920.

17. *See* 3 Wayne R. LeFave et al., *Criminal Procedure* § 11.5(g) (2d ed. 1999).

18. *Len Davis*, 150 F. Supp. 2d at 919.

19. *Id.*

20. 528 U.S. 152, 120 S.Ct. 684 (2000).

21. *Id.* at 162, 120 S.Ct. at 691-92.

22. *Len Davis*, 150 F. Supp. 2d at 922.

23. *Id.* at 923.

In the alternative, Judge Berrigan concluded "that even if such a right exists, it is overcome by more compelling Eighth Amendment and Fourteenth Amendment requirements that the death penalty not be imposed arbitrarily and capriciously."[24] She rested this conclusion on a series of Supreme Court decisions requiring individualized sentencing in imposing the death sentence.[25] Under this Supreme Court jurisprudence, a sentencer must be allowed to engage in a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[26] Judge Berrigan feared that if Len Davis was allowed to proceed *pro se* he would withhold from the jury these relevant aspects of his record and character by offering no mitigating evidence. Judge Berrigan reasoned that by doing so Davis would, in effect, prevent the jury from being able to make an individualized determination of whether to impose the death penalty. To allow Davis to help the prosecution in this way, concluded Judge Berrigan, would be to allow him to procure his own death, thereby committing government-aided suicide. Thus, she revoked Len Davis's *pro se* right and appointed counsel to present the mitigating evidence he wanted to withhold.

C. The Fifth Circuit's Opinion

1. The Majority

After considering the arguments offered by Judge Berrigan in support of revoking Len Davis's *pro se* right, the majority of the Fifth Circuit concluded that Davis's right to proceed *pro se* should not have been revoked.[27] Judge Parker, writing for the majority, underscored the importance of honoring a defendant's autonomy as mandated by the *Faretta* decision. In addressing whether the *Martinez* decision should be read as cutting off a defendant's *pro se* right upon conviction, he reiterated that, in deciding *Martinez*, the Supreme Court drew a distinction between trial and appellate proceedings not pre-conviction and post-conviction proceedings. Moreover, he wrote confidently, "[n]othing in *Martinez* can be read to push the ending point for the Sixth Amendment right of self-representation in criminal proceedings back to

---

24. *Id.* at 919.
25. *Id.* at 924 (citing Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978)).
26. *Furman*, 408 U.S. at 286-91, 92 S. Ct. at 2750-53.
27. *Len Davis*, No. 01-30656, slip op. *7.

the end of the guilt/innocence phase of a bifurcated trial proceeding."[28] Thus, concluded Judge Parker, Len Davis should have been allowed to exercise his *pro se* right during the sentencing phase of his trial.[29]

In addressing whether the *pro se* right recognized in *Faretta* extends to capital cases, Judge Parker relied on the importance the Supreme Court placed on individual autonomy. He did not agree with Judge Berrigan's conclusion that, if Davis did have a *pro se* right, it was outweighed by the Eighth Amendment requirement of an individualized sentencing determination. In an attempt to quell Judge Berrigan's Eighth Amendment concerns, Judge Parker suggested that the prosecution's duty to bring out all evidence and the trial judge's right to question witnesses would safeguard the need for an individualized sentence.[30] He also highlighted the *pro se* defendant's role in the trial, noting that "[t]he jury will have the benefit of whatever defense Davis chooses to mount."[31] After commending Judge Berrigan for her "thoughtful grappling" with the issue,[32] Judge Parker concluded that, out of a respect for Davis's autonomy, he should be allowed to proceed *pro se* during the sentencing phase of his capital trial.[33]

2. Judge Dennis's Dissent

Judge Dennis was concerned with the fact that Len Davis was willing to risk his life in order to carry out his plan.[34] Though he shared Judge Berrigan's opinion that Davis should not be allowed to proceed *pro se*, he did not agree with Judge Berrigan's conclusion that *Martinez* should be read as cutting off a defendant's *pro se* right upon conviction.[35]

Judge Dennis read the *Faretta* opinion as recognizing the defendant's Sixth Amendment right to present a defense against the

---

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* Judge Parker's statement belied the fact that Davis had chosen to present no defense at all.
32. Judge Parker phrased the issue as whether *Faretta* extends to capital cases. However, as will become clear in Part III, though he correctly decided the issue as he phrased it, he did not phrase it correctly. Thus, he left unanswered the more difficult question, to wit: whether the Eighth Amendment precludes a defendant from proceeding *pro se* even though he chooses not to fight the death penalty. *Len Davis*, No. 01-30656, slip op. *6.
33. *Id.* at *7.
34. In his brief, Davis's counsel wrote, "[w]hile he [Davis] has no desire to die he has weighed carefully the prospects of a death sentence against spending the rest of his life in jail—and he finds life in prison to be more onerous." *Len Davis*, No. 01-30656, slip op., dissent 2 n.2 (Dennis, J., dissenting) (quoting an appellate brief submitted by Julian Murray, appointed counsel for Len Davis).
35. *Len Davis*, No. 01-30656, slip op. *7, 4 (Dennis, J., dissenting).

