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## Constitutional Law-Criminal Defendant Guaranteed Right to Self-Representation in State or Federal Courts

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**Constitutional Law—CRIMINAL DEFENDANT GUARANTEED RIGHT TO SELF-REPRESENTATION IN STATE OR FEDERAL COURTS—*Faretta v. California*, 95 S. Ct. 2525 (1975).**

Sixteenth and early seventeenth century England did not recognize the right to counsel in criminal cases.<sup>1</sup> In fact, ultimate recognition of this right in 1695 was considered a special privilege bestowed at the discretion of the Crown,<sup>2</sup> rather than a logical development of the common law. Under modern English law, the defendant has an absolute right to counsel, but he must also be allowed to conduct his own case as to matters of fact, leaving issues of law to counsel.<sup>3</sup> It remains unclear, however, whether this concept of self-representation was a right at common law or a corollary of the right to appointed counsel.<sup>4</sup>

In contrast to its development in England, the right to counsel was guaranteed in 1791 by the sixth amendment to the United States Constitution.<sup>5</sup> Prior to the passage of the sixth amendment, the right to counsel for

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1. See 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 324-57 (1883). The prisoner's defense was made by way of argument and altercation with the prosecution and the other witnesses on a face to face basis. *Id.* at 349. But this was done in the setting of a criminal trial that differed in several important ways from today's criminal trials:

(1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defence. He was examined, and his examination was taken down.

(2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced at his trial. He had no counsel either before or at the trial.

(3) At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced.

(4) The confessions of accomplices were not only admitted against each other, but were regarded as specially cogent evidence.

(5) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance. *Id.* at 350.

2. See 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 213 (2d ed. 1898).

3. See *Rex v. Parkins*, 171 Eng. Rep. 1311, 1312 (1824); *Rex v. White*, 170 Eng. Rep. 1318, 1319 (1811).

4. Many critics argue against the theory that self-representation was a right. Their view is that self-representation was commonplace only because there was no other alternative open to the defendant. See note 1 *supra*; Comment, *The Pro Se Defendant: No Right to Say No*, 23 EMORY L.J. 523, 524 (1974).

5. U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

a criminal defendant, as well as the right of self-representation, were both guaranteed by federal statute.<sup>6</sup> Today all states must provide appointed counsel for indigents,<sup>7</sup> and the constitutions of thirty-seven states currently recognize the right of self-representation.<sup>8</sup>

In *Faretta v. California*,<sup>9</sup> the Supreme Court was asked to decide whether the states must also permit self-representation in criminal cases. In 1942 the Court had decided that the right to defend *pro se*<sup>10</sup> was not to be limited by the Bill of Rights.<sup>11</sup> In that same decision the Court noted in dictum that self-representation itself was a constitutional right.<sup>12</sup> Nevertheless, the federal circuit courts split on whether there is a constitutional right to self-representation in criminal trials. Five circuits held the right to be guaranteed by the sixth amendment,<sup>13</sup> while three held the right to

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6. [I]n all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92, *as amended*, 28 U.S.C. § 1654 (1970).

The present version provides that "[i]n 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." Compare the language of FED. R. CRIM. P. 44(a):

Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

7. *Gideon v. Wainwright*, 372 U.S. 335 (1963). A Florida defendant charged with a felony had been denied counsel. The Supreme Court, overruling *Betts v. Brady*, 316 U.S. 455 (1942), held that the sixth amendment guarantee of assistance of counsel was made obligatory upon the states by the fourteenth amendment.

8. *United States v. Plattner*, 330 F.2d 271, 275 nn.6 & 7 (2d Cir. 1964).

9. 95 S. Ct. 2525 (1975).

10. As used in this article *pro se* will mean by self-representation.

11. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942): "[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters."

12. The short of the matter is 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.

The Court noted this right to be embodied in the sixth amendment as a correlative right to the right to assistance of counsel. *Id.* at 279.

13. *United States v. Dujanovic*, 486 F.2d 182 (9th Cir. 1973); *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973); *United States v. Warner*, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); *United States v. Odom*, 423 F.2d 875 (9th Cir. 1970); *United States v. Sternman*, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); *Arnold v. United States*, 414 F.2d 1056 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); *Hodge v. United States*, 414 F.2d 1040 (9th Cir. 1969); *Bayless v. United States*, 381 F.2d 67 (9th Cir. 1967);

be only statutory.<sup>14</sup>

The Superior Court of Los Angeles County, California, after interviewing the defendant, Anthony Faretta, decided he had not made an intelligent and knowing waiver of his right to assistance of counsel and therefore denied him the right to proceed *pro se*.<sup>15</sup> A public defender had been appointed to represent Faretta at the arraignment, but Faretta requested well before trial that he be permitted to represent himself.<sup>16</sup> Faretta appealed the court's ruling, and in view of the division between the federal courts<sup>17</sup> the Supreme Court granted certiorari<sup>18</sup> on a writ from the Court of Appeals for the Second Appellate District of California.

