RECENT DEVELOPMENTS

FARETTA v. CALIFORNIA

CONSTITUTIONAL LAW—Sixth Amendment—Appearing pro se—A defendant in a state criminal trial who voluntarily and intelligently waives the assistance of counsel has a constitutional right to proceed pro se. 95 S. Ct. 2525 (1975).

In Faretta v. California, the United States Supreme Court held that a criminal defendant who is prosecuted in a state court has a constitutional right to proceed pro se. The sixth amendment does not specifically include a right of self-representation and as a consequence, federal courts have divided sharply over the stature of the pro se right. This division resulted from the fact that prior to the recent decision, there existed a federal statutory right of self-representation secured by an act of the First Congress in 1789. One day after President Washington signed this act into law, James Madison proposed the sixth amendment which guaranteed that in all criminal prosecutions "the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The federal statutory guarantee of both the rights to counsel and to self-representation so closely preceded the sixth amendment, which made no mention of the pro se right, that it has been argued alternatively that the framers specifically excluded or implicitly included self-representation in the right to counsel clause.

Various courts have held this right to be merely statutory and exercisable at the discretion of the trial judge; statutory, but unqualified; and a guarantee of the Constitution. Controversy has also extended to whether a defendant must be advised of the right, at what time in the proceedings the right must be asserted, and whether denial of the right required reversal absent a showing that the defendant was prejudiced by the denial. By declaring in Faretta that the sixth amendment embodies the right by implication, the Supreme Court resolved only a few of these disputes.

1. 95 S. Ct. 2525 (1975).
Faretta, charged with grand theft, was represented by the public defender at his arraignment before the Superior Court of Los Angeles County. Because he believed that the public defender's office had "a heavy case load," Faretta made a pre-trial application for permission to defend himself. Faretta had previously proceeded pro se in a criminal prosecution and he so informed the judge. He also indicated that he had a high school education. After warning Faretta of the hazards of his choice and admonishing him that the court would undertake no special procedures on his behalf at trial, the judge tentatively accepted his waiver of the right to assistance of counsel.8

At the time of Faretta's pro se application, California recognized neither a state nor a federal constitutional right to self-representation.9 Several weeks after accepting Faretta's waiver of counsel, the Superior Court judge conducted a further inquiry into Faretta's ability to represent himself which concentrated on whether the defendant comprehended the hearsay rule and the law governing the challenge of jurors.10 As a result of this inquiry, the judge terminated Faretta's privilege of self-representation because his waiver of counsel had not been knowing and intelligent.11

The California Court of Appeals affirmed Faretta's subsequent conviction, the California Supreme Court denied review,12 and the United States Supreme Court granted certiorari. The conviction was vacated and remanded because Faretta had been deprived of his federal constitutional right to proceed on his own behalf.13 There was no showing that the defendant had been prejudiced by the denial of his pro se application.

In deciding that the right to proceed on one's own behalf has constitutional stature, the Supreme Court used, in part, a score-
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board rationale. Thirty-six state constitutions explicitly include a pro se provision;¹⁴ six United States courts of appeals have held that the sixth amendment guarantees the pro se right;¹⁵ various state courts have also held the right to be federally guaranteed.¹⁶ The Court concluded that there was a consensus that the right warranted constitutional protection. It then assessed the dicta in prior Supreme Court decisions, and discovered there that the right to assistance of counsel and the correlative right to dispense with counsel indicate that an individual has an affirmative right to conduct the trial himself.¹⁷ With this background the Court turned to the amendment as written:¹⁸

It speaks of the “assistance” of counsel, and an assistant, however expert, is still an assistant. 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. . . . An unwanted counsel “represents” the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for in a very real sense, it is not his defense. [Citations omitted.]

Looking to British and American proceedings and documents that preceded the Constitution, the Court found that only in the notorious British Star Chamber was the right to counsel deemed to exist in derogation of a personal defense.¹⁹ Nevertheless, the Court could not fail to be concerned with the fact that the right of self-representation seems to conflict with the right to counsel. Decisions of the Court from Powell v. Alabama²⁰ to Argersinger v. Hamlin²¹ indicate that the presence and assistance of an attorney is an essential element of a fair trial.

¹⁴. Id. at 2530 & n.10.
¹⁵. Id. at 2532.
¹⁶. Id. at 2530 & n.11.
¹⁷. Id. at 2530-31. It is useful to consider the court rules in effect at the time of Faretta’s trial. As an indigent, he had no right to choose appointed counsel and appointed counsel had total control over the lawsuit. Id. at 2529-30 n.8. In at least these two respects, Faretta lost autonomy when denied permission to proceed pro se.
¹⁸. Id. at 2533-34.
¹⁹. Id. at 2534-37.
²⁰. 287 U.S. 45 (1932).
Aware of this policy in favor of a lawyer, and also aware of the disadvantages of a pro se defense, the Court chose to protect individual choice, rather than to allow the imposition of counsel to provide a greater opportunity for a successful defense.\(^2^2\)

As expressed in \textit{Faretta}, the individual who is able to competently waive counsel and choose self-representation is an understanding person, aware of the benefits relinquished and warned of the dangers of the choice.\(^2^3\) The Court refused to assess Faretta’s ability to defend himself and instead declared that since he was competent to waive counsel and was denied the chance to do so, he was deprived of his constitutional right. The error required reversal of the conviction irrespective of any showing of prejudice.\(^2^4\)