prosecution.[36] According to Judge Dennis, because Len Davis was helping the prosecution procure a death sentence he was not exercising his *Faretta* right to present his own defense.[37] He emphasized, "[o]ver and over, the Court makes clear in *Faretta* what the majority cannot see: the right is not to make a non-adversary non-defense under the guise of a mere formalistic or nominal self-representation; the right is to make a genuine adversary defense."[38] Judge Dennis viewed Davis's actions as distorting the *pro se* right by turning it into a "constitutional right to mismanage, sabotage, or abandon a defense."[39] Thus, he concluded that the majority should not have reinstated Len Davis's *pro se* right.

PART II

A. The Sixth Amendment Pro Se Right

1. Faretta v. California*: the Jurisprudential Origin of the Pro Se Right*

In 1975, the Supreme Court held that a criminal defendant has a fundamental right under the Sixth Amendment to proceed *pro se*.[40] The Court based its conclusion on the text of the amendment, supporting its reading by way of reference to English and American legal history.[41] Though the Court admitted that the Sixth Amendment does not expressly contain such a right, it argued that "the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment."[42] The court reasoned that since the Sixth Amendment clearly states that the accused shall have the right to notice, confrontation, and compulsory process, it is the accused who should have the right to make his defense personally.[43] Underscoring the personal nature of the amendment, the Court explained, "[t]he right to defend is given

---

36. *Id.* at 8-9.
37. *Id.* at 10.
38. *Id.* at 9.
39. *Id.* at 10.
40. *Faretta*, 422 U.S. 806, 95 S.Ct. 2525. The Court had already held that the *Constitution* does not require an attorney be appointed against the will of the defendant. *See* Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236 (1942). The issue in *Faretta* was whether the Constitution forbids the *states* from forcing an attorney on an unwilling defendant. *Faretta*, 422 U.S. at 815, 95 S.Ct. at 2530.
41. *Faretta*, 422 U.S. at 818, 95 S.Ct. at 2532.
42. *Id.* at 819, 95 S.Ct. at 2533.
43. *Id.*

directly to the accused; for it is he who suffers the consequences if the defense fails."[44]

After concluding that the Sixth Amendment implies a right of self-representation, the Court searched the archives of the common law to find support for its reading. In sixteenth and seventeenth century England, accused felons and traitors were forbidden to appear before the courts with counsel.[45] Though this prohibition was eventually lifted,[46] self-representation continued throughout England. The long tradition of self-representation in criminal proceedings in England found its way into the colonies, where the heart of the *pro se* right beat with an undeniable contempt for lawyers.[47] The Court found that early Americans had evidenced their distrust for lawyers through their laws[48] and through their states' constitutions,[49] many of which vested defendants with the right of self-representation. These sentiments, concluded the Court, were shared by the drafters of the Sixth Amendment and, therefore, the last effect the drafters would have wanted the Sixth Amendment to have would be to force defendants to accept the assistance of unwanted counsel.[50] Thus, concluded the Court, the purpose of the Sixth Amendment was to give defendants the choice to proceed with or without the assistance of counsel.[51]

According to the Court, although a defendant would not likely present a defense as skillfully as his counsel, out of a respect for his personal autonomy, he must be allowed to proceed *pro se*.[52] Reluctant to distort the defendant's perception of the Constitution, the

---

44. *Id.* at 819-820, 95 S.Ct. at 2533.

45. *Faretta*, 422 U.S. at 823, 95 S.Ct. at 2535.

46. The Treason Act of 1695 granted, among other things, the right to court appointed counsel for a willing defendant. *Id.* at 824, 95 S.Ct. at 2536.

47. "When the Colonies were first settled, 'the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions.'" *Id.* at 826, 95 S.Ct. at 2537 (*quoting* C. Warren, A History of the American Bar 7 (1911)). "This prejudice gained strength in the Colonies where 'distrust of lawyers became an institution.'" *Id.* at 826-27, 95 S.Ct. at 2537 (*quoting* D. Boorstin, The Americans; The Colonial Experience 197 (1958)).

48. In the 17th century, several colonies, including Massachusetts, Virginia, Connecticut, North Carolina, and South Carolina, prohibited pleading for hire. *Id.* at 827, 95 S.Ct. at 2537.