In a six-to-three decision the Court held that the sixth amendment also embodied the right *not* to have counsel, and this right was applicable to the states under the fourteenth amendment's due process clause.<sup>19</sup> The Supreme Court grounded its decision in: (1) the history of self-representation prior to the passage of the sixth amendment, (2) decisional and state constitutional law since the passage of that amendment, and (3) the requirement of "fundamental fairness."<sup>20</sup>

Justice Stewart, writing for the majority, concluded that English and American jurisprudence supported the contention that the right of self-representation, even though not mentioned in the sixth amendment, is embodied therein as a correlative right.<sup>21</sup> Self-representation was a com-

United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959); Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 375 U.S. 920 (1958).

14. Van Nattan v. United States, 357 F.2d 161 (10th Cir. 1966); Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959).

15. 95 S. Ct. at 2528 n.3. The superior court's decision was made in accordance with the then recent California Supreme Court ruling in *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), *cert. denied*, 410 U.S. 944 (1973).

[T]aking into consideration the recent case of *People versus Sharp*, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in *pro per* should be and is hereby revoked. That privilege is terminated. 95 S. Ct. at 2529 n.4.

16. 95 S. Ct. at 2527.

17. Cases cited notes 13 & 14 *supra*.

18. 415 U.S. 975 (1974).

19. 95 S. Ct. at 2527.

20. *Id.* at 2530-41.

21. *Id.* at 2533. See generally Annot., 77 A.L.R.2d 1233 (1961); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971).

mon practice in criminal trials in sixteenth and early seventeenth century England.<sup>22</sup> As English criminal procedure underwent reforms, the right to counsel was recognized, but the defendant retained his right to self-representation.<sup>23</sup> The American colonies made various attempts to preserve a similar right of self-representation, primarily as a result of their distrust of lawyers.<sup>24</sup> Finally, Congress passed the Judiciary Act of 1789<sup>25</sup> just one day before the sixth amendment was proposed.<sup>26</sup> This analysis led the Court to conclude:

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel . . . . The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.<sup>27</sup>

The Supreme Court also noted that its analysis is bolstered by the recognition of a right to defend *pro se* in criminal trials, albeit in different forms, in thirty-six state constitutions.<sup>28</sup>

The Court went further to review its own decisions interpreting the provisions of the sixth amendment. Initially, the Court merely acknowledged that lack of counsel did not invalidate a conviction, provided the waiver was competently and intelligently made.<sup>29</sup> Later, in several cases, it indicated in dictum that the *pro se* election was not only permissible, but was in fact guaranteed as a correlative right embodied in the sixth amendment guarantee of appointed counsel in a criminal trial.<sup>30</sup> Numerous

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22. See note 1 *supra*.

23. The Treason Act of 1695 provided for court appointment of counsel "upon his or their Request." The necessary implication is that the defendant was free to conduct his own defense in the absence of such a request. This view was made more explicit in early nineteenth century case law. Cases cited note 3 *supra*.

In *Rex v. Woodward*, [1944] 1 K.B. 118, 119, the court noted that "no person charged with a criminal offense can have counsel forced upon him against his will."

24. See 18 U. MICH. L. QUADRANGLE NOTES 9 (1974).

25. Ch. 20, § 35, 1 Stat. 92.

26. For relevant portions of text see note 5 *supra*.

27. 95 S. Ct. at 2539-40.

28. *Id.* at 2530 n.10.

29. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938). The Court also noted that when a defendant appeals a decision because there was no competent and intelligent waiver of counsel, he has the burden of proof.

