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THE RIGHT OF AN INDIGENT CRIMINAL DEFENDANT TO PROCEED *PRO SE* ON APPEAL: BY STATUTE OR CONSTITUTION, A NECESSARY EVIL

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INTRODUCTION

Protection of the rights of individuals is a task that the courts of this country take very seriously.[1] Whatever the source of

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1. The United States Supreme Court will not act as a super-legislature to override the legislature at will. *See, e.g.*, Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978), *reh'g denied*, 439 U.S. 884 (1978). The Court's function is not to interject itself into areas where the legislature may properly act and has acted in a proper manner. The Court has specifically noted that it will not interfere with legislative

those rights, the courts jealously guard them against government oppression.[2] Once a right has been determined to be fundamental or it has been determined that the affected person is a member of a certain class of people, the state carries a heavy burden to have the law upheld.[3] Most often the rights to civil liberties and basic freedoms dealt with by the courts work for the benefit of individuals struggling to maintain dignity and avoid discrimination.[4] An individual's freedom to make certain

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determinations on nonfundamental rights unless the legislature has acted with no rational basis. Parham v. Hughes, 441 U.S. 347, 351 (1979).

However, where a fundamental right is involved, or where the legislature discriminates against a suspect class of persons, the court can and will step in. In the landmark case of Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court struck down state sanctioned, official segregation of public schools. The Court was willing to step in and correct an injustice that impacted on persons because of those persons' racial status. In *Brown* the Court dealt with state action that impacted on fundamental rights or discrimination against certain groups. The Court required the justification for such laws to meet a heightened standard of review.

2. There are numerous instances where the courts have expressed desire to protect the rights of individuals from official oppression. A clear example is the sixth amendment right to trial by jury. "Trial by jury in serious criminal cases has long been regarded as an indispensable protection against . . . governmental oppression. . . ." Brown v. Louisiana, 447 U.S. 323, 330 (1980).

The Minnesota Supreme Court has also expressed its desire to protect the citizens of this state from official denial of fundamental rights. In the recent case of State v. Hamm, 423 N.W.2d 379, 385–86 (Minn. 1988), the court ruled that a Minnesota statute allowing six member juries in misdemeanor and gross misdemeanor cases violated article I, section 6 of the Minnesota Constitution. The statute in question in *Hamm* did not violate any federal constitutional protections. *See* Williams v. Florida, 399 U.S. 78 (1970) (sixth amendment does not constitutionally require states to have 12 member juries). However, the Minnesota Supreme Court determined that the protection was available to state citizens under the Minnesota Constitution regardless of the federal interpretation. *Hamm*, 423 N.W.2d at 381–82. The *Hamm* court noted that the purpose of a jury is to protect individuals from oppression. *Id.* at 384. Most interestingly, the court expressed a commitment to safeguard the rights of state citizens. *Id.* at 383. Another example of Minnesota courts working to protect individuals under state law is Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988), where the court dealt with the rights of persons committed to mental institutions. In *Jarvis*, the court stated that "the courts cannot abdicate *all* responsibility for protecting a committed person's fundamental rights. . . ." *Id.* at 147 (emphasis in original).

3. The standard of review used when fundamental rights are concerned is traditionally known as "strict judicial scrutiny." *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973), *reh'g denied*, 411 U.S. 959 (1973). In order to be upheld under this standard, the state must show that the law is necessary to meet a "legitimate, articulated state purpose." *Id.* at 17.

4. In *Brown v. Board of Education* the Court acknowledged the public policy involved with education and the evils surrounding official segregation.

> [Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cul-

intimate and fundamental life decisions without government interference is vital to the protection of individual autonomy. Protection of individual rights not only benefits the individual involved but also society as a whole.[5]

Cases dealing with first amendment rights demonstrate an assumption by the courts that the freedoms guaranteed by that amendment are beneficial both to the individual and to society as a whole.[6] Without the freedom to speak, print and believe as one chooses, all of society, in addition to the individual who is subject to regulation, suffers. The right to privacy is another area where the courts assume, quite correctly in most cases, that protecting the individual's "right to be let alone"[7] is a de-

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tural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493.

5. *See, e.g.*, Arizona v. Hicks, 480 U.S. 321, 329 (1987). In holding that a particular search and seizure violated the individual defendant's constitutional rights, the Court noted that "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Id.* at 329.

6. In an early freedom of speech case, Justice Brandeis wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . .

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled*, Brandenburg v. Ohio, 395 U.S. 444, 449, (1969). The necessity of a free and independent press has also been recognized as indispensable to an informed society, for the betterment of all. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

7. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *cf.* Katz v. United States, 389 U.S. 347, 351–52 (1967) (privacy right extends to public telephone booth). Development of constitutional protections for a right to privacy is particularly insightful in the desire of courts to protect certain basic rights and freedoms of individuals. The United States Supreme Court was able to find a fundamental right to privacy even though there is no mention of "privacy" in the text of the Constitution. The various protected aspects of the right to privacy originate in the "penumbra" of rights founded under several specific constitutional provisions. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Under this theory, the penumbras surrounding the guarantees in the Bill of Rights emanate to create a "zone of privacy." *Id* at 484. *See* Roe v. Wade, 410 U.S. 113 (1973), *reh'g denied*, 410 U.S. 959 (1973) (woman's right to choose to have an abortion is protected under right to privacy).

sirable end both for the individual and the society as a whole.[8]

No area better demonstrates the court's view that protecting the rights of the individual are beneficial than cases involving the rights of the accused in a criminal suit.[9] The prohibition against unreasonable searches and seizures[10] and the right against self-incrimination[11] demonstrate the court's concern with protecting an individual defendant's rights, as well as pro-

8. A common thread in the privacy cases is the notion that protection of these fundamental rights enhances the individual's ability to protect individual autonomy and dignity. "[T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." Thornburgh v. American College of Obstetrician & Gynecology, 476 U.S. 747, 772 (1986) (citations omitted). In addition, the Court definitely perceives that protection of the individual's right to privacy has a beneficial effect on society as a whole. "That promise extends to women as well as to men. . . . A woman's right to make that choice [whether to end a pregnancy] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Id.* at 773. *See also* Justice Blackmun's dissenting opinion in Bowers v. Hardwick, 478 U.S. 186, 204 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

The decisions creating and defining a woman's right to an abortion under the right to privacy have been among the Court's most controversial decisions. *See, e.g.*, Roe v. Wade, 410 U.S. at 113. The continuing controversy that has existed since Roe v. Wade clearly indicates that there is no universal agreement as to the wisdom or benefits of granting certain rights to individuals.

9. Taken together, the fourth, fifth and sixth amendments to the United States Constitution are the basis for most of the rights of an accused in a criminal suit. U.S. CONST. amends. IV, V, and VI.

10. In Mapp v. Ohio, 367 U.S. 643 (1961), *reh'g denied*, 368 U.S. 871 (1961), the Court imposed the exclusionary rule on the states, thereby rendering any evidence seized illegally inadmissible against the defendant. *See id.* at 655. Part of the Court's rationale for this rule was the importance of preserving a person's privacy from the arbitrary intrusion of the police. *Id.* at 650. The Court stated:

> Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Id. at 660. The exclusionary rule also assures all members of society that their private domain will not be subject to unreasonable intrusions by the government. Weeks v. United States, 232 U.S. 383, 391–92 (1914).

11. In Miranda v. Arizona, 384 U.S. 436 (1966), *reh'g denied*, 385 U.S. 890 (1966), the Court summarized the history behind the privilege against self-incrimination. *Id.* at 458–59. The Court concluded that the rule is necessary to strike a proper balance between the needs of society and the individual.

> Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a 'noble principle often transcends its origins,' the privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a gov-

tecting society from the excesses and abuses of an overzealous government. Protecting the accused may allow those that are perceived guilty to go free, but these protections help secure the freedom and rights of all.[12]

Courts are occasionally confronted with cases in which the individual claims a right that is arguably not in that individual's best interest. The court is then forced to grapple with the dilemma of enforcing the purported right when the exercise of that right could be harmful to the individual. The court must determine the extent to which the individual should be allowed to assert a right even in the face of potentially disastrous individual consequences. Such a situation occurs when an individual chooses to waive an established constitutional right.[13]

In those instances, courts must resolve the conflict between an individual's freedom of choice and the court's knowledge that such exercise may harm the individual. While the court is understandably concerned with the individual's best interests, an individual's freedom of choice is nonetheless vital to the exercise of fundamental human autonomy.

An indigent criminal defendant, for example, is entitled to the services of a court appointed attorney.[14] The United States Supreme Court, however, has held that an indigent criminal defendant has the right to reject the services of appointed counsel at trial, and may proceed *pro se*.[15] While few would agree that the exercise of such a right is wise, it is a guaranteed right under the Constitution, and correlative to the right to

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ernment—state or federal—must accord to the dignity and integrity of its citizens.

Id. at 460 (quoting United States v. Grunewald, 233 F.2d 556, 579, 581–82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)) (citations omitted).

12. *See* Arizona v. Hicks, 480 U.S. 321, 329 (1987).

13. On a certain level any time a criminal defendant chooses to waive a constitutional right, there is the possibility that the defense will be harmed. Pleading guilty to a criminal charge, for example, might be harmful if the state has a weak case. However, so long as the waiver is knowing and voluntary, the courts will allow a defendant to waive these rights and plead guilty. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969).

However, in Singer v. United States, 380 U.S. 24, 26 (1965), the United States Supreme Court declined to hold that a defendant has a constitutional right to a bench trial in a criminal case. The right to a jury trial under the sixth amendment was held to not give rise to a correlative constitutional right to reject a jury trial in favor of a bench trial.

14. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

15. Faretta v. California, 422 U.S. 806, 834 (1975).

assistance of counsel.[16] The dispute over whether there is a right to self-representation has been settled at the trial level. The issue remains whether the right to proceed *pro se* extends to appeal.[17] The cases are divided on whether such a right exists.[18] In the recent case of *State v. Seifert*,[19] the Minnesota Supreme Court held that under current state law an indigent criminal defendant may proceed *pro se* on direct appeal.[20]

While the *Seifert* court was careful to base its decision on state statutes and rules, the decision nevertheless raises serious constitutional issues. This article analyzes the issues surrounding the *Seifert* case, and concludes that constitutional principles would not allow a court to hold that an indigent criminal defendant must accept representation on direct appeal.[21] While the dissenting justices in *Seifert* viewed the denial of self-representation on direct appeal to be permissible,[22] a constitutional issue that was not addressed by the court or the dissents would prohibit such a result. The thesis of this article is that current Minnesota state law and custom, as well as principles of equal protection, require that the state allow an indigent criminal defendant to proceed *pro se* on direct appeal. Furthermore, any change that might negate the effect of *Seifert* is unlikely to withstand constitutional attack.[23]

I. *FARRETA* AND THE RIGHT TO PROCEED *PRO SE* UNDER THE SIXTH AMENDMENT

Prior to 1963, a state's failure to provide counsel to an indigent defendant charged with a noncapital crime was not violative of the due process clause of the fourteenth amendment.[24]

16. *Id.* *See infra* notes 36–47, 111 and accompanying text.
17. *See infra* notes 48–71 and accompanying text.
18. *Id.*
19. 423 N.W.2d 368 (Minn. 1988).
20. *See id.* at 374.
21. *See infra* notes 124–82 and accompanying text.
22. *Seifert*, 423 N.W.2d at 374 (Wahl, J., dissenting), 379 (Simonett, J., dissenting).
23. *See infra* notes 154–59 and accompanying text.
24. In Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963), the Supreme Court held that a state's refusal to appoint counsel for an indigent defendant did not in all cases violate due process. *See id.* at 471. The Court instead viewed the concept of due process as flexible, and refused to adopt a per se rule requiring counsel, stating:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial

The United States Supreme Court had construed the sixth amendment guarantee of the right to counsel[25] to require the appointment of counsel for indigent defendants in federal court.[26] The Court, however, refused to extend the same requirement to state courts[27] unless special circumstances existed.[28]

In 1963, less than twenty years after refusing to require a state to offer counsel to indigent defendants, the Court overruled itself in *Gideon v. Wainwright*.[29] It concluded that the sixth amendment guarantee of the right to counsel was indeed fundamental and essential to a fair trial, and therefore binding on the states.[30] The Court recognized the inability of the average

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> of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Id. at 462.

25. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

26. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

27. *See Betts*, 316 U.S. at 465. The Court, after finding that the sixth amendment established "no rule for the conduct of the States," next considered whether the requirement of counsel in the federal courts was "a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Id.* After considering the history of the right to counsel, the Court concluded that in state court the right to appointed counsel "is not a fundamental right, essential to a fair trial." *Id.* at 471.

28. In Powell v. Alabama, 287 U.S. 45 (1932), the Court held that under the particular circumstances of the infamous Scottsboro case, the refusal to appoint counsel constituted a denial of due process. The factors considered to be significant, in addition to the fact that it was a capital case, included "ignorance, feeble mindedness, illiteracy, or the like. . . ." *Id.* at 71.

Following the *Betts* decision, the Court required a strict showing by a defendant of special circumstances in order to entitle him to counsel. *See, e.g.*, Foster v. Illinois, 332 U.S. 134, 138 (1947) (refusal to appoint counsel before entry of guilty plea not violative of due process). However, that attitude soon softened. *See* Bute v. Illinois, 333 U.S. 640, 676 (1948) (counsel required in all capital cases even absent special circumstances). Quicksall v. Michigan, 339 U.S. 660, 666 (1950), was the last capital case in which the court failed to find special circumstances requiring appointment of counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 351 (Harlan, J., concurring).

29. *Gideon*, 372 U.S. at 345.

30. *Id.* at 341–42. It is interesting to note that the petition for certiorari in *Gideon* was a *pro se* petition, handwritten in pencil by Clarence Earl Gideon from a prison in Florida. *See* A. LEWIS, GIDEON'S TRUMPET (1966) for a full story of Gideon's struggle. Ironically, although counsel was eventually appointed, the case which guaranteed the right to appointed counsel in state courts began as a *pro se* case by a jailhouse lawyer. *Id.*

Betts was decided less than 20 years before *Gideon*. Considering the general conservatism of the law in general and the Court's reluctance to overrule its previous

lay person to conduct an effective defense.[31]

Gideon and its progeny guaranteed that an indigent defendant could not be convicted and imprisoned unless counsel was indeed provided.[32] Soon, however, the question arose whether a defendant, who was constitutionally entitled to appointed counsel, could nevertheless forego representation and defend the action *pro se*.[33]

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

Previously, the Court recognized that due process does not *prohibit* a *pro se* defense.[34] The Court has implied that the sixth amendment right to counsel inherently embodied a "correlative right to dispense with a lawyer's help."[35] In *Faretta v. Cali-*

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construction of constitutional provisions, it is worth speculating whether an attorney, trained in the law and well aware of the Court's hesitancy to overrule recent decisions, would have insisted that an indigent defendant be entitled to appointed counsel in all cases. That, however, is exactly what Clarence Earl Gideon did in his *pro se* petition. His only claim was that a poor man, tried for a felony in state court, was entitled to appointed counsel under the United States Constitution. This was a contention expressly contrary to the *Betts* holding. If nothing else, this case shows that *pro se* appeals can raise very significant issues.

31. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell, 287 U.S. at 68–69, *quoted in Gideon*, 372 U.S. at 344–45.

32. While *Gideon* applies only to felony convictions, the rule was subsequently extended to any criminal case wherein the defendant is in fact sentenced to imprisonment. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).

33. *See* Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965) (concluding that defendant should be allowed to intelligently waive counsel); *see also* Note, *The Right to Defend Pro Se in Criminal Proceedings*, WASH. U.L.Q. 679 (1973).

34. Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.

Carter v. Illinois, 329 U.S. 173, 174–75 (1946) (citation omitted).

35. Adams v. United States *ex rel* McCann, 317 U.S. 269, 279 (1942). *Adams* did not hold that the Constitution forbade a state from requiring a defendant to accept counsel. The question was whether a person could competently waive the right to a

fornia,[36] the Court was squarely presented with the extent of the constitutional protection of the right to proceed *pro se* at trial. The defendant requested permission to represent himself at trial because he believed that the public defender's office was overworked.[37] After questioning the defendant, the trial court granted his request.[38] The court later reversed its ruling.[39] The defendant was subsequently convicted after being forced to accept representation at trial.[40] The United States Supreme Court granted certiorari, stating that the question to be reviewed was "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."[41] Although finding it a difficult question, the majority concluded that the Constitution prohibits a state from forcing unwanted representation on an accused.[42]

The majority began its analysis by acknowledging the long-standing statutory right to self-representation in the federal

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jury trial without the advice of counsel. The Court concluded that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel." *Id.* at 275.

Moreover, though *Adams* did not directly address the issue, the language of that opinion strongly suggests that a state may not force counsel on a criminal defendant. The Court explained:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . .
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> . . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
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> . . . 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 him in 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.

Id. at 279–80, *quoted in* Faretta v. California, 422 U.S. 806, 815 (1975) (citation omitted).

36. 422 U.S. 806 (1975).

37. *Id.* at 807. Notice that the *Faretta* Court never once questioned the accuracy or reasonableness of this belief. Rather, the Court proceeded to decide the case solely on the basis of the stated belief.

38. *Id.* at 808.

39. *Id.* at 810.

40. *Id.* at 811.

41. *Id.* at 807.

42. *Id.*

courts.[43] In addition, the Court noted that the right to self-representation had been recognized by numerous states.[44] The Court also looked to the language of the amendment itself,[45] and found that "the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment."[46]

While acknowledging the critical importance of an attorney's assistance in ensuring a defendant a fair trial, the Court also recognized the clear principle implicit in the Bill of Rights affirming an individual's "inestimable worth of free choice."[47]

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43. *Id.* at 812. The Court noted that section 35 of the Judiciary Act of 1789, provided that in the federal courts " 'the parties may plead and manage their own causes personally or by the assistance of . . . counsel. . . .' The right is currently codified in 28 U.S.C. § 1654." *Id.* at 813. Most significantly, the Judiciary Act was "enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed. . . ." *Id.* at 812–13. Thus, the drafters of the sixth amendment must have been aware of the right to appear *pro se*.

Chief Justice Burger, in dissent, interpreted these same circumstances and reached the opposite conclusion. He stated:

> The text of the Sixth Amendment, which expressly provides only for a right to counsel, was proposed the day after the Judiciary Act was signed. It can hardly be suggested that the Members of the Congress of 1789, then few in number, were unfamiliar with the Amendment's carefully structured language, which had been under discussion since the 1787 Constitutional Convention. And it would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication. Rather, under traditional canons of construction, *inclusion* of the right in the Judiciary Act and its *omission* from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional.

Id. at 844 (Burger, C.J., dissenting) (emphasis in original). Justice Blackmun, dissenting separately, found the historical evidence to be inconclusive. *Id.* at 850 (Blackmun, J., dissenting).

44. *Id.* at 813 & nn. 9–10. Moreover, the majority looked at the English common law and found a long tradition of allowing persons to appear in court on their own behalf. *Id.* at 821–26.

45. The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.

Id. at 819.

46. *Id.* Both dissents rejected the majority's conclusion that the right to self-representation is implicit in the language of the amendment itself. "It is self-evident that the Amendment makes no direct reference to self-representation. Indeed, the Court concedes that the right to self-representation is 'not stated in the Amendment in so many words.' " *Id.* at 847 (Blackmun, J., dissenting) (citation omitted).

47. *Id.* at 833–34.

In short, the defendant was given the opportunity to make an informed choice as to the value of counsel.

B. *The Extension of the Faretta Right to Appeal*

After the *Faretta* Court determined that there exists a right to proceed *pro se* at trial, the question naturally became whether the same right exists in other stages of the criminal prosecution.[48] A much litigated area in this regard is whether a defendant may proceed *pro se* on appeal.[49]

The courts that have reached this issue are split on whether

48. Prior to *Faretta*, several appellate courts addressed the concept of self-representation on appeal. *See* Baker v. Arkansas, 505 F.2d 750 (8th Cir. 1974) (defendant may represent self if he or she knowingly and intelligently refuses counsel on appeal, and signs an affidavit that no help was received from another prisoner on the appellate brief); United States v. O'Clair, 451 F.2d 485, 486 (1st Cir. 1972), *cert. denied*, 409 U.S. 986 (1972) (defendant may represent self if defendant feels qualified; otherwise defendant must accept counsel); United States v. Grimes, 426 F.2d 706, 707 (5th Cir. 1970) (right to appeal *pro se*); United States *ex rel.* Sliva v. Rundle, 295 F. Supp. 613, 616 (E.D. Pa. 1969) (asserting right to proceed *pro se* acts as waiver of counsel); Mitchell v. State, 175 So. 2d 52, 54 (Fla. Dist. Ct. App. 1965), *cert. denied*, 177 So. 2d 481 (Fla. 1965) (right to appeal *pro se*); Finley v. Thompson, 100 Ga. App. 508, 509, 112 S.E.2d 166, 167 (1959) (right to appeal *pro se*); Lee v. Kindelan, 80 R.I. 212, 220–21, 95 A.2d 51, 55 (1953), *cert. denied*, 345 U.S. 1000 (1953) (right to appeal *pro se*); State v. Jones, 57 Wash. 2d 701, 703, 359 P.2d 311, 313 (1961) (right to appeal *pro se*). *But see* People v. Ashley, 59 Cal. 2d 339, 361, 29 Cal. Rptr. 16, 29, 379 P.2d 496, 509 (1963), *cert. denied*, 374 U.S. 819 (1963) (no right to appeal *pro se*).

49. In one notable case, a defendant insisted on proceeding *pro se* at a pre-trial hearing. *See* United States *ex rel.* George v. Lane, 718 F.2d 226 (7th Cir. 1983). The court held, without extensive analysis of the procedural posture of the case, that "[a] criminal defendant certainly has a right to refuse counsel and conduct his own defense. . . ." *Id.* at 232 (citing Faretta v. California, 422 U.S. 806 (1975)).