49. "After the Declaration of Independence, the right of self-representation, along with other rights basic to the making of a defense, entered the new state constitutions in wholesale fashion." *Faretta*, 422 U.S. at 828-29, 95 S.Ct. at 2538.

50. *Id.* at 832, 95 S.Ct. at 2539-40.

51. *Id.*, 95 S.Ct. at 2539-40.

52. *Id.* at 832-33, 95 S.Ct. at 2540.

Court wrote that "[t]o force a lawyer on a defendant [would] only lead him to believe that the law contrives against him."[53] Justice Blackmun, who was less concerned with the defendant's perception of the Constitution, underscored the disadvantages of proceeding *pro se*. Dissenting, he wrote, "[i]f there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself."[54]

2. Martinez v. Court of Appeal of California: *Recent Limitations on the Pro Se Right*

In *Martinez v. Court of Appeal of California*, the Supreme Court held that a defendant's *Faretta* right to proceed *pro se* does not extend to the appellate stage of a criminal proceeding.[55] The Court based its decision on the three inter-related arguments it had set forth in *Faretta*: (1) an historical analysis of the *pro se* right; (2) a textual analysis of the Sixth Amendment in light of its history; and (3) an argument in favor of the *pro se* right based on the defendant's autonomy rights.[56] The Court noted that though the history of *pro se* representation in England may have been useful in the context of a trial, it did not prove to be very helpful in the appellate context. In *Faretta*, the Court relied on a long history of *pro se* representation in criminal trials in England, but in *Martinez*, the Court found that there was no appeal from a criminal conviction in England until 1907.[57] Though most of the States historically had some form of discretionary appellate review, there was no generally recognized appeal as of right until 1889, when Washington explicitly incorporated it into its constitution.[58] Thus, concluded the Court, because there was no traditional right to appeal a criminal conviction, the *pro se* right preserved in the Sixth Amendment did not encompass the appellate stage of a criminal proceeding.

In addition to a lack of historical evidence supporting a *pro se* right on appeal, the Court pointed to the language of the Sixth Amendment, which contains no reference to a criminal appeal. Moreover, the Court noted that none of its cases protecting the rights of indigent appellants had placed any reliance on the Sixth

53. *Id.* at 834, 95 S.Ct. 2540.
54. *Faretta*, 422 U.S. at 592, 95 S.Ct. at 2550 (Blackmun, J., dissenting).
55. 528 U.S. 152, 120 S.Ct. 684 (2000).
56. *Id.* at 156, 120 S.Ct. at 688.
57. *Id.* at 160, 120 S.Ct. at 690.
58. *Id.* at 159, 120 S.Ct. at 690.

Amendment.[59] Thus, concluded the Court, because the Sixth Amendment does not even apply to appellate proceedings, it cannot be the source for a *pro se* right on appeal.[60]

The Court reasoned that because the Sixth Amendment does not apply to appellate proceedings a *pro se* right on appeal would have to be grounded in the Due Process Clause.[61] The Court reasoned that, in the appellate context, because a defendant is not being haled into the courtroom against his will as he was for his trial, a defendant's appeal does not elicit the same autonomy concerns as his trial because his presence on appeal is voluntary.[62] "There are significant differences between the trial and appellate stages of a criminal proceeding," explained the Court, "the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*."[63] Thus, reasoned the Court, the autonomy interests of a convicted defendant seeking an appeal are diminished. On the other hand, the government's interest in maintaining the fair and efficient administration of justice is just as strong on appeal as it is during the trial. Thus, concluded the Court, "the States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interest in self-representation."[64]

3. The Eighth Amendment Prohibition of Arbitrary and Capricious Death Sentences

The series of Supreme Court cases addressing the validity of the death penalty under the Eighth Amendment began with *Furman v. Georgia*.[65] The issue in that case was whether the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[66] A plurality of the Court agreed that to impose and carry out the death penalty under the statutes before it would have been unconstitutional.[67] Two Justices concluded that the death penalty was unconstitutional *per se*.[68] Three Justices, declining to read the Eighth Amendment as altogether prohibiting the death

59. *Id.* at 160, 120 S.Ct. at 690.
60. *Martinez* at 161, 120 S.Ct. at 690.
61. *Id.* at 161, 120 S.Ct. at 690.
62. *Id.* at 163, 120 S.Ct. at 691.
63. *Id.* at 163, 120 S.Ct. at 692.
64. *Id.*
65. 408 U.S. 238, 92 S.Ct. 2726 (1972).
66. *Id.* at 239, 92 S.Ct. at 2727.
67. *Id.* at 238, 92 S.Ct. at 2726.
68. *Id.* at 305-06, 370-71, 92 S.Ct. at 2760, 2793.