The dissenting Justices\(^2^5\) read the sixth amendment differently than did the majority. Chief Justice Burger stressed the integrity of the judicial system as opposed to that of the individual defendant involved in it; he therefore concluded that “there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges.”\(^2^6\) In light of the fact that the right to appear “in person” developed when a criminal defendant was not permitted to testify under oath, Justice Blackmun questioned the validity of supporting a reading of the sixth amendment with largely irrelevant historical proceedings.\(^2^7\) Thus, what the majority read to be an independent right of self-defense, Justice Blackmun saw as a right of defense rendered irrelevant by the rights to testify and to be assisted by counsel.\(^2^8\) He then raised questions which were not resolved by the majority:\(^2^9\)

\begin{itemize}
  \item Must every defendant be advised of his right to proceed \textit{pro se}?
  \item If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured?
  \item If a defendant has elected to exercise his right to proceed \textit{pro se},
\end{itemize}

\begin{footnotes}
23. \textit{Id.} at 2541.
24. \textit{Id.}
25. Three Justices dissented; Chief Justice Burger wrote an opinion in which Justices Blackmun and Rehnquist joined, and Justice Blackmun wrote an opinion in which the Chief Justice and Justice Rehnquist joined.
27. \textit{Id.} at 2549.
28. \textit{Id.}
29. \textit{Id.}
\end{footnotes}
does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? Must he be allowed to switch in mid-trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the pro se defendant differently than it would professional counsel?

The first articulation of any right cannot answer all of the questions that will arise later. Justice Blackmun postulated that with respect to the right to proceed pro se, the irresolvable procedural and policy problems would outstrip any advantage a defendant might believe he has gained. Justice Blackmun added that the constitutional right to defend oneself is but the right to act like a fool. The problem is even greater than that: the pro se right is the right to act like a fool with scant chance later to appeal an ill-advised decision.

The Waiver of Counsel

The absolute prerequisite to self-representation is a knowing and intelligent waiver of the right to assistance of counsel. This odd circumstance—predicating the exercise of one constitutional right on the waiver of another—finds its basis in the fundamental importance attached to representation by counsel. Repeatedly, the Supreme Court has stressed that it will not tolerate convictions unless the assistance of counsel has been accorded to the accused in a meaningful way. In Faretta, the Court acknowledged that the “basic thesis of [the right to counsel] decisions is that the help of a lawyer is essential to assure the defendant a fair trial.”

30. Justice Sutherland articulated the classic statement on the importance of counsel nearly 35 years ago:

    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.


32. 95 S. Ct. 2525, 2540 (1975).
In *Johnson v. Zerbst*, the Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." To be effective, the waiver must be knowingly and intelligently made. To augment this general standard, ten years later in *Von Moltke v. Gillies*, Justice Black attempted to particularize the necessary criteria for a valid waiver of counsel. The newly stated standard required a consideration of whether the accused person had an apprehension of the nature of the charges to be answered, the statutory offenses included in those charges, the possible punishments, available defenses, mitigating circumstances, and any other matters essential to a broad understanding of the consequences of waiver. However, generally speaking, this stricter standard of waiver, enunciated in a plurality opinion, has not been adopted. The test remains whether the waiver was "knowing and intelligent." *Von Moltke* has been looked to more for the substance of its inquiries than for its exact formulations and it stands primarily for the proposition that a judge has a duty to inquire into the background, experience, and conduct of the accused to determine the effectiveness of an attempted waiver. Both the *Zerbst* and *Von Moltke* decisions were cited in *Faretta*, but the Supreme Court applied only the more general standards of the former test.

The *Faretta* Court charged trial judges with the additional duties of making a person who seeks self-representation aware of the dangers of that choice and of creating a record which demonstrates that awareness. The Court noted that with respect to Faretta's lack of legal skills: "[H]is technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." The record showed that a literate, competent man exercised "his informed free will" and thus it mandated that he be permitted to waive counsel.

With only a vague standard established, waiver may remain in large part discretionary with the trial court. There are, how-

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33. 304 U.S. 458, 464 (1938).
34. Id.
35. 332 U.S. 708, 724 (1948) (plurality opinion).
36. See Spanbauer v. Burke, 374 F.2d 67 (7th Cir. 1966) (collecting federal court decisions in which waivers were found to be valid despite omission of one or more of the *Von Moltke* criteria); Carter v. State, 243 Ind. 584, 187 N.E.2d 482 (1963).
37. See Spanbauer v. Burke, 374 F.2d 67, 72 (7th Cir. 1966).
39. Id.
40. Id.
41. Arguably, this is as it must be. If technical legal skills were a prerequisite for the
ever, various objective facts which make some persons clearly incompetent to waive counsel. An accused person’s age may, of itself, permit an inference that the waiver of counsel was not intelligently and competently made. A court may also determine that an individual does not have the requisite mental capacity to appear without the assistance of an attorney. To allow such an individual to conduct an unassisted defense would constitute a deprivation of the right to a fair trial and to due process of law.