The real issue in *George* was whether a *pro se* defendant may also insist on access to legal materials and research assistance. The court held that: "[I]t is not the prerogative of a defendant in custody to decide whether he will accept either the State's offer of legal counsel or instead insist that the State provide him with access to 'the same facilities that a bar association lawyer would get.' " *Lane*, 718 F.2d at 233 (citing State v. Simon, 297 N.W.2d 206 (Iowa 1980)). The practical implication of *George* is that a defendant who rejects appointed counsel also is effectively cut off from legal materials necessary to pursue his appeal.

This rule seems consistent with constitutional principles. *See* Bounds v. Smith, 430 U.S. 817 (1977). In *Bounds*, the Court held that the constitutional right of access to the courts requires, in any proceeding where there is no right to the assistance of counsel, a state to provide either "adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. However, courts have interpreted *Bounds* to mean that the right of access to the courts "is satisfied if, in lieu of a law library, adequate assistance of counsel is provided." Johnson By Johnson v. Brelje, 701 F.2d 1201, 1208 (7th Cir. 1983). Thus, it is apparently the state's prerogative to decide what the defendant gets, and if the defendant rejects one offer, the defendant is not entitled to the other. *See also* Bell v. Hopper, 511 F. Supp. 452, 453 (S.D. Ga. 1981).

a defendant may reject counsel and proceed *pro se* on appeal.[50] In addition, the various courts use different rationales for reaching their results.[51] Thus, there is no uniform agreement as to the analysis and resolution of this issue.

A few courts have expressly held that the rule in *Faretta* applies to appeals.[52] The theory is that the sixth amendment right to the assistance of counsel is applicable to both the trial and first appeal of a criminal case. The correlative right to reject counsel should therefore be equally applicable.[53] The thrust of these cases is that the courts perceive no meaningful distinction between trial and appeal as it relates to the right to reject counsel.[54] This theory has much intuitive appeal. The

50. *Compare* Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), *cert. denied*, 470 U.S. 1008 (1985) (defendant not required to have appellate counsel thrust upon him or her at trial or appeal); *Bell*, 511 F. Supp. at 453 (no right to law library on *pro se* appeal); Owen v. State, 269 Ind. 513, 517, 381 N.E.2d 1235, 1238 (1978) (declines to ground right on federal constitution, rather, state law and policy dictate granting right); People v. Stephens, 71 Mich. App. 33, 38, 246 N.W.2d 429, 432 (1976) (right found in state and federal constitution); State v. Seifert, 423 N.W.2d 368, 370 (Minn. 1988) (right found in state law); Webb v. State, 533 S.W.2d 780, 783 (Tex. Crim. App. 1976) (*Faretta* expressly extended to appeal) *with* United States v. Gillis, 773 F.2d 549, 560 (4th Cir. 1985) (*Faretta* held not to apply to appeal); Lumbert v. Finley, 735 F.2d 239, 245–46 (7th Cir. 1984) (*Faretta*'s sixth amendment rationale does not extend to appeal); Hines v. Enomoto, 658 F.2d 667, 677 (9th Cir. 1981) (allowing supplemental *pro se* brief satisfies any hypothetical right that may exist); *In re Walker*, 56 Cal. App. 3d 225, 227–28, 128 Cal. Rptr. 291, 292 (1976) (since appeal is discretionary, it may be limited to deny self-representation); Callahan v. State, 30 Md. App. 628, 635, 354 A.2d 191, 194–95 (1976) (hybrid representation on appeal is discretionary and not mandated by *Faretta*).

51. As can be seen, the cases cited in *supra* note 50, show any number of rationales for the various conclusions reached. However, several courts have come to diametrically opposed conclusions about the applicability of *Faretta* to this issue. *Compare Bell*, 511 F. Supp. at 453 ("A criminal defendant [in a case on appeal] certainly has a right, correlative with his right to assistance of counsel, to dispense with counsel, and conduct his defense *in propria persona*." (citing Faretta v. California, 422 U.S. 806 (1975)) *with Gillis*, 773 F.2d at 560 ("Although a convicted defendant has a right to counsel on appeal, his implicit Sixth Amendment right to represent himself at trial does not carry over to the appeal."). Thus, there is a split of authority on the constitutionality of *pro se* appeals. Eventually, the United States Supreme Court will have to settle this dispute.

52. *See, e.g.*, *Stephens*, 71 Mich. App. at 38, 246 N.W.2d at 432; *Webb*, 533 S.W.2d at 783. These cases rely more on the tenor and broad scope of *Faretta* rather than the specific constitutional provisions upon which the *Faretta* court relied.

53. *See, e.g.*, *Webb*, 533 S.W.2d at 783 ("We discern no meaningful distinction between conducting a defense at trial and prosecuting an appeal which would prevent the application of the *Faretta* rationale to the case of an appellant who wished to reject representation by counsel and instead represent himself on appeal").

54. The right to reject counsel is constitutionally protected in these cases. Thus, counsel cannot be forced upon an unwilling defendant. *See Faretta*, 422 U.S. at 835

language and rationale of *Faretta* are quite broad, and would seem to support the right to reject counsel at both the trial and appellate levels.[55] If one focuses on the freedom of choice aspect of *Faretta*, the defendant should logically be allowed that same freedom at the appellate stage of the proceedings.[56]

The basic weakness with the cases acknowledging self-representation on appeal is that the issue is never extensively analyzed. The courts seem to assume the independent existence of the right under the Constitution, relying primarily on the breadth of *Faretta*.[57] However, the constitutional analysis of *Faretta* is much narrower and may not be applicable to the appellate stage. In any event, these cases do not embark on an analysis to determine if the same constitutional principles apply. It is significant that at least one other court prior to *Seifert* declined to adopt the reasoning of *Faretta,* and held that the

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(part of waiver is to make defendant aware of the disadvantages of self-representation); *Chamberlain*, 744 F.2d at 630 (citation omitted) ("We have no doubt that a defendant is not required to have counsel forced upon him or her. . . . This rule is true not only at trial but on appeal."); *see also Stephens*, 71 Mich. App. at 38, 246 N.W.2d at 432 ("Furthermore, there seems to be no meaningful distinction that can be drawn between the right to represent oneself at the trial level and the right to submit an appellate brief."). The only real question that must be answered, therefore, is not whether a waiver of counsel can be made, but rather whether the waiver was knowing, voluntary and intelligent.

55. The *Faretta* Court states: "But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." *Faretta*, 422 U.S. at 833.

56. "The right to defend is personal. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring), *reh'g denied*, 398 U.S. 915 (1970)).

The dissent took issue with the majority's willingness to protect a defendant's freedom of choice. The dissent criticized the majority for holding that any defendant in any criminal proceeding may insist on representing himself regardless of how complex the trial is likely to be and regardless of how frivolous the defendant's motivations may be. "The Court seems to suggest that so long as the accused is willing to pay the consequences of his folly, there is no reason for not allowing a defendant the right to self-representation." *Faretta*, 422 U.S. at 849 (Blackmun, J., dissenting) (citations omitted).

57. The actual holding of *Faretta* was that self-representation at trial is embodied as a correlative right to the assistance of counsel under the sixth amendment. By ruling that there is no distinction in the right as it applies to trial and as it applies to appeal, the courts are assuming that trial and appeal stand on the same footing under the sixth amendment. As shown in the cases that reject this proposition, trial and appeal do not, in fact, stand on the same footing under the sixth amendment. *See infra* notes 65–71 and accompanying text.

right to self-representation on appeal exists under state law and policy.[58]

Insofar as it is the defendant who must ultimately bear the consequences of any criminal proceeding,[59] appeal is conceptually identical to trial. To the extent that these decisions rely on the policy of allowing freedom of choice,[60] there is no difference in the two proceedings. Significant differences do exist, however, between trial and appeal.[61] One difference is a defendant's relative need for counsel.[62] A more significant difference is that trial in a criminal case requires finding and adjudication of facts by the jury. Appeal, on the other hand, deals more with the court's review of those facts and its consideration of possible errors of law. Arguably, a defendant might be

58. *See* Owen v. State, 269 Ind. 513, 517, 381 N.E.2d 1235, 1238 (1978). The court stated: "[T]here is disagreement about whether the federal self-representation right extends to appeals. . . . However this may be, self-representation has traditionally been allowed in this state at both the trial level, . . . and at the appellate level. . . ." *Id.* (citations omitted).

59. *Faretta*, 422 U.S. at 834. As noted by the *Faretta* Court, the attorney acts as a representative, assisting the client rather than as the master, dictating to the client.

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. . . . In such a case, counsel is not an assistant, but a master. . . .

Id. at 820.

60. *See id.* at 834–35.

61. Most significantly, the purposes of trial and appeal are different. The trial court is primarily responsible for finding and adjudicating facts. In a criminal case, the jury must determine and apply the facts and make a finding of guilt or innocence. It is the jury's exclusive function to assess witness credibility and weigh the conflicting facts. *See* State v. Pieschke, 295 N.W.2d 580, 584 (Minn. 1980); *see also* State v. Ostlund, 416 N.W.2d 755, 760 (Minn. Ct. App. 1987) (trier of fact determines credibility and weight of opinion testimony). The same rule applies in a civil case, where the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *See* FED. R. CIV. P. 52.

The appellate court, on the other hand, is primarily responsible for correcting errors that occur at trial. *See* Sefkow v. Sefkow, 413 N.W.2d 127 (Minn. Ct. App. 1988) (The appellate courts are bound by the various standards of review for examining the trial court record. In most cases, the appellate court may not try the matter de novo.) An appellate court may intervene in a criminal case only if the record does not support a finding of guilt beyond a reasonable doubt or if errors of law have occurred. *See* State v. Oevering, 268 N.W.2d 68, 71 (Minn. 1978). The appellate court also has responsibility to correct legal errors committed by the trial court. The appellate court may not retry the facts of the case.

62. "The defendant needs an attorney on appeal not as a shield to protect him against being haled into court by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." Ross v. Moffitt, 417 U.S. 600, 610–11 (1974).

able to elicit and present the facts to a jury, but the legal questions raised on an appeal require a completely different set of skills. Some of the cases that reject self-representation on appeal rely on these differences to justify their result.[63]

Also pertinent are the historical distinctions that exist between trial and appeal. As previously noted, the *Faretta* decision relies heavily upon the historical and preconstitutional foundation of self-representation at trial.[64] The right of appeal, in and of itself, is without such historical or constitutional foundations.[65] In fact, there is no constitutional right of appeal.[66] The right exists only as provided by state law. Therefore, the courts are correct in dismissing this aspect of *Faretta* when analyzing the applicability of *pro se* appeals.

The three leading cases holding that self-representation is not constitutionally protected on appeal have found the historical distinctions between trial and appeal to be dispositive.[67] If the state chooses to institute an appellate process, there is clearly a sixth amendment right to the assistance of counsel at

63. Apparently it is appropriate for a defendant to do battle at trial with no shield, but it is not allowed for a defendant to go into an appellate battle without a sword. It raises an interesting question of which is better, the sword or the shield. At any rate, this analysis does not take into account whether a defendant should be allowed freedom of choice to make such a decision.

64. *Faretta*, 422 U.S. at 812–17. *See supra* notes 43–44.