penalty, concluded that the death penalty was constitutional only if the legislature guided the discretion of the sentencer.[69]

In *Gregg v. Georgia*, the Court refined its *Furman* decision, holding that as long as sentencing discretion is "directed and limited" so as not to create a "substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner," the Eighth and Fourteenth Amendments are not violated.[70]

In an attempt to conform with the Supreme Court's holdings in *Furman* and *Gregg*, many states enacted statutes limiting sentencing discretion in death penalty cases. In *Lockett v. Ohio*, the Court was presented with a death penalty statute that limited sentencing discretion by only allowing the sentencer to consider three enumerated mitigating factors.[71] While recognizing the legislature's role in deciding how much discretion to give the judge or jury deciding the sentence, the Court noted that "it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[highly] relevant—*if not essential*—[to the] selection of an appropriate sentence. . . ."[72] Due to the lack of corrective mechanisms available in redressing a wrongfully imposed death sentence, the Court reasoned that the death penalty, by all comparisons, is the most egregious penalty under the law. Relying on the qualitative difference between the death sentence and all other sentences, the Court declared that a greater degree of reliability is necessary to impose a death sentence.[73] The Court reasoned that an individualization of the sentencing process would increase the reliability of death sentences by allowing for a meaningful basis for distinguishing the cases in which it should be imposed from those in which it should not be imposed.[74] The Court argued that the consideration of both mitigating and aggravating factors was essential in adequately determining the appropriateness of the death penalty in a criminal case. Thus, concluded the Court, "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and

---

69. *Id.* at 257, 310, 313, 92 S.Ct. at 2735, 2762, 2764.

70. 428 U.S. 153, 188, 189, 96 S.Ct. 2909, 2932 (1976).

71. 438 U.S. 586, 98 S.Ct. 2954 (1978); *see* Ohio Rev. Code Ann § 2929.04 (B) (1975).

72. *Lockett*, 438 U.S. at 602-03, 98 S.Ct. at 2963-64 (*quoting* Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083 (1949) (emphasis added by the Court)).

73. *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964.

74. *Id.* at 605, 98 S.Ct. at 2965.

any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[75]

PART III

The District Court, the Fifth Circuit majority, and Judge Dennis each had different approaches to the question of whether Len Davis should be allowed to proceed *pro se* in his sentencing trial. Their divergence was due, in part, to the way each of them phrased the issue. Judge Berrigan, in her opinion, addressed two novel issues: (1) whether under *Faretta*, and in light of *Martinez*, Davis had a right to proceed *pro se* during his penalty trial; and, (2) if he did have a *pro se* right, whether it was outweighed by Eighth Amendment concerns. Judge Dennis, through a more straightforward approach, raised another novel issue: whether the *pro se* right recognized by the *Faretta* Court includes the right to present no defense.

The Fifth Circuit did not fully address the issues raised by these two judges but phrased the issue more simply: whether under *Faretta*, and in light of *Martinez*, Len Davis had a right to proceed *pro se* during the sentencing phase of his capital trial. Though the Fifth Circuit was correct in holding that Davis should be allowed to proceed *pro se*, the opposing arguments were not given enough weight and, consequently, were simply dismissed instead of thoroughly rebutted. The following discussion will provide additional support for the Fifth Circuit's holding through a critique of the arguments offered by Judges Berrigan and Dennis.

A. The District Court Opinion

1. Whether Martinez *Should Be Read as Cutting of the Pro Se Right upon Conviction*

Judge Berrigan read *Martinez* as completely cutting off a defendant's *pro se* right upon conviction. According to her, because Len Davis's conviction reduced his autonomy interests, the government's undiminished interest in maintaining the integrity of the trial outweighed his *pro se* right. Thus, she concluded, Davis was precluded from proceeding *pro se* by virtue of his conviction. In reaching this conclusion, Judge Berrigan relied on language in *Martinez* characterizing a defendant's autonomy interests as being diminished upon conviction. Though the *Martinez* Court did make the distinction between pre-conviction autonomy interests and post-conviction autonomy interests, it did so in order to highlight the

75. *Id.* at 604-05, 98 S.Ct. at 2964-65 (emphasis added by the Court).

distinction between the trial and appellate stages of a criminal proceeding. When a defendant voluntarily seeks an appeal, his autonomy is not as threatened as it was in his trial when he was haled into a courtroom against his will. Moreover, when a defendant appeals his conviction he is not defending himself from the prosecution but rather is attacking the prosecution's arguments and seeking a reversal of the court's ruling. As the Court found in *Martinez*, this distinction defines the boundaries of the procedural protection the Constitution affords a convicted defendant on appeal.