According to the Supreme Court’s decision in *Westbrook v. Arizona*, the inquiry into competence to waive counsel is separable from the inquiry into competence to stand trial: the pro se defendant must possess a higher degree of mental competence than one represented by an attorney. Shortly after *Faretta* was decided, however, the New York Court of Appeals in *People v. Reason* rejected the contention that there are two separate and distinct levels of mental capacity. In that case a defendant with a history of mental illness proceeded pro se after indictment for murder and attempted murder. Psychiatrists who examined the defendant at the time of the arraignment reported that he was competent to stand trial. When the case was tried two years later, the defendant refused to present an insanity defense and insisted on self-representation. The court provided him with two advisory attorneys. The jury found him guilty. Prior to sentencing, the trial judge ordered a reexamination of the defendant to determine his mental capacity at the time of trial. At that point two psychiatrists concluded that the defendant had the ability to comprehend the proceedings against him and to assist in his defense. Throughout the trial the defendant had lapsed into incoherent waiver of counsel, the right would be illusory. People v. McIntyre, 36 N.Y.2d 10, 19, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 845 (1974). However, a survey of Illinois judges, dealing with that state’s constitutional pro se right, showed that they condition permission to proceed pro se on the seriousness of the offense. Some indicated that they insisted on representation by counsel in all felony cases, others in cases of crimes punishable with imprisonment, others in all trials involving fines. Note, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240, 248-49 (1973).

44. 384 U.S. 150 (1966). An example may clarify the difference between the two standards. In *State v. Kolocotronis*, a schizophrenic in a state of remission was capable of standing trial, but not of proceeding pro se. 436 P.2d 774 (Wash. 1968).
46. Id. at 352.
47. Id. at 353.
erency, but continued to maintain at trial and on appeal that he was not mentally incapacitated.

The issue decided by the New York court was whether one who has a history of mental illness but has been found capable of standing trial could, under *Faretta*, waive counsel and thus exercise his right to proceed pro se.\(^{48}\) Because the concept that a defendant must be competent to stand trial arose when there was no right to appointment of counsel, the court reasoned that the standard was designed specifically to determine whether the individual had the mental competency for self-defense.\(^{49}\) The court distinguished the Supreme Court's decision in *Westbrook v. Arizona*\(^{50}\) on the ground that there the Court was primarily concerned "that there was nothing in the record to indicate that the trial court had queried the defendant in accordance with *Johnson v. Zerbst* to determine whether his waiver of counsel was intelligently made."\(^{51}\) Thus in New York, when a judge has fully discharged his duty under *Faretta* of determining that the defendant is an understanding person, exercising his informed free will and when the defendant is found mentally competent to stand trial, the pro se defense cannot be attacked on the ground that the defendant's mental capacity was not found to have met some higher standard.\(^{52}\)

Three judges dissented, unwilling to distinguish *Westbrook v. Arizona* in that manner, and suggested that under *Faretta* the determination of competency to choose self-representation mandates a thorough inquiry into the background of the defendant and the nature of the case. They believed that past mental illness, for instance, should be considered in determining the defendant's condition, because in waiver "the subjective understanding of the defendant is sought, rather than the quality or contents of the explanation given him."\(^{53}\) The dissenting judges further stated:\(^{54}\)

A situation may occur where the court properly finds that a defendant competently waives counsel before trial, but as it develops at trial, the defendant is unable actually to conduct his defense. Under such circumstances, the court should not hesi-

\(^{48}\) Id.
\(^{49}\) Id. at 354.
\(^{50}\) 384 U.S. 150 (1968).
\(^{52}\) Id.
\(^{53}\) Id. at 358.
\(^{54}\) Id. at 358-59.
tate to declare a recess and conduct further inquiry as to the defendant's mental competency to continue as his own counsel. Upon a finding by the court that the defendant no longer possesses the necessary competence to proceed with his own defense, due process requires that trial counsel [assumed to be present throughout in an advisory capacity] should be directed to take over the defense in order that the rights of the accused may be fully protected.

The majority of the New York court may have relied too heavily on the historical basis of the competency test. The test evolved as an assessment of the defendant's capacity to present a defense at a time when counsel was not appointed. Today the assistance of an attorney is available to all and the two-tiered standard of mental capacity has validity for the reasons pointed out by the dissent. Arguably, however, under *Faretta*, an inquiry into the defendant's actual ability to conduct a defense is irrelevant, and only the inquiry into his competency to knowingly and intelligently waive counsel is apposite.

Thus, under the present standard of waiver, the individual who is intelligent, but untutored in law, may forego counsel's assistance if he is apprised of the consequences of the choice and if he exercises free will. This is allowed despite the fact that the defendant may be unable to meet his accusers effectively, much less have any chance of prevailing in his defense. “[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires . . . .” This same principle is implicit in *Faretta* and in a recent New York Court of Appeals decision. In *Faretta*, dissenting Justices Burger and Blackmun both challenged the wisdom of protecting an accused's decision to commit a folly so long as he is willing to bear the consequences of it. Both opined that the gains of such a choice are illusory and that the corrosive effect on the reliability of the guilt-determining process is great.