65. The United States Supreme Court has stated:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not allow such a review. . . . It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper.

McKane v. Durston, 153 U.S. 684, 687–88 (1894).

66. *See* Jones v. Barnes, 463 U.S. 745, 754 (1983)(no constitutional right to appeal); *see also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (state not required by the Federal Constitution to provide a right to appellate review). However, once the right to appeal has been granted it must be applied equally so as not to deprive litigants access to the appellate process on account of their poverty. Douglas v. California, 372 U.S. 353, 357–58 (1963).

67. *See* United States v. Gillis, 773 F.2d 549, 559–60 (4th Cir. 1985) (there exists no constitutional right to appeal; however, once granted by statute, equal protection and due process are applicable); *see also* Lumbert v. Finley, 735 F.2d 239, 244–46 (7th Cir. 1984) (the court notes that on appeal the defendant needs an attorney not as a shield, but as a sword); *In re Walker*, 56 Cal. App. 3d 225, 227–28, 128 Cal. Rptr. 291, 292–93 (1976).

trial and on first appeal.[68] However, appeal does not have the historical underpinnings of trial. Thus, it cannot be said that a "correlative" right to self-representation under the sixth amendment exists on appeal as it does at trial.[69] The basic rationale of this rule is that, since appeal is a creature of state law, the state may constitutionally regulate it and limit the way litigants employ the process.[70] If a state requires appellate counsel, the sixth amendment as interpreted in *Faretta,* does not bar such representation.[71]

Consequently, the post *Faretta* cases are inconclusive concerning the constitutional applicability of the right of self-representation on appeal. Its ultimate resolution both in Minnesota and elsewhere is left for another day. This split of authority forced the Minnesota Supreme Court to confront the issue directly. The court, however, dodged resolution of the issue by basing its analysis on statutory construction.

II. *State v. Seifert*, 423 N.W.2d 368 (Minn. 1988), and the Right to Appeal *Pro Se* Under Current State Law

A. Background

In *State v. Seifert*,[72] the Minnesota Supreme Court was faced with the issue of an indigent criminal defendant's right to self-representation on appeal. Craig Thomas Seifert was convicted

68. *See Douglas*, 372 U.S. at 357 (counsel must be made available on first appeal).

69. In *Gillis*, the court held that, since appeal is a creature of modern statute, the implicit right of self-representation does not carry over to appeals. *Gillis*, 773 F.2d at 560.

70. "California has made the right to appeal a statutory creature whose scope and *authority is only as specifically delineated.*" *In re Walker*, 56 Cal. App. 3d at 227, 128 Cal. Rptr. at 292 (emphasis added). This is true so long as the specifically delineated appellate authority does not discriminate against any classes of litigants based on wealth. *See Griffin*, 351 U.S. at 19.

71. *See, e.g., Gillis*, 773 F.2d at 560. The *Gillis* court relied heavily on the United States Supreme Court's decision in Price v. Johnston, 334 U.S. 266 (1948). In *Price*, the Court noted that a defendant or "prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Id.* at 285 (quoting Schwab v. Berggren, 143 U.S. 442, 449 (1892)). Extending the *Price* holding, the *Gillis* court opined that self-representation on appeal is not constitutionally protected. However, the *Price* holding dealt only with the right to appear and argue before the court. It did not deal with the writing of briefs or handling other aspects of the appeal.

72. 423 N.W.2d 368 (Minn. 1988).

of two separate felonies.[73] Seifert was determined to be indigent and therefore eligible for representation by the State Public Defender's Office (SPDO) on his appeal.[74] Seifert, however, wanted to dispense with that representation and proceed *pro se* on both appeals.[75]

Seifert's determination to represent himself stemmed from his belief (apparently shared by other inmates) that the SPDO furnished perfunctory representation to defendants.[76] Moreover, disputes between inmates and the SPDO are of long-standing duration and have been litigated before.[77]

Prior to the *Seifert* decision, the SPDO had attempted to accommodate indigent defendants who wished to proceed *pro se*. Although the appointed attorney retained control over the actual appeal, the defendant was allowed to file a supplemental *pro se* brief, raising whatever issues the defendant desired.[78] The supplemental brief, however, was prepared by the defendant without access to the trial transcript, which was ordered and retained by the SPDO.[79]

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73. *Id.* at 369.

74. *Id. See* MINN. STAT. § 611.14 (1986) (delineates the classes of persons that are entitled to representation by the SPDO).

75. *Seifert*, 423 N.W.2d at 369.

76. *See* Zack, *Prisoner entitled to represent self in an appeal, court rules*, Star Tribune of the Twin Cities, Apr. 29, 1988, at 12C, col.2. In the news report of Seifert's success in this case, Seifert was quoted as saying: "Inmates feel they don't get any justice because [the SPDO] is a prosecutor in public defender's clothes." *Id.* In another article, a "disgruntled inmate" described the SPDO as the "public pretender." Shapiro, *For the Defense*, Twin Cities Reader, June 29, 1988, at 1.

One may certainly question the accuracy of this perception. In her dissent, Justice Wahl specifically noted that the briefs submitted by the SPDO have been "of the highest quality." *Seifert*, 423 N.W.2d at 377 (Wahl, J., dissenting). In fact, few could reasonably challenge the ability, commitment and dedication of the SPDO.

Specifically, these authors do not necessarily agree with the contentions raised against the SPDO. However, the accuracy of the perception concerning the quality of representation is not relevant for present purposes. What is significant is that the defendant believes, for whatever reason, that self-representation is preferable to that of the SPDO. *See supra* note 37 and accompanying text.

77. *See, e.g.*, Chamberlain v. Ericksen, 744 F.2d 628, 629 (8th Cir. 1984), *cert. denied*, 470 U.S. 1008 (1985) (Chamberlain's supplementary brief raised the issue concerning his dissatisfaction with the public defender).

78. *See* Case v. State of Minnesota, 364 N.W.2d 797, 800 (Minn. 1985). In *Case*, the court recognized that an indigent appellant may supplement the efforts of the court appointed attorney by filing a supplemental *pro se* brief. *Id.* It did not, however, address whether the indigent appellant may dispense with counsel altogether. *See also Seifert*, 423 N.W.2d at 377 (Wahl, J., dissenting) (good discussion of the appeal procedures used by the SPDO including the use of supplemental *pro se* briefs).

79. *Seifert*, 423 N.W.2d at 369 n.1.

Seifert was not satisfied with the existing policy. He consistently maintained that the SPDO was not authorized to act on his behalf. After both convictions, he notified the SPDO that he wished to represent himself on appeal.[80] He also attempted to acquire a copy of his transcripts to help in the preparation of his appeals.[81] The SPDO continued to act on his behalf, but refused to give him access to the transcripts.[82]

Seifert was undeterred. After his second conviction, he filed a *pro se* motion to enjoin the SPDO from acting on his behalf, and to supply him with a copy of his court transcripts at state expense.[83] The Minnesota Court of Appeals denied the motion; the Minnesota Supreme Court subsequently granted Seifert's *pro se* petition for accelerated review of the issue.[84] In its order granting review, the court stated the question as: "when . . . may an indigent criminal defendant refuse representation by the state public defender, act as his own attorney, and have access at public expense to a copy of any transcript needed to represent himself[?]"[85] After the court granted the petition, counsel was appointed solely for the purpose of arguing the issues on appeal.[86]

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80. *See* Petitioner's Brief And Appendix at Appendix A, State v. Seifert, 423 N.W.2d 368 (Minn. 1988) (No. C1-87-452) [hereinafter Petitioner Brief]; Brief Of State Public Defender As Amicus On Issue Of Pro Se Right To Appeal at Appendix D, State v. Seifert, 423 N.W.2d 368 (Minn. 1988) (No. C1-87-452) [hereinafter SPDO Brief].

81. *See* SPDO Brief, *supra* note 80, at Appendix B and C.

82. *Seifert*, 423 N.W.2d at 369.

83. *See* SPDO Brief, *supra* note 80, at Appendix H.

84. *Seifert*, 423 N.W.2d at 369.

85. *See* SPDO Brief, *supra* note 80, at Appendix K. Because the issue presented was so limited, the court left open the question of whether a nonindigent criminal defendant had the right to proceed *pro se* on appeal. Indeed, both the Minnesota Court of Appeals and the Minnesota Supreme Court have accepted *pro se* appeals. *See infra* notes 158–59 and accompanying text. A rule that provides inconsistent treatment between indigent and nonindigent appellants raises serious constitutional questions. *See infra* notes 160--82 and accompanying text.

86. *Seifert*, 423 N.W.2d at 369. Thus, ironically, Seifert's argument that he had a right to represent himself on appeal, was briefed and argued by counsel. Although the State of Minnesota did not participate, three amicus briefs were submitted. The Minnesota Civil Liberties Union submitted a brief in support of Seifert's position. Both the Minnesota County Attorneys Association and the SPDO submitted amicus briefs in opposition to Seifert's position. This strange alliance of prosecutors and public defenders serves to underscore the unusual nature of this dispute. Unfortunately, it also tends to reinforce the inmates' beliefs regarding the loyalty of the SPDO. *See* Shapiro, *supra* note 76, at 10.

B. Discussion

The *Seifert* court stated that the basic issue in the case was "whether an indigent criminal defendant may waive counsel on direct appeal and proceed *pro se*."[87] Directly dependent upon the resolution of that issue, was the second question of whether such a defendant is entitled to access to the trial transcript to help prepare an appellate brief.[88]

The majority of the court held that an indigent defendant has the power, under Minnesota statutes[89] and rules,[90] to waive representation and proceed *pro se* on direct appeal.[91] The majority, in a proper exercise of judicial restraint, utilized principles of statutory construction. It specifically grounded it's decision on state law, thereby obviating the necessity of reaching the constitutional issues raised by Seifert and amicus curiae.[92]

The majority's decision hinged upon its construction of Minnesota Statute section 611.25[93] and Rule 28.02(5) of the Minnesota Rules of Criminal Procedure[94] that govern the SPDO's

87. *Seifert*, 423 N.W.2d at 369.

88. *Id.*

89. *See* MINN. STAT. § 611.25 (Supp. 1987).

90. *See* MINN. R. CRIM. P. 28.02(5).

91. *Seifert*, 423 N.W.2d at 371.

92. *Id.* at 369. In addition to making a statutory argument, Seifert and the Minnesota Civil Liberties Union, as amicus curiae, contended that the system used by the SPDO violated the equal protection and due process guarantees of the fourteenth amendment to the United States Constitution. Seifert primarily argued that the rule of *Faretta* applied to appeal. *See* Petitioner Brief, *supra* note 80, at 15–17. *See also supra* notes 48-60 and accompanying text. The Minnesota Civil Liberties Union argued that the present system treats indigent defendants differently due to their poverty in violation of equal protection. Brief Of Minnesota Civil Liberties Union As Amicus at 3–10, State v. Seifert, 423 N.W.2d 368 (Minn. 1988) (No. C1-87-452) [hereinafter Liberties Brief]; *see infra* notes 124–82 and accompanying text.