Thus, when the *Martinez* Court characterized the autonomy interests of a defendant as being diminished upon his conviction, the Court was simply reinforcing its argument that, on appeal, a defendant's autonomy interests are at their weakest. However, this was not how Judge Berrigan read the *Martinez* decision. She described the Court's holding as setting a threshold for the *pro se* right at the point of conviction. Judge Berrigan portrayed the Court's holding as one militating against the conclusion that a defendant retains his *pro se* right after his conviction. In her analysis, she quoted a passage from the *Martinez* decision, wherein the Court stated that "the status of the accused defendant, who retains the presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict."[76] However, she did not quote the sentence that followed:

> We have recognized this shifting focus and noted: '[T]here are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. . . .'
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below.'[77]

Judge Berrigan also quoted the Court as saying "the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*."[78] But the sentence, as

---

76. *Len Davis*, 150 F. Supp. 2d at 921 (*quoting Martinez*, 528 U.S. at 162, 120 S.Ct. at 691).

77. *Martinez*, 528 U.S. at 162-63, 120 S.Ct. at 691 (*quoting* Ross v. Moffitt, 417 U.S. 600, 610, 94 S.Ct. 2437 at 2444 (1974)).

78. *Len Davis*, 150 F. Supp. 2d at 921 (*quoting Martinez*, 528 U.S. at 163, 120 S.Ct. at 692).

written by the Court, read, "*[c]onsidering the change in position from defendant to appellant*, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*."[79]

Reading *Martinez* as Judge Berrigan presented it, her conclusion seems to be one compelled by logic. However, when read in its entirety, the *Martinez* decision does not clearly stand for the conclusion that a defendant loses his *pro se* right upon conviction. Though her arguments in favor of revoking Len Davis's *pro se* right were compelling, her reliance on *Martinez* as cutting off a defendant's *pro se* right upon conviction was not warranted.

In *Martinez*, the Court made no distinction between pre-conviction defendants and post-conviction defendants; rather, the Court underscored the language of the Sixth Amendment as vesting in *defendants* the right to proceed *pro se* in a criminal *trial*. Because the penalty trial ordered by the Fifth Circuit is, in essence, merely a re-determination of what the District Court should have determined in the original trial, it follows that the penalty trial is part of the original trial. Thus, Len Davis should not be stripped of his *pro se* right because of his conviction, as he is still a defendant in a criminal trial.[80] Revoking the *pro se* right by virtue of his conviction would be unfair, especially to Len Davis because his case was remanded due to legal errors in his first trial. Thus, by stripping Davis of his *pro se* right upon conviction the court would, in effect, be penalizing him for something beyond his control. Moreover, if the *pro se* right was automatically taken away from defendants whose sentences were wrongly assessed at the original trial, courts would then have the power to strip defendants of their *pro se* rights by rendering sentences highly susceptible to being reversed. Then, upon remand for post-conviction proceedings, the courts, resting on the conclusion that a conviction cuts off a defendant's *pro se* right, would be able to prevent defendants from proceeding *pro se*. Though no court would likely do this purposefully, the result would certainly undermine one of the most important functions of the Sixth Amendment: to protected

---

79. *Martinez*, 528 U.S. at 163, 120 S.Ct. at 692 (emphasis added).

80. This proposition is illustrated best in the appellate brief filed by Davis's attorney: "[Mr. Davis] is facing a trial in every sense of the word. The penalty phase of any capital case is a trial in that there are opening statements, presentation of evidence, cross-examination of witnesses, and closing arguments, but especially so in the instant case. Here there is also the requirement for jury selection. Further, even though guilt is not technically an issue, as a practical matter the government is once again going to have to present evidence in an attempt to prove the defendant's guilt. It certainly cannot expect jurors to return a death verdict if they have no evidence before them as to what facts led to the conviction."

defendants from the powers of courts.[81] Thus, the Fifth Circuit was correct in holding that the Sixth Amendment vests the *pro se* right in both convicted and unconvicted defendants.