55. See text accompanying note 49 *supra*.
The Fairness of the Trial

In *Argersinger v. Hamlin*, the Supreme Court extended the right to the appointment of counsel to misdemeanor cases in which the defendant may be sentenced to a jail term. Thus *Argersinger* is an extension of *Gideon v. Wainwright* which had in turn overruled *Betts v. Brady*. In *Betts*, the Court had stated that the appointment of counsel is mandated only when special circumstances indicate that the absence of counsel would deprive the defendant of a fundamentally fair trial. The special circumstances test, however, quickly lost meaning. Appellate courts could hardly fail to find some prejudice in the case of an unrepresented individual. The Supreme Court invalidated attorney-less convictions where the numbers, complexity, and seriousness of the charges against the accused were such that "no layman could have understood the accusations"; where possible defenses "raised questions of considerable technical difficulty"; and where the defendant failed to object to considerable inadmissible hearsay and otherwise incompetent evidence and was, by his ineptness, prevented from attacking the credibility of a prosecuting witness.

Undoubtedly, the same deficiencies can exist in the defense made by an accused who waive counsel's representation. Nevertheless, when counsel has been offered and refused, the only means to attack the conviction is proof that the purported waiver was not competent. The fact that the pro se defendant inadequately and ineffectively presented the case is irrelevant to the issue of whether he validly waived counsel. Seemingly, a valid waiver precludes a later allegation that the accused's ineptness resulted in an unfair trial. Such reasoning leads to the conclusion that due process guarantees only the "opportunity to a fair trial, but not a fair trial itself."

A recent New York decision indicated a willingness to allow

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62. 316 U.S. 455 (1942).
69. Id. at 1202.
a limited review of pro se proceedings: a defendant might claim a denial of due process "when the trial viewed as a whole amount[ed] to a travesty of justice." This standard seems comparable to that used to evaluate the effective assistance of counsel; that is, ineffective assistance is often described as that resulting in "a farce and mockery, shocking to the Court." Some courts have begun to interpret the right to assistance of counsel as the right to an attorney "reasonably likely to render, and rendering reasonably effective assistance." Where a court has adopted a more liberal means of attacking defense by counsel, the self-represented defendant should be permitted to have his defense assessed by a parallel standard—reasonably effective representation such as a pro se defendant is capable of rendering. The quick rebuttal to this position is that the self-represented defendant who finds himself losing, or one whose chances for success on the merits are slim, might deliberately present a poor defense. This could result in the addition of another stage to the criminal justice system, the pro se trial prior to the trial with counsel. But a system of review could provide safeguards: if the record showed deliberate ineffectiveness or bad faith, an appellate court would be justified in refusing to overturn the conviction. If review is too liberal, the result may be endless litigation by the wily. If it is unavailable, too often the honestly inept will receive unfair trials. Neither alternative serves fully the goals of the judicial process—reliability, the integrity of the individual, and efficiency.

Disadvantages of Proceeding Pro Se

A scrutiny of the consequences of the pro se defense makes clear that there are many dangers inherent in self-representation. One study reveals that representation by an attorney substantially improves the accused's chances of receiving a preliminary hearing, release on bail, and a relatively short sentence if imprisoned. Furthermore, a defendant with counsel more frequently

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72. Id. at 696; accord, West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973).
73. Nagel, Effects of Alternative Types of Counsel on Criminal Procedure Treatment, 48 Ind. L.J. 404 (1972-1973). Nagel's findings were based on data collected in 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report (1965). Nagel's conclusions are particularly apposite in reference to the Faretta decision inasmuch as out of the 11,258 felony cases tried in 1962 and reported in Silverstein's study, Nagel examined only the 1,101 grand larceny cases. Faretta was convicted of grand theft.
obtains a jury trial, dismissal or acquittal, or if found guilty, a suspended sentence or probation. The majority in *Faretta* acknowledged that a lawyer's guidance would almost always result in a better defense, but stated: "Personal liberties are not rooted in the law of averages." The rationale for this conclusion follows from the accused's position before the law. When the criminal justice system attaches to an individual, the consequences—irrespective of the ultimate determination of guilt—are grave. The stages of a criminal proceeding, in varying degree, disrupt the defendant's freedom and autonomy. The intrusion upon individual liberty and dignity would be increased if, when the defendant was summoned into court, the state could force a lawyer upon him.

Procedural due process has been described as an accommodation of the ultimate goals of the judicial process in our society: respect for the dignity of the individual and the reliability of the guilt-determining system. The issue to be faced by courts is whether a criminal defendant appearing without counsel actually retains any autonomy or dignity. Some judges have acknowledged that they willingly modify procedure for the pro se litigant, offer advice about rights and procedures, and allow greater latitude in the examination of witnesses and admission of evidence. Others take an activist role, questioning witnesses and making objections on the accused's behalf. However, there are judges, and the trial court judge Faretta faced was one, who refuse to alter the practices of the courtroom to accommodate the unrepresented defendant.

Several years ago, the Supreme Court reviewed a case in which a pro se defendant was sentenced to 11 to 22 years for acts of criminal contempt that occurred during the trial. Although the segments of the trial court record which were included in the opinion show that the defendant was an aggressively disruptive individual, several of his outbursts are typical of the frustrations

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77. Id.
78. For the trial judge's remarks to Faretta see *Faretta v. California*, 95 S. Ct. 2525, 2527 n.2 (1975).
79. See *The Right to Appear Pro Se*, supra note 76, at 249.
felt by most untutored litigants. The defendant vilified the trial judge, accused the judge of railroading him into a life sentence, and repeated several times: “You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.”