The SPDO and the Minnesota County Attorneys Association argued that indigent criminal defendants have no *Faretta* right to proceed *pro se* on appeal, and that Rule 28.02(5) mandates representation for indigent appellants. Consequently, since no sixth amendment right to proceed *pro se* exists, it is not constitutionally required that the defendant be personally granted access to the trial transcript. The fact that counsel has the transcript is sufficient. *See* SPDO Brief, *supra* note 80; Brief Of Amicus Curiae: Minnesota County Attorneys Association, State v. Seifert, 423 N.W.2d 368 (Minn. 1988) (No. C1-87-452) [hereinafter County Brief]. While the majority of the court did not address these arguments, Justices Wahl and Simonett, in separate dissents, agreed that self-representation is not guaranteed under *Faretta*.

93. MINN. STAT. § 611.25 (Supp. 1987).

94. MINN. RULE CRIM. P. 28.02(5).

representation of defendants on appeal.[95] The statute provides that the SPDO shall represent defendants on appeal when directed to do so by the court.[96] Rule 28.02(5), in conjunction with the statute, delineates the procedures to be used by indigent defendants who desire an appeal.[97] In addition to the foregoing, which specifically applies to appeals by indigent defendants, the court considered the legislative policy allowing a party to appear before any court on his or her own behalf.[98]

The court construed the statute and the rule to require the SPDO to represent indigent appellants if so required.[99] The majority rejected the contention that *all* indigent appellants must accept its representation.[100] Central to the court's conclusion was the language in Rule 28.02(5), stating that "[a] indigent defendant *wishing the services of an attorney*" should make application with the SPDO.[101] The court correctly pointed out that, "[i]f an indigent defendant must be represented by the SPDO, as argued, then this is certainly an odd choice of

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95. *Seifert*, 423 N.W.2d at 370–74.

96. The state public defender shall represent, without charge, a defendant or other person appealing from a conviction or pursuing a post conviction proceeding after the time for appeal has expired when the state public defender is directed to do so by a judge of the district court, of the court of appeals or of the supreme court.

MINN. STAT. § 611.25, subd. 1 (Supp. 1987), *quoted in Seifert*, 423 N.W.2d at 369 (the court used the 1986 version of § 611.25 which contained the same provision as stated above).

97. (1) An indigent defendant wishing the service of an attorney in an appeal or postconviction case shall make application therefore to the office of the Public Defender, . . .

. . . .

(5) The State Public Defender's office shall determine if the applicant is financially and otherwise eligible for representation. If the applicant is so eligible then the State Public Defender shall represent him regarding a judicial review or an evaluation of the merits of a judicial review of his case in a felony case. . . .

(6) All requests for transcripts necessary for judicial review or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing as in paragraphs (2) through (5) above.

MINN. R. CRIM. P. 28.02(5), *quoted in Seifert*, 423 N.W.2d at 369–70.

98. *Seifert*, 423 N.W.2d at 370. *See also infra* note 156.

99. *Seifert*, 423 N.W.2d at 370.

100. "It does not, however, require that such a defendant must accept representation if he wishes to go it alone." *Id.*

101. *Id.* (emphasis in original). The court noted that MINN. STAT. § 611.14 "bolsters our belief that *pro se* appeals are statutorily authorized. This statute enumerates what classes of persons are '*entitled* to be represented by a public defender.' It does not say these persons must accept such representation, only that they are entitled to it." *Id.* (emphasis in original) (citations omitted) (quoting MINN. STAT. § 611.14).

words."[102]

The court did recognize that the predecessor to Rule 28.02(5), had expressly authorized *pro se* appeals. This express authorization was deleted in 1983 when the rules underwent significant amendment.[103] However, the meaning of Minnesota Statute section 611.25 remained unchanged.[104] The court was not persuaded that this decision changed the rule's implicit recognition of *pro se* appeals.[105]

When the language of the statutes and rules is scrutinized, it is clear that the court reached the correct result. The SPDO's major argument—that the statutory mandate that it "shall represent" an indigent appellant forbids self-representation—ignores the obvious purpose of the statute.[106] Minnesota Statutes section 611.25 merely implements the constitutional mandate that, where appeal is provided, equal protection requires that appointed counsel be made available to indigent appellants through first appeal.[107] Therefore, this statute does not prohibit self-representation when an appellant properly waives appointed counsel.[108]

After determining that state law grants a right to proceed *pro se* on appeal, the court concluded that transcripts must be pro-

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102. *Id.* at 370–71. If the drafters of the rule wished to require representation on appeal it could have done so unambiguously by, for example, requiring any indigent defendant wishing to appeal to apply to and cooperate with the SPDO.

103. *Id.* at 370 n.2. The former rule, stated:

> All requests for transcripts or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing. Any applicant who then wishes to proceed without an attorney representing him shall advise the court and the State Public Defender's office in writing that he waives any right he may have to the services of the State Public Defender's office.

MINN. R. CRIM. P. 29.02(7) (revised and rearranged in 1983 as MINN. R. CRIM. P. 28.02(5)).

104. *Seifert*, 423 N.W.2d at 370 n.2. *See, e.g.*, MINN. STAT. § 611.25 (Supp. 1987).

105. "We do not believe this deletion changes the result, as Section 611.25 and the other operative sections in the rule have not been changed to eliminate the right to appeal *pro se*." *Seifert*, 423 N.W.2d at 370 n.2.

106. *Id.* at 371.

107. *See* Douglas v. California, 372 U.S. 353, 357 (1963); *see also infra* notes 146–47 and accompanying text.

108. MINN. STAT. § 611.19 (1986) governs waiver of appointed counsel. This section was not mentioned by the *Seifert* court. However, it merely directs that any defendant who waives counsel must make the waiver in writing. The statute does not specifically apply only to trial counsel. Because waiver of counsel is expressly anticipated by statute, it would appear to support the majority's conclusions that state law countenances *pro se* appeals.

vided to the indigent defendant at no cost.[109] The remainder of the opinion establishes temporary procedures to be followed by the SPDO in implementing the decision and assuring that the defendant makes a knowing, voluntary and intelligent waiver of the right to appellate counsel.[110] In an understatement the court concluded by warning *pro se* appellants that "a criminal defendant who elects to appeal *pro se* will very likely harm rather than help his chances for success."[111]

C. *Dissents*

Two justices dissented in *Seifert*.[112] Justice Wahl interpreted the relevant statutes and rules as requiring indigent defendants to accept representation on appeal. This dissent focused primarily on the "shall represent" language enunciated in the statute and rules,[113] and concluded that this language unam-

109. *Seifert*, 423 N.W.2d at 371 (citing Mayer v. City of Chicago, 404 U.S. 189 (1971)). The court noted that the *pro se* appellant was entitled to use of the trial transcripts to prepare the appeal. *Seifert*, 423 N.W.2d at 371.

110. *Id.* at 371–74. The court enunciated guidelines for providing transcripts to indigent *pro se* appellants and also cautioned that the transcript be safeguarded by the appellant. *Id.* at 371–72. "Upon completion of the *pro se* brief, the transcript must be returned to the SPDO and that office will provide the defendant with a signed receipt. That receipt must be provided to the Office of the Appellate Courts as a prerequisite to acceptance of the defendant's brief." *Id.* at 372 (footnote omitted). The court did note that it would entertain motions to accept briefs if the transcript has been inadvertently lost or destroyed. *Id.* at 372 n. 5. The court concluded with a discussion of the practical limits placed on the *pro se* appellant and the necessity of obtaining a written waiver of counsel. *Id.* at 372–74.

111. *Id.* at 374. In fact, the opinion itself places considerable restraints on the *pro se* appellant's chances of success. First, there is the risk of a brief being rejected if the transcript is not returned to the SPDO. *Id.* at 372. *See supra* note 110. Second, the *pro se* appellant will not be given access to a law library. "The defendant may not have it both ways. He must either accept appointed appellate counsel or proceed *pro se* at his own risk, which, we might add, is considerable. If he makes that choice, the defendant must proceed with whatever limited resources are on hand." *Seifert*, 423 N.W.2d at 373. Moreover, the majority noted that the *pro se* appellant "must still comply with all procedural rules." *Id.* at 372.

The net effect of this discussion by the court is that the *pro se* appellant must proceed within the procedural constraints applicable to attorneys without the necessary knowledge or materials to adequately present the case. In light of this, it is indeed the unwise indigent defendant who would make that choice. However, as the majority pointed out, competency to waive appellate counsel and the wisdom of that waiver are two entirely separate considerations. *Id.* at 374 n.7. The upshot of this is that the competent defendant may waive appellate counsel, but must then live with the consequences. *Id.*

112. *Id.* at 374 (Wahl, J., dissenting); *Id.* at 378 (Simonett, J., dissenting).

113. *See* MINN. STAT. § 611.25 (Supp. 1987); MINN. R. CRIM. P. 28.02(5).

biguously requires that result.[114] Justice Wahl then proceeded to argue that *Faretta* and its progeny do not bar her reading of the state law.[115] Finally, Justice Wahl considered whether *pro se* indigent appeals should be allowed as a matter of policy, and concluded that they should not.[116]

The most troubling aspect of this dissent is that it ignores two very significant concerns. First, rejecting *Faretta* as a constitutional challenge does not address a separate and even more serious constitutional issue.[117] Second, this interpretation of state law focuses solely on the requirement that the SPDO furnish representation to indigent defendants.[118] It ignores the language that indicates that a defendant should have the freedom to choose.[119]

Similarly, Justice Simonett's dissent fails to address either of

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114. "This language clearly and unambiguously requires the State Public Defender to represent indigent persons seeking review of their criminal convictions." *Seifert*, 423 N.W.2d at 374–75.

115. Yet nothing in *Faretta* indicates that the right to proceed *pro se* at trial extends to a right to proceed *pro se* on appeal. Not only does the absence of language indicating such a right exists imply that it does not exist, but this conclusion can be otherwise inferred from the opinion and interpretations thereof.

Id. at 375.

116. *Id.* at 376–78. Justice Wahl recognized and expressed concern over the likely reality of *pro se* appeals. It is obvious that this was a chief concern of the dissent. For example, incomprehensible briefs cause appellate courts and their clerks to perform the proper duties of an appellate attorney. *Id.* at 378. Justice Wahl viewed these potential and very real problems as mitigating strongly against any change in the system. *Id. But see* Faretta v. California, 422 U.S. 806, 834 (1975) (Court emphasizes freedom of choice as important consideration). *See also infra* note 178.

117. It is quite possible that the sixth amendment right to self-representation as delineated in *Faretta*, does not extend to appeal. *See supra* notes 48–71 and accompanying text. However, the dissent ignores the fact that a separate and distinct constitutional issue existed and was raised. *See* Liberties Brief, *supra* note 92, at 3–10. The state law, if interpreted as Justice Wahl argues, would prohibit indigent defendants from proceeding *pro se*. Yet, nonindigents would not be so prohibited. Nothing in the rules or statutes would prohibit a defendant who financially *could* hire an attorney from declining to do so. Only those appellants who *could not* afford counsel would be deprived of the right to choose. And yet, the same concerns expressed in the dissent would be equally applicable to nonindigent and indigent appellants. For a complete discussion of this issue, see infra notes 124–82 and accompanying text.