30. The cases cited by the Court in support seem less than conclusive. In *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278-79 (1942), the only question before the Court was whether petitioner's waiver of trial by jury was effective though made without aid of counsel. The Court said it was not. In *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), the Court merely assumed for purposes of the case that the power to defend *pro se* would be guaranteed by the fourteenth amendment. Nor does *Price v. Johnson*, 334 U.S. 266, 285 (1948) seem

federal circuit court decisions also support the idea of a sixth amendment right to self-representation.<sup>31</sup> Respect for individual autonomy was considered paramount over the interest in a just outcome.<sup>32</sup>

Considering the amendment's historical background, the majority of state constitutions, and a broad range of decisional law, the Court ruled that the sixth amendment does guarantee the right of self-representation in criminal trials.<sup>33</sup> The rights guaranteed by the sixth amendment are "fundamental and essential" and therefore obligatory upon the states by the fourteenth amendment.<sup>34</sup>

There are some logical difficulties with the Court's conclusion. Critics of the decision in *Faretta* point out that at early common law the *pro se* defense was not identified as a right, but rather as the only defense the law recognized.<sup>35</sup> Moreover, the English developments subsequent to 1791 are only helpful insofar as they accurately interpret common law prior to 1791. The Supreme Court has stated that the Judiciary Act of 1789,<sup>36</sup> passed by a Congress which included many members of the Constitutional Convention, is to be regarded as "a contemporaneous exposition of the highest authority."<sup>37</sup> It can be argued, however, that the failure of Congress to specifically include the right of self-representation in the sixth amendment, when that right had been specifically included in the statute, indi-

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supportive since it contrasts the defendant's "constitutional prerogative" of being present at trial with his "recognized privilege" of conducting his own defense. Furthermore, in *Price* the Court found that "[a] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Id.* In *Carter v. Illinois*, 329 U.S. 173, 174-75 (1946), the Court noted:

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.

Again, *Carter* dealt with a defendant who had already waived counsel, the Court noting that the Constitution does not require counsel. The Court did not say the defendant has a constitutional right to self-representation.

31. Cases cited note 13 *supra*.

32. Particularly unequivocal is the following statement:

[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 and if he makes the choice 'with eyes open.' *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965).

33. 95 S. Ct. at 2532.

34. *Id.* at 2532, 2541. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

35. See notes 1 & 2 *supra*. See generally Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970).

36. Ch. 20, § 35, 1 Stat. 92.

37. *Patton v. United States*, 281 U.S. 276, 300-01 (1930).

brates the intent of Congress that the right of self-representation in criminal trials be only statutory.<sup>38</sup> Furthermore, in *Singer v. United States*, the Supreme Court found that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”<sup>39</sup> The majority in *Faretta* accepted this view that rights should not be mechanically inferred, but nevertheless concluded that *Singer* is distinguishable by the different historical background of the right involved.<sup>40</sup>

There is authority for the view that there is no constitutional right to defend *pro se* and that the court has considerable discretion to refuse the defendant permission to discharge counsel.<sup>41</sup> This view is based on the idea that a layman, even if intelligent, lacks the skill and knowledge to prepare adequately his own defense. The government’s goal in a criminal trial should be to promote justice, rather than simply satisfy the defendant’s requests or win the case.<sup>42</sup> This contradicts the attitude that respect for individual autonomy requires allowing the defendant to harm himself and go to jail “under his own banner.” Moreover, the very fact that no such right has previously been explicitly recognized by the Supreme Court militates against such use of the fourteenth amendment in the absence of a strong case.<sup>43</sup>

The decision in *Faretta* raises several difficult procedural problems. First, the decision by the accused to proceed *pro se* must be made “knowingly and intelligently.”<sup>44</sup> However, no specific guidelines were given.<sup>45</sup> While there is authority that the complexity of the offense charged would be a legitimate consideration,<sup>46</sup> the Court in *Faretta* noted that the accused’s “technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.”<sup>47</sup> Other questions arise as to the weight of the trial judge’s ruling on the waiver,<sup>48</sup> the

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38. See Note, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U.L.Q. 679, 686.

39. 380 U.S. 24, 34-35 (1965). In *Singer* the defendant waived trial by jury, but the government refused to consent, and the Court therefore denied the waiver under FED. R. CRIM. P. 23(a).

40. 95 S. Ct. at 2533 n.15.

41. Cases cited note 14 *supra*.

42. See *Berger v. United States*, 295 U.S. 78, 88 (1935); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

43. See *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

44. 95 S. Ct. at 2541.

45. See generally Annot., 97 A.L.R.2d 549, 563 (1964); Annot., 149 A.L.R. 1403, 1409-13 (1944).

46. See *McNeal v. Culver*, 365 U.S. 109, 111 (1961); *Cash v. Culver*, 358 U.S. 633, 637 (1959).

47. 95 S. Ct. at 2541.

48. See *Sanders v. United States*, 373 U.S. 1, 19 (1963) (trial judge’s belief that the defen-

role of intelligence tests,<sup>49</sup> and unruly defendants.<sup>50</sup> No guideline is given as to what instructions the trial court must give the defendant.<sup>51</sup> Nor is it clear whether the defendant must be allowed to relieve his counsel and begin defending *pro se* in mid-trial.<sup>52</sup>

dant acted intelligently and with understanding not conclusive); *Johnson v. United States*, 318 F.2d 855, 856 (8th Cir. 1963) (question found to be usually one of fact).