Trial judges believe that the unrepresented defendant is far more likely than his represented counterpart to become disruptive and abusive in the courtroom. After listing the procedural aspects of a trial through which the pro se litigant must be “led by the hand,” one judge stated:

A defendant of this nature, when afforded the opportunity to cross-examine, usually starts out, “He said that I stole the purse and ran; well I didn’t do any such thing,” or “Your honor, this man is lying and I can prove it. Just give me a chance to call my brother in Buffalo and he’ll tell you I was up there at that time,” or some similar form of approach. It is usually idle for the judge to instruct the defendant that he must confine himself to questions, for when the explanation is made, the defendant shakes his head in confusion and, not understanding the intricacies of such a procedure, usually replies hopelessly that he has no questions to ask. . . . This is pitiful in the case of a defendant who may be innocent, but it is disturbing in any case because the judge cannot escape the feeling that the trial has not performed its true function and that he has unwittingly been made a part of it.

While frustration often plays a large part in causing a defendant to become disruptive, such behavior is deliberate on the part of some self-represented individuals. A defendant may waive counsel and act disorderly, thinking that the absence of counsel is a basis for reversal, and thinking the same of any disciplinary action taken against him by the court. Significantly, however, most judges point first to the pro se defendant’s genuine faith in his innocence and second to his mistrust of lawyers and the legal

81. Id. at 457.
83. Laub, supra note 82, at 255.
84. Dorsen & Friedman, supra note 82, at 118.
85. Laub, supra note 82, at 246.
process as the reasons for which counsel is waived.\textsuperscript{86} For the most part, it appears that disorder in the courtroom is the unintentional outgrowth of a good faith exercise of the defendant's autonomy. But good faith notwithstanding, the obnoxious defendant may lose his right to appear on his own behalf.\textsuperscript{87}

The dissenting opinions in \textit{Faretta} expressed deep concern that society's interest in achieving justice in a criminal prosecution could not be vindicated where a defendant was freely allowed to go to jail "under his own banner" because he foolishly waived counsel.\textsuperscript{88} Chief Justice Burger stated that the sixth amendment mandates that every defendant receive the fullest possible defense, thus requiring the discretion of the trial judge in all cases of waiver.\textsuperscript{89} But Faretta believed that defending himself would be more effective than putting the case in the hands of the overworked public defender's office. However wide of the mark Faretta's belief in himself may have been, the Supreme Court has held that the belief in one's autonomy must be protected. By waiving counsel, the defendant waives the right to attack his conviction on the grounds that his self-representation fell short of the best possible defense and in effect denied him "effective assistance of counsel."\textsuperscript{90}

\textbf{Limitations on the Pro Se Right}

Another factor is added to the balance between procedural reliability and individual integrity when the defendant seeks to discharge an attorney and conduct a personal defense at midtrial or on the eve of trial. This third consideration—the necessity of maintaining orderly judicial systems—is thought to tip the scales away from the right to defend oneself. In order to exercise the pro se right during the proceedings, it has been held that the defen-

\textsuperscript{88} Faretta v. California, 95 S. Ct. 2525, 2543 (1975) (Burger, C. J., dissenting); id. at 2548 (Blackmun, J., dissenting). In his dissent, Justice Blackmun stated:

\textit{For my part, I do not believe that any amount of pro se pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated pro se defendant.}
\textit{Id.}
\textsuperscript{89} Id. at 2543.
\textsuperscript{90} Id. at 2541 n.46; see United States v. Armedo-Sarmiento, No. 75-1329 (2d Cir., Oct. 1, 1975), and text accompanying notes 60-72 supra.
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dant must show that the prejudice to his legitimate interests outweighs the potential for disruption of the trial. The underlying considerations for such a curtailment of the right to self-representation resemble the policies which militate against a defendant having an absolute right to change counsel. In each situation the courts fear a defendant's attempt to manipulate constitutional rights for the purpose of delay and disruption. But if delay can be avoided, and order and fairness to other defendants can be preserved, a defendant should have the right to elect to proceed pro se during the trial. After Faretta was decided, a California appeals court denied a defendant's motion to represent himself when the motion was made on the day of trial. The court stated that in Faretta, the Supreme Court had stressed the timeliness of the motion considered in that case, and thereby acknowledged that the right must be timely asserted.

The case of Johnson v. Zerbst, which established the basic test of waiver, also pointed to prior Supreme Court decisions which had held that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights. [Citations omitted.]" It remains to be seen whether the courts will follow the Zerbst presumption against waiver of counsel as stringently as did one federal court in a case decided when that court considered the pro se right only statutory. A defendant who accepted counsel's assistance prior to trial was found to have waived the right to self-representation, despite protest to the contrary. Because courts may be expected to favor the right to