118. What is absolutely clear is that Minnesota Statutes section 611.25 removes any discretion from the SPDO in deciding whether or not to represent an indigent defendant who wishes representation on appeal. *See* MINN. STAT. § 611.25 (Supp. 1987).

119. The majority recognized that this is a different issue. *Seifert*, 423 N.W.2d at 370. The question is whether the legislative mandate to represent also removes all freedom of choice from the defendant, the person who, as the majority pointed out, "must live with the consequences" of that choice. *Id.* at 374.

these concerns. While he agreed with the majority that state law does not require an indigent defendant to accept appellate representation,[120] he concluded that the court has the power to interpret its rules to prohibit *pro se* appeals.[121] Justice Simonett agreed with Justice Wahl that there is no constitutional bar to prohibiting *pro se* appeals.[122] This dissent also focused on the potential problems with *pro se* appeals.[123]

As both the majority and dissents recognized, the choice to proceed *pro se* is, in almost all cases, unwise and ineffective. The question presented, then, is not whether the defendant is making a wise choice, but rather, whether the defendant is entitled to make that choice and live with the consequences. While the dissenters saw no constitutional infirmity under *Faretta* to deprive an indigent appellant of the right to choose, a far more troubling, and as yet unaddressed issue, casts doubt on whether the Constitution would allow the system suggested by the dissenters.

III. Equal Protection and the Right to Proceed *Pro Se* on Appeal under Minnesota Law

The Minnesota Supreme Court majority in *Seifert* did not foreclose the possibility of changing the result by indicating that the Supreme Court Advisory Committee on the Rules of Criminal Procedure could propose amendments to Rule 28.02(5).[124] If change is desired, specifically negating *pro se*

120. *Id.* at 378 (Simonett, J., dissenting).

121. *Id.* Apparently under this interpretation, the appellant must either accept unwanted representation or forfeit appeal altogether.

122. *Id.*

123. "To allow a rudderless appeal accompanied by an unwieldy procedural superstructure is unfair to the defendant and unfair to the appellate court." *Id.* at 378–79. However, such concerns cannot be said to be controlling. The United States Supreme Court has stated:

> [T]he Constitution recognizes higher value 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 of 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) (footnote omitted).

124. *Seifert*, 423 N.W.2d at 371 n.3. By holding that the decision was governed by statutory and rule interpretation, the result could be changed by redrafting any applicable statutes or rules. The court pointed this out in its opinion.

> It must also be noted that the present Rules of Criminal Procedure provide the basis for our opinion here. If the [Supreme Court Advisory] Committee [on Rules of Criminal Procedure] determines that the conclusions we have

representation for indigent defendants would be the easiest route.[125] Such a change would undoubtedly bring a constitutional challenge.[126]

While a challenge based on *Faretta* may not be successful,[127] an amended rule that does no more than negate the effect of *Seifert* raises a far more fundamental constitutional challenge.[128] Such a rule would raise an equal protection chal-

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reached in interpreting the existing Rules is not in accord with the intention of the Committee in its original and amendatory drafting of the rules, it may recommend redrafted rules to more clearly express its intention.

Id. The only impediment to changing the rules would be if a particular rule change would result in an unconstitutional denial of some protected right. *But see id.* at 374 (Wahl, J., dissenting) (arguing that present rules should be interpreted to prohibit *pro se* appeals and that such an interpretation is constitutional).

125. Prior to 1983, *pro se* appeals were expressly authorized under Rule 29.02(7) of the Minnesota Rules of Criminal Procedure. Paragraph 6 read:

> All requests for transcripts or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing. Any applicant who then wishes to proceed without an attorney representing him shall advise the court and the State Public Defender's office in writing that he waives any right he may have to the services of the Public Defender's office.

MINN. R. CRIM. P. 29.02(7), *quoted in Seifert*, 423 N.W.2d at 370 n.2.

In 1983 the Minnesota Rules of Criminal Procedure were amended. Rule 29.02(7) was rearranged at 28.02(5). The present rule is essentially the same except that the last sentence of paragraph six above was deleted.

The court in *Seifert* rejected any argument that deletion of this language amounted to taking away the previously granted right. *Seifert*, 423 N.W.2d at 370 n.2. Thus, in order to reverse the decision of *Seifert*, the Committee would have to draft specific language prohibiting *pro se* appeals where the appellant is eligible for representation by the SPDO. However, such a change would be unwise and would raise grave constitutional questions. *See infra* notes 126–82 and accompanying text.

126. Despite the *Seifert* dissents' protests to the contrary, a *Faretta* challenge to denial of the right might be successful. *See, e.g.*, People v. Stephens, 71 Mich. App. 33, 38, 246 N.W.2d 429, 432 (1976) (applies *Faretta* analysis to appeal and perceives no meaningful distinction). *But see In re Walker*, 56 Cal. App. 3d 227, 228, 128 Cal. Rptr. 291, 292 (1976) (right to *pro se* appeal does not exist). In any event, the challenge could be brought. While Justices Wahl and Simonett rejected applying *Faretta* to appeal, it is not at all clear how the other members of the court would decide the issue.

127. *See supra* notes 48–71 and accompanying text.

128. The question raised, in light of Minnesota's current law and custom, concerns the denial of a fundamental right to a certain, suspect class. This is not a question that was answered by the *Seifert* majority. "We agree with Seifert that the current statute and rule authorizes him to proceed *pro se* on direct appeal and have access to the trial transcripts. Consequently, we need not reach the constitutional questions raised." *Seifert*, 423 N.W.2d at 369. Nor did the dissenting justices raise or analyze this question. Those opinions do no more than reject the applicability of *Faretta* to this case. "[N]othing in *Faretta* indicates that the right to proceed *pro se* at trial extends to a right to proceed *pro se* on appeal." *Id.* at 375 (Wahl, J., dissenting).

lenge because of the denial of access to the judicial process based solely on the classification of wealth.[129] The United States Supreme Court has repeatedly held that it violates equal protection to deny a fundamental right because of an individual's poverty.[130] Without a massive restructuring of current state law and custom, denial of the right of self-representation on direct appeal would unconstitutionally deny indigent criminal defendants access to the courts because of their poverty.

Subtle distinctions must be made to distinguish this analysis from that employed in *Faretta*.[131] The cases holding that *Faretta* does not apply to the appellate context have basically held that the sixth amendment, as incorporated by the equal protection clause of the fourteenth amendment, does not contemplate such a rule.[132] Consequently, there is arguably no

129. This issue was raised in *Seifert* by the Minnesota Civil Liberties Union. *See* Liberties Brief, *supra* note 92, at 3–10. The *Seifert* majority did not need to address this issue. The dissenters, who sought to deny self-representation on appeal, inexplicably failed to address the viability of this issue either. The dissenters apparently felt it was sufficient to distinguish *Faretta* even though the present issue is different and requires analysis of different considerations.

130. Wealth in and of itself is not a suspect classification. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 14.25, at 680 (3d ed. 1986). Where a legislative classification based on wealth affects only economic or other nonfundamental rights, it will be upheld if it meets the traditional rational basis test. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); *reh'g denied*, 398 U.S. 914 (1970); *see also* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972), *reh'g denied*, 411 U.S. 959 (1973) (the Court will not use an elevated standard of review in reviewing a law that burdens poor people in allocation of nonfundamental benefits). This rule was recently reaffirmed in Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2489 (1988). "We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict Equal Protection scrutiny." *Id.* As that case shows, often the salient constitutional issue is whether the claimed right is, in fact, fundamental. *See id.* at 2492 (Marshall, J., dissenting).

However, once it is clear that a fundamental right is involved, classifications based on wealth must be viewed through a higher standard. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (marriage and family relationships are fundamental rights, and therefore, law charging filing fee for divorce must be waived for indigent persons because there is no compelling reason to deny indigents divorce as compared to nonindigents).

131. Any *Faretta* based analysis must ultimately be based on an interpretation of the sixth amendment. Conversely, this issue is grounded on notions of the right of persons to be treated equally in regards to fundamental rights. When a state attempts to restrict a person's access to fundamental rights based on that person's poverty, equal protection is violated. The state must demonstrate some compelling reason for the distinction. *See, e.g.*, *Douglas v. California*, 372 U.S. 353, 357–58 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

132. *See supra* notes 65–71 and accompanying text.

constitutional violation in denying any appellant the right to proceed *pro se* in the appellate process.[133] However, these cases were decided in a vacuum without reference to whether any disparate treatment was given different classes of litigants.[134]

Whatever the implications for other states, Minnesota's statutory and rules scheme countenance the ability of litigants generally to proceed *pro se* on appeal.[135] A rule that merely denies an indigent criminal defendant the right to proceed *pro se* on direct appeal, while not changing other litigants' abilities to do so, would create disparate treatment of two classes based on the relative wealth of the litigants.[136]

Poverty, as such, is not a suspect classification under the equal protection analysis.[137] A classification that merely affects an economic right will be upheld if it meets the traditional ra-

133. *Id.*

134. None of the cases holding that an indigent criminal defendant has a right to appeal *pro se* address whether other classes of litigants are restricted in their right to proceed without counsel. However, even one of the courts that rejected the *Faretta* analysis in the appellate context noted that "[o]nce appellate review is established *it must be kept free from any procedures which violate due process or equal protection of the law.*" *In re Walker*, 56 Cal. App. 3d 227, 227, 128 Cal. Rptr. 291, 292 (1976) (emphasis added). Thus, even without *Faretta*, if the state appellate scheme employs procedures that arbitrarily limit the access of poor appellants, equal protection is offended.

135. The Minnesota legislature has expressed its intent that nonattorneys may not act in a representative capacity to other people. However, the statute expressly allows a party to appear on that party's own behalf. MINN. STAT. § 481.02, subd. 1 (1986).

Thus, the general rule in Minnesota is that persons may appear without counsel in any proceeding. *See also* 28 U.S.C. § 1654 (1982). "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." *Id.* One federal court held, in a habeas petition case, that 28 U.S.C. § 1654 prohibits the courts from forcing counsel onto an unwilling defendant. *See* Lee v. Alabama, 406 F.2d 466, 466 (5th Cir. 1969), *cert. denied*, 395 U.S. 927 (1969), *reh'g denied*, 396 U.S. 871 (1969). However, another court found that this statute is subject to the "rules of such courts." Based on a local rule, the court held the statute inapplicable and required appellate counsel. *See* United States v. Gillis, 773 F.2d 549, 560 (4th Cir. 1985).

136. *See infra* notes 163–68 and accompanying text.

137. The basic rule under the Constitution is that all persons are accorded equal rights, whether rich or poor. *See* Schilb v. Kuebel, 404 U.S. 357 (1971), *reh'g denied*, 405 U.S. 948 (1972); *see also* 16A AM. JUR. 2d *Constitutional Law* § 739 (1979) ("The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it"); *accord* Harris v. McRae, 448 U.S. 297, 322–23 (1980) (the general proposition is that the poor are not accorded extra benefits simply because of their poverty).

tional basis test.[138] Similarly, a classification that only affects a nonfundamental right will be upheld if it meets the same test.[139]

However, when the classification involves disparate treatment which affects a fundamental right,[140] a higher standard is employed.[141] In *Gideon v. Wainwright*,[142] the United States Supreme Court held that access to the judicial process is a fundamental right.[143] While no one landmark case has expressed the precise standard of review in cases dealing with access to the courts or other fundamental rights, the cases show that classifications that burden the poor are to be reviewed as suspect under the strict scrutiny test.[144]

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138. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); *see also* San Antonio Indep. School Dist., 411 U.S. 1, 28 (1973) (elevated standard not used in reviewing law that burdens the poor in allocation of nonfundamental benefits).