49. See *Hines v. United States*, 254 A.2d 408, 410 (D.C. Ct. App. 1969), where intelligence tests were held not determinative of competence.

50. Cf. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1970); *People v. Allen*, 37 Ill. 2d 167, 226 N.E.2d 1, *cert. denied*, 389 U.S. 907 (1967) (violent defendant apparently may be barred from representing himself). See generally *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963); Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964).

51. One set of instructions was set forth in *Von Moltke v. Gillies*, 332 U.S. 708 (1948):

[The] . . . duty of a federal judge to protect the constitutional rights of an accused "cannot be discharged as though it were a mere procedural formality" . . . . [To be a valid waiver of counsel the waiver must be made] with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Id.* at 722, 724.

*But see Hodge v. United States*, 414 F.2d 1040, 1044 (9th Cir. 1969); *Cox v. Burke*, 361 F.2d 183, 186 (7th Cir.), *cert. denied*, 385 U.S. 939 (1966), where courts held *Von Moltke* to be only a guideline in the event of a guilty plea.

See *United States v. Harrison*, 451 F.2d 1013 (2d Cir. 1971) (waiver of right to counsel requires specific instructions to the accused informing him of his rights); *United States v. Gutterman*, 147 F.2d 540, 542 (2d Cir. 1945) (request to proceed *pro se* must be unequivocal). *But see Quicksall v. Michigan*, 339 U.S. 660, 665-66 (1950) (not necessary that there be a record showing that counsel was offered when defendant had prior experience in court and judge believed him to be acting of free will and with clear understanding).

52. There is authority that the defendant must make his decision at the outset. *People v. Ephraim*, 411 Ill. 118, 103 N.E.2d 363, *cert. denied*, 343 U.S. 930 (1952); *People v. Jones*, 11 Mich. App. 703, 704, 162 N.W.2d 152, 153 (1968); *State v. Sinclair*, 49 N.J. 525, 552, 231 A.2d 565, 579 (1967); *Application of Trevithick*, 81 S.D. 121, 127, 131 N.W.2d 440, 443 (1964); cf. *United States v. Catino*, 403 F.2d 491, 497-98 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969); *United States v. Bentvena*, 319 F.2d 916, 938 (2d Cir. 1963); *United States ex rel. Pugach v. Mancusi*, 310 F. Supp. 691, 715 (S.D.N.Y. 1970), *aff'd per curiam*, 441 F.2d 1073, *cert. denied*, 404 U.S. 849 (1971); *Seale v. Hoffman*, 306 F. Supp. 330, 332 (N.D. Ill. 1969). *But see United States ex rel. Davis v. McMann*, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968) where the court found:

[A] defendant may not through a deliberate process of discharging retained or assigned counsel whenever his case is called for trial subvert sound judicial administration by such delaying tactics . . . . Though a defendant has a right to select his own counsel if he acts expeditiously to do so . . . he may not use this right to play a "cat and mouse" game with the court . . . or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel. *Id.* at 618-19.

*Accord, United States v. Private Brands, Inc.*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*,

While many may hail the decision in *Faretta* as a victory in the field of individual rights, it is based on a questionable analysis of common law and legislative history<sup>53</sup> and a weak assembly of decisional support.<sup>54</sup> Furthermore, the exercise of this right may create serious procedural difficulties. It leaves the *pro se* defendant at the mercy of his own ignorance since he is entitled to no special consideration by the court.<sup>55</sup> It leaves the courts at the mercy of the ensuing procedural confusion. On the other hand, the decision's negative impact may be mitigated by the intervention of amicus curiae to guide a defendant who exercises his right of self-representation.<sup>56</sup> The ultimate impact of the Court's decision will obviously depend on how frequently the right of self-representation in criminal trials is exercised.

R. C. J.

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355 U.S. 957 (1958); *United States v. Mitchell*, 137 F.2d 1006, 1010-11 (2d Cir.), *cert. denied*, 321 U.S. 794 (1943).

53. See notes 4 & 38 *supra*.

54. See note 30 *supra*.

55. See *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967), *vacated on other grounds*, 391 U.S. 367 (1968); *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1949); *People v. Chessman*, 38 Cal. 2d 166, 238 P.2d 1001 (1952).

56. In *United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972), a "friend of the court" was appointed to aid the accused in the event he requested assistance. But the attorney's role must not be too conspicuous.