94. DORSEY & FRIEDMAN, supra note 82, at 124.
96. 304 U.S. 458 (1938).
97. Id. at 464.
98. Duke v. United States, 255 F.2d 721 (9th Cir.), cert. denied, 357 U.S. 920 (1958). But see United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971). In Spencer, a particularly wily pro se defendant was appointed advisory counsel for assistance prior to arraignment without losing the self-representation right. When the appointed counsel was permitted to leave the case, defendant claimed that his constitutional right to an attorney had been violated because by the time counsel moved to be relieved, defendant had decided to accept representation by counsel. The court found the pro se request to have been explicit and the waiver of counsel unambiguous. Notably, the defendant did not oppose the attorney's actions at the time of the motion.
counsel over the right to a pro se defense, waiver of the latter right will likely occur far more freely than that of the former. For example, one could waive the statutory right to proceed without counsel and never have been advised that the right existed.\textsuperscript{99}

The Second Circuit, which has recognized the federal constitutional right to proceed pro se longest, set forth procedures to be followed to safeguard both the rights to counsel and to self-representation in\textit{United States v. Plattner}:\textsuperscript{100}

\begin{quote}
[I]t is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the \textit{choice between defense by a lawyer and defense pro se}; that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interests of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself.
\end{quote}

It must be noted, however, that the procedures suggested in\textit{Plattner} were recommended only for use in the instance of a defendant making an initial pro se request. Furthermore, in the next self-representation case to arise after\textit{Plattner}, the Second Circuit indicated, in the context of a discussion on the limited nature of the pro se right when invoked mid-trial, that:\textsuperscript{101}

Regardless of whether he has been notified of his right to defend himself, the criminal defendant must make an unequivocal request to act as his own lawyer in order to invoke the right. If an unequivocal request were not required, convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel. And if notice of the right had to be given, the task of administering the overriding constitutional policy in favor of granting a lawyer to every person would become unduly treacherous. [Citations omitted.]

\begin{footnotes}
\item[99.] Brown v. United States, 264 F.2d 363 (D.C. Cir. 1959).
\item[100.] 330 F.2d 271, 276 (2d Cir. 1964)(emphasis added).
\item[101.] United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15-16 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966). The other element of the notice requirement in a\textit{Plattner} situation, the judge's caveat against the pro se defense, also recommended in\textit{Faretta}, 95 S. Ct. 2525, 2541 (1975), has been found by the Second Circuit to be unnecessary as a prerequisite to a valid waiver of counsel. United States v. Rosenthal, 470 F.2d 837 (2d Cir. 1972); United States v. Duty, 447 F.2d 449 (2d Cir. 1971).
\end{footnotes}
The Constitutional Pro Se Right

The Pro Se Defendant's Right to Advisory Counsel

The courts do not protect the pro se right of the defendant who vacillates between self-representation and representation by counsel. This is partly explained by the long-engrained belief that the rights are mutually exclusive. The 1789 Judiciary Act provided that "the parties may plead and manage their own causes personally or by the assistance of counsel."\(^\text{102}\) The argument that the rights may not be exercised simultaneously has been accepted,\(^\text{103}\) even in an instance in which the state constitution in question provided that a criminal defendant might appear "in person and with counsel."\(^\text{104}\) Courts do not wish to force counsel into a subservient role;\(^\text{105}\) an attorney's exclusive control over a case has been viewed as "necessary to the decorum of the court and the due and orderly conduct of the cause."\(^\text{106}\)

It is easy to imagine the difficulties likely to beset a trial in which both the attorney and the defendant examine witnesses, make objections, and in general both actively participate in the presentation.\(^\text{107}\) Such problems do not figure strongly, however, when a defendant requests appointment of counsel solely for assistance in filing papers, preparing subpoenas, and obtaining documents. Yet in just such a case, appointment of advisory counsel was refused on the ground that an attorney appointed by the court should not be required to "surrender any of the substantial prerogatives traditionally or by statute attached to his office."\(^\text{108}\) A court's real concern is that a pro se defendant who has requested limited pre-trial assistance may retire to a passive role and attempt to reemerge on his own behalf during the trial. A court which initially appoints advisory counsel without diminishing the accused's pro se right may later refuse to allow the accused's participation in the trial because advisory counsel has assumed the normal trial duties of an attorney and the court will

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107. See People v. Burson, 143 N.E.2d 239 (Ill. 1957) for a good example of the fiasco which can result from such simultaneous participation.
not then infringe upon the attorney's dominion over the cause.\textsuperscript{109} Thus the defendant may involuntarily waive the right to speak on his own behalf.

The need for orderliness and the policy favoring attorney control do not fully account for the fact that a defendant, when represented by counsel, has no right to address the jury in summation.\textsuperscript{110} The State of Georgia at one time allowed defendants to make personal, unsworn statements to the jury not subject to cross-examination; furthermore, the self-represented defendant could participate with counsel in the examination of witnesses.\textsuperscript{111} Significantly, at that time a criminal defendant in Georgia could not testify under oath.\textsuperscript{112} The right of a represented defendant to address the jury in an unsworn statement ceases when the competency of the accused to testify is recognized by statute; at that point, the right to testify under oath becomes primary,\textsuperscript{113} as was noted by Justice Blackmun in his \textit{Faretta} dissent.\textsuperscript{114} The criminally accused individual who does not wish to take the stand, either because he does not want to give the prosecution the chance to reveal prior convictions or to use an illegally obtained confession to impeach his testimony, or because his story cannot withstand cross-examination, may address the jury in an unsworn statement, by right, only if proceeding pro se.