2. Whether Eighth Amendment Concerns Outweigh Len Davis's Pro Se Right

In concluding that Eighth Amendment concerns outweighed Len Davis's *pro se* right, Judge Berrigan reasoned that, by foregoing the presentation of evidence mitigating against the death penalty, Davis would have been able to deprive the jury of its ability to make an appropriate sentencing determination. In reaching this conclusion, Judge Berrigan relied on Supreme Court jurisprudence requiring an individualized determination of guilt based on a consideration of all available factors, both mitigating and aggravating. To the extent that Davis might have chosen to withhold exculpatory evidence known only by him, Judge Berrigan was correct in assuming that he would have been able to prevent the jury from hearing all mitigating evidence. However, revoking Davis's *pro se* right would not have changed this because Davis could have withheld that evidence even if defense counsel was appointed to represent him. Moreover, the Eighth Amendment does not prohibit a *defendant* from withholding mitigating evidence, rather it prohibits *governments*, state and federal, from preventing sentencers from hearing all mitigating factors.[82]

Granted, it could be argued that by allowing a *pro se* defendant to withhold mitigating evidence, the judicial branch of the government would, in effect, be preventing the sentencer from hearing all available mitigating evidence. However, if this argument was given full weight, the government would have to

---

81. *See* Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968); 4 W. Blackstone, Commentaries on the Laws of England 343 (Cooley ed. 1899).

82. In the Eighth Amendment cases Judge Berrigan cited, the government had restricted the use of mitigating evidence through state statutes, court rules, or evidentiary rulings. The focus of those decisions was on the information necessary for an individualized determination of guilt, not the means by which that information must be conveyed to the jury. *See Furman* 408 U.S. 238, 92 S.Ct. 2726; *Lockett*, 438 U.S. 586, 98 S.Ct. 2954; *Gregg*, 428 U.S. 153, 96 S.Ct. 2909; *Williams*, 337 U.S. 241, 69 S.Ct. 1079; Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988); California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987); Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 58 S.Ct. 59 (1937).

force defendants to disclose all mitigating evidence in order to comport with the Eighth Amendment. Volumes of case law would likely proliferate due to the liberty violations that would necessarily result from even attempting to meet this standard. When defendants would choose to suppress exculpatory evidence by remaining silent, it would be impractical, not to mention unconstitutional, to force them to speak up. Forcing disclosure of all exculpatory evidence known to a defendant would cut against the grain of the *pro se* right, which was meant to allow, *inter alia*, the defendant to choose what evidence to present.[83] Moreover, giving criminal *suspects* the right to remain silent,[84] only to strip them of that right once they become criminal *defendants*, would create yet another inconsistency in constitutional law.

To the extent that Len Davis would have been able to prevent the jury from hearing mitigating evidence from other sources, Judge Berrigan's concerns did not even apply because Davis's *pro se* powers did not reach beyond the scope of his own case-in-chief.[85] In other words, though Davis did have a right to waive counsel and control his own case, he did not have a right to waive justice and control the courtroom proceedings by keeping all available mitigating evidence from the jury. Though his *pro se* right necessarily entailed the ability to prevent appointed defense counsel from presenting mitigating evidence, it did not give him the right to prevent anyone else from presenting mitigating evidence. At all times, the prosecution, in accordance with its duty to seek justice rather than the death penalty, had to comport with its duty to disclose all exculpatory evidence within its possession.[86] Len Davis had no power to prevent the prosecution from presenting this evidence.[87] Furthermore, as a federal judge, Judge Berrigan had at her disposal several resources through which she could have brought out all available mitigating evidence. She could have asked the witness questions in order to

---

83. The Court has stated that a *pro se* defendant should be given much discretion in choosing how to mount a defense. *See* In re Little, 404 U.S. 553, 92 S.Ct. 659 (1972).

84. *See* Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

85. Judge Berrigan recognized this limitation but still felt that Len Davis would interfere with the jury's efforts at reaching an individualized determination regarding his guilt. *Davis*, 150 F. Supp. 2d at 923, 930.

86. *See* Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). *See also* Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103 (1957); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959); Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987) (the prosecution has an affirmative duty to correct bad information).

87. Len Davis did, however, have a right to demand that the prosecution bring forth information favorable to his case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972).

clear up ambiguities in their testimony,[88] she could have called her own witnesses,[89] and she could have appointed an expert witness to develop the mitigating evidence that the prosecution is required to disclose.[90] Most importantly, Judge Berrigan could have appointed amicus curiae to bring out evidence mitigating against the death penalty.[91]

There is one final consideration that would seem to foreclose any further discussion on whether the Eighth Amendment requires an attorney to be appointed against Len Davis's wishes. In *Adams v. United States ex rel. McCann*, the Supreme Court held that the Constitution does not require the appointment of an attorney on a defendant who does not want the assistance of counsel.[92] In so holding, the Court wrote that "the Constitution does not force a lawyer upon a defendant."[93] Thus, the holding in *Adams*—not to be confused with the *Faretta* holding—seems inapposite to Judge Berrigan's argument that the Constitution, via the Eighth Amendment, requires appointment of defense counsel.[94]

The import of *Adams* notwithstanding, the existence of the prosecution's duty to disclose all mitigating evidence and the trial judge's broad discretionary powers provided the jury with a variety of resources from which to gather the information needed to make an individualized sentencing determination. Thus, Judge Berrigan's Eighth Amendment concerns could have been dispelled by utilizing these resources. Although the Fifth Circuit did not fully address whether Len Davis's strategy violated the Eighth Amendment, it reached the right result by holding that he must be allowed to proceed *pro se*.