139. In Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2483 (1988), the United States Supreme Court held that a state imposed fee for school bus transportation did not violate equal protection when applied to the poor. Since education is not recognized as a fundamental right, the law was analyzed under the rational basis test. The Court reiterated the test to be applied to these cases. "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Id.* at 2487. The dissent, however, argued that education is a fundamental right, thus triggering a heightened standard of review. *Id.* at 2493 (Marshall, J., dissenting).

140. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie*, the Court held that a marital relationship is a fundamental right. It further found that a filing fee in a divorce action impacted on that right. Therefore, the fee had to be waived for poor people; otherwise, the fee denied the exercise of a fundamental right on the basis of poverty.

In another case, however, the Court held that bankruptcy is not a fundamental right. Therefore, bankruptcy court filing fees do not have to be waived for poor people as the fees have a rational relationship to a legitimate governmental purpose. *See* United States v. Kras, 409 U.S. 434 (1973).

141. The heightened standard of review is generally termed "strict scrutiny." However, Justice Marshall argues that labels should not be used and that the level of scrutiny should vary depending on the "real interests at stake." *Kadrmas*, 108 S. Ct. at 2492 (Marshall, J., dissenting).

142. 372 U.S. 335 (1963).

143. The Court stated that counsel at trial is a fundamental right under the sixth amendment. "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " *Id.* at 343, (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

144. *See* J. NOWAK, *supra* note 130, § 14.25, at 680. The authors sum up the thrust of the cases in this area.

In a series of decisions in the 1960's concerning rights to fair treatment in

Although an appellate process is not required,[145] once a state implements one, its availability to all is deemed fundamental. Discriminating against defendants based upon wealth[146] would impinge on the defendant's fundamental right to equal access to the courts.[147] Therefore, counsel must be equally available to an indigent appellant on a first appeal.[148] In other words, once the state provides for appeal, its availability to all persons without regard to wealth is deemed fundamental.

In *Ross v. Moffitt*,[149] the United States Supreme Court explored the limits of equal access by indigents to the appellate process. The Court held that the equal protection clause does not require a state to offer an attorney to an indigent defendant for discretionary appeals.[150] The Court stated that a defendant is assured of an adequate opportunity to present claims when the right to counsel is provided on first appeal.[151] The *Ross* Court, however, noted the vitality of its prior deci-

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the criminal process, voting rights, and ability to engage in interstate travel, opinions of the Supreme Court had indicated that classifications which burden the poor were to be reviewed under an increased standard of review as suspect classifications.

Id. (footnotes omitted). *See also infra* notes 146–53.

145. *See supra* note 65.

146. In Douglas v. California, 372 U.S. 353 (1963), *reh'g denied*, 373 U.S. 905 (1963), the Court held that when appeal as of right is offered by a state, an indigent defendant is entitled to the assistance of counsel to assist in the appeal. *Id.* at 356. Basically, the Court ruled that access to the previously granted state right of appeal is fundamental and must be granted to all regardless of wealth. *Id.* at 356–57. "For there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.' " *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956), *reh'g denied*, 351 U.S. 958 (1956)).

147. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. Moreover, after noting that a state need not have an appellate process the Court stated: "But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18.

148. The Minnesota Supreme Court interpreted *Griffin* to mean "that a poor person is entitled to the *same right* of review as a person who has money." State *ex rel.* Williams v. County of Hennepin, 252 Minn. 330, 333, 89 N.W.2d 907, 909 (1958) (emphasis added).

149. 417 U.S. 600 (1974).

150. "[W]e do not believe that the Equal Protection Clause, when interpreted in the context of [prior] cases, requires [a state] to provide free counsel for indigent defendants seeking to take discretionary appeals to the [state] Supreme Court, or to file petitions for certiorari in this Court." *Id.* at 612.

151. "The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." *Id.* at 611 (emphasis in original).

sions when it said those decisions "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[152] Thus, *Ross* cannot be said to support an argument that a state may arbitrarily create classifications based on wealth and force counsel upon an unwilling appellant on first appeal.[153]

Minnesota does have an appellate process.[154] Therefore, direct appeal must constitutionally be made available to the rich and poor on an equal basis.[155] Minnesota also has a statute that prohibits the unauthorized practice of law.[156] However, this statute expressly excepts from its prohibition a party appearing on one's own behalf.[157] In addition, the Minnesota Court of Appeals expressly contemplates processing *pro se* appeals in its internal rules.[158] Even the Minnesota Supreme

152. *Id.* at 607.

153. One noted treatise writer, however, has viewed *Ross* as effectively sterilizing the *Douglas* holding by severing *Douglas* from the newly created body of law, and thereby "[c]utting off Douglas' possibilities for future growth." L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16–51, at 1647 (2d ed. 1988). Whatever the case may be, the present issue is not one of future growth of *Douglas* and its severance from *Griffin* and *Ross*; rather, it is about equal treatment on a first appeal as of right. For that proposition, these cases still stand as the law of the land.

154. The Minnesota Rules of Criminal Procedure provide for appeals from judgments and appealable orders, and sets up procedures for protesting those appeals. MINN. R. CRIM. P. 28.02.

155. *See supra* note 148.

156. The rule states:

> It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity. . . .

MINN. STAT. § 481.02, subd. 1 (1986). Moreover, in construing a predecessor statute, the Minnesota Supreme Court stated that in addition to being guaranteed by the statute, the right to represent oneself "undoubtedly exists independently of the statute." State v. Townley, 149 Minn. 5, 22, 182 N.W. 773, 781 (1921), *cert. denied*, 257 U.S. 643 (1921).

157. MINN. STAT. § 481.02, subd. 1 (1986).

158. "Members of the Minnesota Bar and specially admitted out-of-state attorneys may argue before the Court. If a litigant is without counsel, the case shall be submitted on briefs without oral arguments by any party, unless the Court orders otherwise." MINN. CT. APP. INTERNAL R. 2.9 (1987). Moreover, there are numerous cases, both criminal and otherwise, where the Minnesota Court of Appeals has processed cases when at least one party did not have counsel. *See, e.g.*, State v. Ferraro, 403 N.W.2d 845 (Minn. Ct. App. 1987) (criminal case); *see also* Goddard v. Peterson, No. C3-87-1490, (Minn. Ct. App. Feb. 16, 1988) (unpublished opinion), *review granted* (April 21, 1988).

Court has processed and heard appeals from *pro se* litigants.[159] Thus the Minnesota legislature and courts have expressed an intent to allow parties to appear in court on their own behalf.

It is clear that the State of Minnesota has not barred *pro se* litigants from its appellate processes. Prior to *Seifert*, only indigent criminal defendants were required to accept appellate representation. Now, however, the United States and Minnesota Supreme Courts have expressly held that access to the courts, including first appeal, cannot be denied to a class of litigants on the basis of wealth without some compelling interest.

It might be argued that such a classification is not discriminatory insofar as the indigent criminal defendant would still have access to the courts; that access is merely channeled through an attorney.[160] However, this "channelling" effectively operates as a denial of access to any indigent criminal defendant who is unwilling to accept the required representation. Absent this "channelling," the defendant would ultimately be refused appellate review.

It might also be claimed that requiring appellate counsel for indigent criminal defendants discriminates in favor of, rather than against, the indigent defendant.[161] In either case, dis-

159. *See* State v. Peterson, 300 Minn. 516, 218 N.W.2d 704 (1974) (*pro se* appeal from conviction for driving under the influence of alcohol); *see also* State v. Flynn, 313 N.W.2d 389 (Minn. 1981) (*pro se* appeal of sentence imposed); Thomale v. State, 261 N.W.2d 353 (Minn. 1977) (*pro se* petition for post conviction relief).

160. This claim does not negate the fact that some litigants would be able to choose to proceed without counsel while others would either have counsel thrust upon them or be required to forego appeal.

161. This argument was, in fact, made in *Seifert*. The Minnesota County Attorney's Association, writing as amicus curiae, argued:

> The forced participation of counsel on appeal does not violate the Equal Protection clause of the Constitution. The state is not discriminating *against* indigent appellants; it is discriminating *for* indigent appellants. Minnesota has chosen to require that indigent appellants accept the assistance of counsel on appeal to insure that every indigent appellant has "meaningful access" to the courts. That policy should not be disturbed. There can be no prejudice to the appellant from such a situation.

County Brief, *supra* note 92, at 9 (emphasis in original).

This of course, misapprehends the issue. The issue is not whether counsel prejudices the defendant's cause; rather, the issue is whether the proposal is discriminatory. This very argument acknowledges the discrimination. It must be remembered that equal protection no more protects favoritism than it does harmful classifications. "[A]ll people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' " Griffin v. Illinois, 351 U.S. 12, 17 (1956) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty

crimination exists. Nevertheless, this assertion does not surmount the basic constitutional problem that only poor litigants are forced to accept counsel on appeal.[162]

In the case of a fundamental right, when the state wishes to discriminate on the basis of a classification, it must show a compelling state interest that the classification is necessary to promote the interest.[163] The dissent in *Seifert* was also concerned that *pro se* appeals will reduce court efficiency.[164] It has also been argued that allowing *pro se* appeals to indigent criminal defendants would ultimately increase cost to the state and taxpayers.[165] Fiscal responsibility and administrative convenience have been rejected by the United States Supreme Court as sufficient reasons to satisfy the strict scrutiny test.[166]

The strongest reason for denying self-representation to indi-

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than on account of religion, race or color." *Griffin*, 351 U.S. at 17. Relying on *Griffin*, the Minnesota Supreme Court has held that "a poor person is entitled to the *same right* of [appellate] review as a person who has money." State v. County of Hennepin, 252 Minn. 330, 333, 89 N.W.2d 907, 909 (1958) (emphasis added).

162. The discrimination based on wealth still exists, even when it is coached in terms of benefit rather than harm. The indisputable fact is that the indigent criminal defendant is treated differently in the appellate courts for no other reason than that the defendant is indigent. In Minnesota, all appellants are entitled to the "same" right of review as a person with money. *County of Hennepin*, 252 Minn. at 333, 89 N.W.2d at 909. In any event, the benefit of this discrimination is a matter of perception. *See supra* note 76 and accompanying text.

163. *Griffin* prohibits a State from discriminating against an indigent defendant in criminal trials. The Supreme Court in *Griffin* implies that an indigent's right to counsel is as fundamental a right as protection from discrimination based on religion, race or color. *Griffin*, 351 U.S. at 17. Justification of discrimination, therefore, must meet the same "compelling interest" standard as cases involving the various suspect classifications. This means that the government must present compelling reasons for the discrimination and that no less restrictive alternatives exist. *See generally* Trimble v. Gordon, 430 U.S. 762, 772 (1977); *see also* Graham v. Richardson, 403 U.S. 365 (1971).