There is no clear historical reason why the rights to a pro se defense and to counsel are assumed to be mutually exclusive. Of the various state bills of rights which preceded the federal constitutional amendments, several employed language similar to that in the Federal Judiciary Act, and established a right to be heard on one's own behalf or by counsel.\textsuperscript{115} More often, the right was stated in terms of guaranteeing the accused "counsel's help,"\textsuperscript{116}

\textsuperscript{109} See United States v. Condor, 423 F.2d 904, 908 (6th Cir. 1970).


\textsuperscript{112} J. \textsc{Maguire}, J. \textsc{Weinstein}, J. \textsc{Chadbourn} \& J. \textsc{Mansfield}, \textsc{Cases and Materials on Evidence} 235 (6th ed. 1973).

\textsuperscript{113} See State v. Louviere, 169 La. 109, 124 So. 188, 192 (1929).

\textsuperscript{114} Faretta v. California, 95 S. Ct. 2525, 2549 (1975).

\textsuperscript{115} Massachusetts Declaration of Rights (1780), in 1 B. \textsc{Schwartz}, \textsc{The Bill of Rights: A Documentary History} 342 (1971); Pennsylvania Frame of Government (1682), \textit{id.} at 142.

\textsuperscript{116} Massachusetts Body of Liberties (1641), \textit{id.} at 69.
or "allowing" a defendant counsel.\textsuperscript{117} Other early bills of rights provided that a cause might be stated by a defendant and counsel.\textsuperscript{118}

The language of the Judiciary Act has been cited in support of contradictory propositions. That it seemed to provide an either-or choice, and was enacted a day before the proposal of the sixth amendment suggested to one author that the framers intended the pro se right to be merely statutory, and only the right to counsel constitutional.\textsuperscript{119} On the other hand, in \textit{Plattner}, the Second Circuit read the Act and the amendment jointly, and concluded that the language of the statute augmented the terse language of the amendment and that the pro se right was constitutionally mandated.\textsuperscript{120}

After \textit{Faretta}, the language of the Judiciary Act undoubtedly will be cited in support of an argument that the sixth amendment includes the rights to counsel and to self-representation as in the Act, disjunctively. The opposite contention has equal force: the Judiciary Act does not clearly state that a defendant has one or the other right "but not both."\textsuperscript{121}

In light of the ambiguous language of the sixth amendment and the many decisions disfavoring a combined right\textsuperscript{122}—even when a state constitution had seemed to grant it\textsuperscript{123}—the Supreme Court in all probability would not find implicit in the amendment the right of a pro se defendant to have advisory counsel. As the Second Circuit reads \textit{Faretta}, "[t]here is nothing in [the decision] or in any statute which suggests that a defendant may have an attorney and represent himself."\textsuperscript{124}

The United States District Court for the Southern District

\textsuperscript{117} Delaware Declaration of Rights (1776), \textit{id.} at 278; Maryland Declaration of Rights (1776), \textit{id.} at 252; North Carolina Amendments (1788), 2 \textit{id.} at 967.

\textsuperscript{118} Pennsylvania Declaration of Rights (1776), 1 \textit{id.} at 265; Vermont Declaration of Rights (1777), \textit{id.} at 323; New Hampshire Bill of Rights (1783), \textit{id.} at 377.


\textsuperscript{120} 330 F.2d 271 (2d Cir. 1964).

\textsuperscript{121} \textit{Comment, supra} note 119, at 1489. \textit{Contra, Shelton} v. United States, 205 F.2d 806, 813 (5th Cir.), \textit{petition for cert. dismissed on motion of petitioner}, 346 U.S. 892 (1953), \textit{motion to vacate denied}, 349 U.S. 943 (1955)(The defendant argued that insofar as the Judiciary Act stated the pro se and counsel rights in the alternative, it was contrary to the Constitution and therefore invalid. The statute was upheld.).

\textsuperscript{122} \textit{See Annot., supra} note 110 (cases collected).

\textsuperscript{123} People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).

\textsuperscript{124} United States v. Wolfish, No. 75-1138 (2d Cir. Aug. 14, 1975).
of New York, in a recent decision which refused to allow a criminal defendant to participate as co-counsel when represented by an attorney, concluded that the defendant had "not put forward sufficient grounds to warrant a finding that traditional representation [was] inadequate or inappropriate." In support of the motion to proceed as co-counsel, the defendant argued that only personal participation at trial would enable her to take personal responsibility for her future insofar as the trial determined it. The defendant, who was indicted for conspiracy to bomb federal property, asserted that by participating in her trial she could "counteract potential improper references to her life-style and political beliefs." Because over five years intervened between the alleged acts and the trial, the defendant alleged her inability to properly brief her attorneys and a belief that she alone could best confront in cross-examination, any of her former associates who might appear as government witnesses. Judge Pollack stated that the rule in the Second Circuit gives the trial judge the discretion to allow a defendant to defend personally while represented by an attorney. The court found nothing in its reading of Faretta to alter that rule of discretion:

Faretta ratified a consensus within the federal judiciary favoring a constitutional right to pro se status; that consensus has existed side by side with another finding that a defendant's appearance as co-counsel lies within the discretion of the trial court.