---

88. This falls within the broad powers vested in federal judges. *See* Quercia v. United States, 289 U.S. 466, 469, 53 S.Ct. 698, 698-99 (1933); United States v. Hasting, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978 (1983); McNabb v. United States, 318 U.S. 332, 341, 345, 63 S.Ct. 608, 613, 615 (1943).

89. Fed. Rule Evid. Rule 614 (2001).

90. Fed. Rule Evid. Rule 706 (2001).

91. *See* Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326 (2000); Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 1609 (1998). On remand, Judge Berrigan appointed Laurie White as independent counsel to represent the public interest in a full and fair penalty phase proceeding. *Davis*, 180 F. Supp. 2d 797, 2001 WL 1711023 (E.D. La. 2001). The Fifth Circuit subsequently held this appointment to be in violation of Len Davis's Sixth Amendment right to self-representation. U.S. v. Davis, 285 F.3d 378 (5th Cir. 2002), rehearing denied. The United States Supreme Court has yet to grant a writ of certiorari on the matter.

92. 317 U.S. 269, 63 S.Ct. 236.

93. *Id.* at 279, 63 S.Ct. at 242.

94. *See supra* note 40.

3. Judge Dennis's Dissent: Whether the Pro Se Right Includes the Right to Present No Defense

According to Judge Dennis, the question of whether Len Davis should have been allowed to proceed *pro se* was not a difficult one. As Judge Dennis read *Faretta*, if a defendant wants to present his own defense, the Sixth Amendment gives him that right, and if a defendant does not want to present a defense, the Sixth Amendment does not even apply. This conclusion was based on the Supreme Court's language in *Faretta* and *Martinez*, and a strict reading of those decisions seems to support Judge Dennis's distinction between *pro se* defendants who wish to present a defense and those who do not.

As Judge Dennis pointed out, the *Faretta* Court repeatedly equated the *pro se* right with the right to present one's own defense. However, this was not without good reason. The defendant in *Faretta* had been completely denied the opportunity to present his own defense.[95] Thus, the narrow issue presented before the Supreme Court in *Faretta* was whether a court could prevent a defendant wishing to present his own defense from proceeding *pro se*.[96] Although Judge Dennis may have been correct in concluding that *Faretta* did not recognize a right to present no defense, this conclusion was not inconsistent with and, therefore, did not militate against the conclusion that a defendant also has a *pro se* right to present no defense. In other words, by equating the limits of the *Faretta* holding with the limits of the *pro se* right, Judge Dennis was, in effect, arguing that when the Supreme Court recognized a defendant's right to present his own defense the Court simultaneously held that a defendant had no right to waive his attorney and present no defense.[97] This argument, which is implicit in Judge Dennis's dissent, forecloses any further discussion on how much freedom of choice the Constitution affords a *pro se* defendant.[98] However, Judge Dennis's position is not clearly supported by the historical and autonomy based arguments the *Faretta* Court utilized to derive a *pro se* right from the Sixth Amendment.

---

95. *Faretta*, 422 U.S. at 809-10, 95 S.Ct. at 2529.

96. *Id.* at 807, 95 S.Ct. at 2527.

97. The underlying rational to Judge Dennis's argument is similar to the all too familiar Latin maxim *expressio unius est exclusio alterius* ("the expression of the one means the exclusion of the other"). *See* Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985).

98. This reasoning seems inconsistent with the spirit of the *pro se* right. In *In re Little*, the Supreme Court held that a defendant who chooses to represent himself is "entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's case." *In re Little*, 404 U.S. at 555, 92 S.Ct. at 660.

In *Faretta*, the Court made several references to a widespread distrust of lawyers in the American Colonies, a distrust that manifested itself in early laws and constitutions and made the colonists' insistence upon a right of self-representation more fervent.[99] Additionally, the Court attached great significant to the fact that self-representation in early American courts was the rule not the exception.[100] After studying the history of the *pro se* right in colonial America, the Court wrote that "the notion of compulsory counsel was utterly foreign to [the Founders]. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."[101]