164. [W]hen an appellate judge reads an incomprehensible *pro se* brief, that judge will be forced, out of conscience, to wear two hats—that of judge and that of advocate—in order to assure the integrity of our reviewing function. This will also be true of our law clerks doing research and preparing bench memos, when issues and cases have not been adequately briefed. Do we have the resources to do this and is it appropriate for us to do so?

Seifert, 423 N.W.2d at 378 (Wahl, J., dissenting).

165. In *Seifert*, the SPDO argued, inter alia, that the costs of transcripts would have to be dealt with if a defendant proceeded *pro se*. SPDO Brief, *supra* note 80, at 11. The SPDO stated that appeals would have to be redone if it were determined that a defendant was not competent to waive counsel. *Id.* It was also argued that overall costs would increase in prosecuting appeals. *See* County Brief, *supra* note 92, at 14–16.

166. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973). Certainly, administrative convenience has some importance. However, it will not be enough to justify a

gent criminal defendants is the quality of advocacy by the *pro se* litigant.[167] There can be little doubt that a *pro se* appellant hurts, rather than helps, the chances of success.[168] In addition to the basic problem of unfamiliarity with the substantive law applicable to any particular criminal case, certain serious practical problems arise. First, a *pro se* litigant will very likely lack the knowledge and objectivity necessary to proceed effectively in court.[169] Second, an incarcerated defendant will have limited or no access to legal materials.[170] Moreover, the *pro se* de-

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classification under strict scrutiny because there are more important considerations than convenience. The *Frontiero* Court stated:

> In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency. . . ." And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality.

Id. (citations omitted).

The Supreme Court has also stated that when considering laws that impact on suspect classifications "a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*." *See Graham*, 403 U.S. at 375; *see also* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (rejects fiscal considerations as compelling interests when it results in invidious classification).

167. In her dissent to *Seifert*, Justice Wahl expressed great concern over the *pro se* appellant's ability to raise and present issues in a comprehensible manner. *Seifert*, 423 N.W.2d at 378 (Wahl, J., dissenting). She argued that use of the SPDO in all cases efficiently serves the ends of justice. *Id.* at 377. The dissenting justices in *Faretta* raised similar concerns. *See* Faretta v. California, 422 U.S. 806, 838 (1975) (Burger, C.J., and Blackmun, J., dissenting).

168. *See Seifert*, 423 N.W.2d at 374. Seifert's court appointed counsel acknowledged that the issue was not whether the appointed counsel would help the cause; rather, "the question is whether due process will suffer a system of adjudication that leaves Seifert no choice in the event that he believes the State Public Defender is more 'state' than 'defender.' The heart of the *Faretta* right is not the truth of the defendant's belief—it is the belief itself." *See* Petitioner Brief, *supra* note 80, at 20; *see also* Bell v. Hopper, 511 F. Supp. 452, 453 (S.D. Ga. 1981).

169. Even though the defendant "obviously lacks the skill and knowledge necessary to present a good defense," the defendant must be allowed to proceed *pro se*. *Bell*, 511 F. Supp. at 453. "A defendant's '. . . technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right. . . .' " *Id.*

170. In fact, rejection of counsel means that the defendant forfeits any right of access to legal materials. In Bounds v. Smith, 430 U.S. 817 (1977), the United States Supreme Court held that a state must provide prisoners with the means to vindicate their rights after the first appeal in which the state must offer to provide counsel. The state may accomplish this either by providing counsel for discretionary post conviction proceedings or by providing a law library or other legal materials with which the defendant may use to proceed alone. *Id.* at 828.

The lower courts, including the *Seifert* court, have held that *Bounds* requires one or the other at the state's choice. Therefore, if the state offers counsel and counsel is rejected, the state need not offer legal materials. *See* United States *ex rel.* George v. Lane, 718 F.2d 226, 231 (7th Cir. 1983); *accord* United States v. Wilson, 690 F.2d

fendant will have to overcome a lack of mobility in serving and filing briefs and other papers.[171] Third, the procedural requirements for processing appeals can be difficult even for experienced attorneys, much less a lay person.[172]

In spite of these admittedly strong reasons for disallowing self-representation to indigent criminal defendants, the same difficulties exist for all *pro se* litigants.[173] Yet, the legislature and the courts have a long-standing history of allowing self-representation.[174] Thus, if the difficulties presented when proceeding *pro se* are not sufficient to prohibit all *pro se* appeals, they cannot be sufficient to prohibit only the appeals of indigent criminal defendants. Absent some compelling reason for such disparate treatment, this classification must fail.[175]

Moreover, a compelling argument can be made that all competent human beings, including indigent criminal appellants, should have a basic right of self-determination.[176] As stated in

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1267, 1271 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983), *reh'g denied*, 467 U.S. 1211 (1984); *see also* Kelsey v. State of Minnesota, 622 F.2d 956, 958 (8th Cir. 1980).

171. An incarcerated defendant will have great difficulty preparing the case and making the required filings since the defendant will be unable to leave the correctional facility. This difficulty, however, is no less real in the trial context. *See generally*, Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 304–07 (1976). "A jailed *pro se* defendant will almost certainly present an inadequate defense because pretrial incarceration has prevented him from preparing any defense." *Id.* at 293. Similar difficulties are present in the case of an incarcerated appellant, regardless of the appellant's indigency. Therefore, the restriction on appellant's mobility cannot, by itself, justify disparate treatment.

172. The Minnesota Rules of Criminal Procedure and the Minnesota Rules of Criminal Appellate Procedure, to which a criminal appellant will be bound, weave a veritable tapestry of complicated procedures. Raising all appropriate issues, proper calculation of deadlines, proper formatting of briefs and compliance with numerous other requirements are often confusing for an attorney, let alone a *pro se* defendant. To the uninitiated, the procedural requirements will be a morass. However, the *Seifert* majority clearly indicated that the *pro se* defendant will receive no special treatment and be held to the same standard as that of an attorney in presenting his appeal. *Seifert*, 423 N.W.2d at 372.

173. Other defendants may not be incarcerated; however, those defendants will be subject to the other problems encountered by the incarcerated defendant. In any event, incarceration is not always a distinction applicable to criminal defendants since not all indigent criminal appellants will be incarcerated pending appeal. Thus, any rule prohibiting self-representation to indigents would, at the very least, be overbroad.

174. *See supra* notes 154–59 and accompanying text.

175. Reliance on the old maxim that to represent oneself is to have a fool for a client is surely not sufficient to justify the disparate treatment.

176. "The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984),

Faretta, it is the defendant who personally bears the consequences of the criminal proceeding.[177] Basic notions of humanity require acknowledgment that the defendant should be allowed to decide how best to present a defense.[178] It is for the competent defendant, and not the courts, to decide what is best for him or her.

To force counsel on an unwilling appellant not only denies recognition of freedom of choice, it reinforces the perception that the law conspires to the defendant's detriment.[179] Thus, the defendant should be free to determine when and if counsel is advantageous.[180] While the *Faretta* holding is limited to the trial stage, this rationale applies equally to all stages of a case, including appeal.[181]

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reh'g denied, 465 U.S. 1112 (1984). *Faretta* also refers to the "inestimable worth of free choice." Faretta v. California, 422 U.S. 806, 834 (1975).

177. *Faretta*, 422 U.S. at 834.

178. The Court pointed out in *Faretta*:

> 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. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Id. (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (Brennan, J., concurring), *reh'g denied*, 398 U.S. 915 (1970)).

179. *Faretta*, 422 U.S. at 834. The *Faretta* court implicitly acknowledged that the defendant's subjective beliefs about counsel are appropriate considerations. "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment." *Id.* at 820. Forcing an attorney upon an unwilling defendant in the appeal context is equally offensive. It is the defendant's perception that is critical, not what others believe will present him or her with the best possible defense.

180. In acknowledging this right of self-determination, the Court held that a defendant may " 'knowingly and intelligently' forego" the benefits of counsel. *Id.* at 835.

181. The courts allow defendants to make knowing and voluntary waivers in a number of contexts. The best example is when a defendant pleads guilty to an offense, the defendant waives a number of constitutional rights. However, as seen in McCarthy v. United States, 394 U.S. 459 (1969), before accepting a guilty plea, the court must first determine that the guilty plea is strictly voluntary, that the defendant understands the nature of the charge against him and that he is aware of the consequences of his plea. *Id.* at 464–67. In order to be assured that the waiver is knowing and voluntary, the defendant must be questioned on the record concerning the various rights that the defendant is waiving. The court cannot presume a valid waiver of these rights from a silent record. So long as the defendant is competent, the courts will not prohibit a defendant from waiving certain constitutional rights. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

It should be noted that, in response to *Seifert*, the SPDO developed an exhaustive

The right to determine one's fate in the judicial process on appeal is no less personal, and the consequences no less real, than at trial. To deny one class of defendants this choice, based on the wealth of the defendant, is fundamentally unfair. It is also constitutionally flawed.

Prohibiting self-representation by only indigent criminal defendants impermissibly impairs access to the appellate stage from an entire class of defendants on the basis of wealth. To believe that *Faretta* alone would not bar the way for such a change does not remove the equal protection issue.

Those defendants who can afford counsel have the option to proceed without counsel, while those indigent criminal defendants who cannot by definition afford an attorney, would be deprived of the right to choose. Without some compelling state reason, such a rule could not withstand attack. Thus, amending the Minnesota Rules of Criminal Procedure to simply negate *Seifert* would not only deprive indigent appellants the basic human right of self-determination, it would also violate equal protection. Under the present statute and rules scheme, it is unlikely that any amendments short of prohibiting self-representation in all appeals, would be constitutionally permissible. Therefore, the right of an indigent criminal defendant to proceed *pro se* on appeal is an "evil" that the courts of Minnesota will have to learn to live with.

CONCLUSION

The defendant in *Seifert* won a significant victory for indigent criminal defendants wishing to proceed *pro se* on direct appeal. The victory was one for self-determination, dignity and freedom of choice in that it acknowledges that an appellant, regardless of wealth, has the ultimate control over how a case should proceed. The *Seifert* decision not only correctly analyzed the state law, it was the only possible result under equal protection. Moreover, contrary to the *Seifert* majority or dissents, this result is not so easily changed.

In light of the practical problems accompanying this newly

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waiver form that is to be used to assure that any defendant who wishes to proceed *pro se* on appeal fully understands the implications of so choosing. *See Order Directing State Public Defender to Provide Preliminary Representation to Pro Se Appellants*, File No. C7-88-983 (May 9, 1988) (reprinted in Minn. Rep. 420-422 N.W.2d at LXIX) (waiver form proposed by SPDO attached to order).

established right, it was indeed a hollow victory at best. However, it is a right that competent defendants can, if they wish, take advantage of. To paraphrase a passage from *Faretta*, defendants not only have a right to make a fool of themselves at trial, now they may also make fools of themselves on appeal.[182]

182. Justice Blackmun argues that the decision to allow a defendant to proceed *pro se* at trial "bestows a *constitutional* right on one to make a fool of himself." *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting) (emphasis in original).