The court noted that an earlier Second Circuit decision advised the appointment of standby counsel for pro se defendants, with counsel available to assist in the defense "to the extent that the defendant may wish the use of his services," and opined that "[s]uch a procedure, whose end result might not be far different from co-counsel, appears to have been approved in Faretta v. California." The question raised in a case like Swinton, for instance, is why the defendant would not choose to proceed pro

126. Id. at 6.
127. Id.
128. Id. at 6-7.
129. Id. at 3-4.
130. Id. at 5.
se and then rely on standby counsel to the extent that he would have relied on co-counsel. In the Second Circuit at least, he would very likely be appointed standby counsel. The drawback is that generally a defendant cannot choose appointed counsel.\textsuperscript{133} Swinton, who was not proceeding as an indigent, probably preferred representation by the attorney of her choice to casting her lot with appointed counsel.

\textit{The Fundamental Fairness Test}

The appointment of advisory counsel has occurred widely on a discretionary basis.\textsuperscript{134} The American Bar Association has advanced the notion that whenever a defendant waives counsel, the trial judge should consider the appointment of standby counsel and should always appoint such counsel "in cases expected to be long or complicated or in which there are multiple defendants."\textsuperscript{135} Responding to the accused’s questions and advising the court of matters favorable to the defendant’s cause are the two main functions of the advisory attorney.\textsuperscript{136} Such counsel must exercise care not to become active in the trial or usurp the accused’s control over the case. The defendant retains the right to examine witnesses and address the jury.\textsuperscript{137} Without infringing upon the accused’s pro se right, assistant or advisory counsel could quite usefully confer with the prosecutor, facilitate discovery, and enter the necessary pre-trial motions.\textsuperscript{138}

The presence of standby counsel allows the trial judge to retain an impartial role because the rights of the defendant can be protected by his attorney.\textsuperscript{139} Should the pro se defendant lose his self-representation right, standby counsel can step in and the trial can continue uninterrupted.\textsuperscript{140} An interesting benefit of allowing advisory counsel is that the pro se defendant frequently decides to abandon self-representation.\textsuperscript{141} The utility of advisory

\begin{footnotesize}
\begin{enumerate}
\item See Faretta v. California, 95 S. Ct. 2525, 2529 n.8 (1975).
\item Dorse & Friedman, supra note 82, at 128.
\item ABA Standards, The Function of the Trial Judge § 6.7 (Approved Draft, 1972).
\item Id.
\item Id. But see Mayberry v. Pennsylvania, 400 U.S. 455 (1971)(Burger, C.J., concurring). The role of standby counsel is "to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument." Id. at 467-68. It might be asked what is left for the pro se litigant to do.
\item See United States v. Spencer, 439 F.2d 1047, 1051 (2d Cir. 1971).
\item Dorse & Friedman, supra note 82, at 124.
\item Id.
\end{enumerate}
\end{footnotesize}
counsel, both inside and out of the courtroom, must not be permitted to blur the distinction sought by some pro se litigants—"the right to appear before the jury in the status of one defending himself"—without apparent aid. A defendant who wishes no assistance at all should be allowed to work alone with a standby attorney present only to fill in if the defendant should lose his pro se right. The hazard of standby counsel's presence is that a trial judge may be swifter to find a litigant to have lost the right to represent himself. On the other hand, advisory counsel should be permitted to take a more active role, if this is what the defendant wishes, without forcing the defendant to yield control of the case. The rules existing in California at the time Faretta was decided stated that appointed counsel would manage and control the lawsuit with final say in trial strategy. The pro se defendant should have the right to appointed counsel without the imposition of such conditions.

For the pro se right to further most effectively the ends of due process, courts must reexamine and alter the standards of waiver and review. So long as the standard of waiver is minimal, and the opportunity to obtain review of the fairness of the trial non-existent or extremely unlikely, the grant of a request to proceed pro se may too often be the denial of ultimate fairness unless an attorney is available as a resource for the accused's defense. The courts have several viable means by which this situation could be remedied. A reconsideration of the standard necessary for waiver of counsel might well begin with the Von Moltke decision. The criteria articulated in Von Moltke speak directly to the accused's cognizance and comprehension of the nature and consequences of the offense charged and the defenses and mitigating circumstances available. Application of this standard would not contravene the holding in Faretta that a defendant's "technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself." The technical legal knowledge in question in Faretta involved procedural and evidentiary rules, while the considerations in Von Moltke related to the intelligence of the waiver, and as such could be employed to ensure that the defendant desiring to proceed pro se grasped the nature of the proceeding to be faced.

144. See notes 35-38 supra and accompanying text.
In conjunction with a higher standard of waiver, a pro se defense should be reviewable by a standard paralleling that used in assessing the effective assistance of counsel in the jurisdiction. There may indeed be no sixth amendment right to representation by counsel while proceeding pro se. But the fifth and fourteenth amendment rights to due process of law and fundamental fairness mandate that absent the above-mentioned safeguards, there must be wide availability and appointment of standby counsel for the pro se defendant. The lack of such counsel should require the reversal of a conviction of a self-represented defendant. The dual goals of due process—autonomy and reliability—must be accommodated. If fairness and justice are truly the ends sought by the criminal justice system, the right to speak on one’s own behalf should not be granted at the expense of a reasonably accurate guilt-determining process.

Stacey Joan Moritz