Furthermore, the English common law references the Supreme Court incorporated into its *pro se* argument demonstrated how sharply opposed the defendant's interests were to those of the courts in England. Drawing on those examples, the argument that the *pro se* right was necessary to protect defendants from corrupt systems of justice was an easy one to make. However, the argument the Court set out to make in *Faretta*—that the *pro se* right is just as important even in the absence of a corrupt judicial system—was a harder argument to make. Nevertheless, the Court analogized early English courts, with all their inhumane and hegemonic pursuits, to twentieth century American courts, where the effects of injustice and corruption had long been diluted by the constitutional guarantees of liberty and due process. By insisting that the *pro se* right remained viable despite the presence of the government's compelling interest in ensuring that there be a fair trial, the *Faretta* Court elevated the importance of the defendant's autonomy to a new level. The Court had made a bold leap from preserving the fairness of the trial at all costs to protecting the autonomy of the defendant despite the costs. Therefore, considering *Faretta*'s departure from more conservative thinking, it would be a small step for the Court to expand the right to present a defense into a right to present one's own case without a defense.

The defendant's autonomy achieved new status after *Faretta* was handed down. In fact, the Court placed the criminal defendant's perspective of justice above its own.[102] In its concluding remarks,

---

99. *Faretta*, 422 U.S. at 826-27, 95 S.Ct. at 2537. The Court wrote, "[t]he Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the antilawyer sentiment of the populace, but also the 'natural law' thinking that characterized the Revolution's spokesmen." *Id.* at 830, 95 S.Ct. at 2539, n.39.

100. *Id.* at 828, 95 S.Ct. at 2537.

101. *Id.* at 833-34, 95 S.Ct. at 2540.

102. The Supreme Court plainly admitted that the *pro se* right seemed to "cut against the grain" of its past decisions holding the right to counsel to be indispensable. *Faretta*, 422 U.S. at 832-33, 95 S.Ct. at 2540. Nevertheless, the

while taking great care to note the disadvantages of waiving assistance of counsel, the Court stressed the importance of avoiding a result that would cause a defendant to believe that the law works against him.[103] This concern was foreshadowed in the dictum of *Adams,* which the Court quoted with approval:

> What were contrived as protections for the accused should not be turned into fetters. . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny in him the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."[104]

In addition to Judge Dennis's argument that *Faretta* did not give Len Davis a right to present no defense, he also made a more practical functional argument. Judge Dennis was concerned that by not presenting a defense, Len Davis would undermine the adversarial nature of the criminal proceeding.[105] He argued that if a defendant were allowed to proceed *pro se* without offering a defense, the prosecution's arguments would go untested by the defendant's counter-arguments, leaving the court to decide a case based on the presentation of the prosecution. Such a result, he correctly concluded, would undermine the adversarial nature of the trial, a result that the *Faretta* Court did not likely intend.

Since the only issue in the penalty trial was whether Len Davis should receive a death penalty or a less severe penalty, the only purpose of an adverse party would be to argue against the imposition of the death penalty. Like Judge Berrigan's Eighth Amendment concerns regarding the need for mitigating evidence, Judge Dennis's concerns about the adversarial nature of criminal proceedings could have been easily resolved by the appointment of independent counsel to argue against the death penalty. Appointing amicus curiae would not have prevented Len Davis from presenting his "non-defense" and, therefore, would have preserved his *pro se* right without undermining the adversarial nature of the proceeding. Therefore, Judge Dennis's

---

Court was adamant in holding that the defendant must be given the final say lest he think the law "contrives against him" otherwise. *Id.* at 834, 95 S.Ct. at 2540-41.

103. *Id.* at 834, 95 S.Ct. 2540.

104. *Id.* at 815, 95 S.Ct. at 2531 (*quoting Adams*, 317 U.S. at 279-80, 63 S.Ct. at 241-42).

105. Judge Dennis's concerns were valid because although a defendant may remain adverse to the prosecution by virtue of his desire to be released from custody, his adversity is cloaked by silence when he does not speak in his defense.

concerns, though legitimate, could have been satisfied without infringing on Davis's *pro se* right.

CONCLUSION

The potential conflict between the government's interest in fairly imposing the death sentence and the defendant's interest in choosing how to exercise his *pro se* right is one that will be the subject of many legal discussions, even after the Supreme Court speaks on the issue. What should be clear is that, considering the importance of a defendant's *pro se* right and the equally important interests of the government in fairly imposing the death penalty, the best result is that which least infringes on the competing interests of the defendant and the government. The prosecution's duty to disclose all mitigating evidence and the trial judge's broad discretionary powers significantly reduce the risk of an arbitrary imposition of the death penalty. Thus, due to the great importance of respecting a defendant's free will to choose how to present his case, the *pro se* right should allow defendants to withhold mitigating evidence and it should encompass a defendant's right to choose whether or not to present a defense.

*Shawn A. Carter**

* The author wishes to thank Professor John M. Devlin for his invaluable assistance in writing this paper.