CRIMINAL LAW—THE RIGHT TO DEFEND PRO SE IN CRIMINAL PROCEEDINGS—*Faretta v. California*, 422 U.S. 806 (1975).

I. INTRODUCTION

"If there is any truth to the old proverb that '[o]ne who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself."[1] This dissent of Justice Blackmun in *Faretta v. California* stands in sharp contrast to the majority opinion of the United States Supreme Court, which holds that a defendant in a state criminal trial has a constitutional right to proceed *without* counsel if he voluntarily and intelligently elects to do so.[2]

On June 21, 1972, Anthony Pasquall Faretta was charged with grand theft in an information filed in the Superior Court of Los Angeles County, California. The court initially appointed the public defender's office to represent Faretta, but upon the request of the defendant,[3] the judge agreed to let Faretta proceed pro se. Faretta's waiver of the assistance of counsel was accepted with the admonition that this ruling might be reversed if it appeared that the defendant lacked the competency to represent himself.

Several weeks later, the court revoked Faretta's right to self-representation and reassigned the public defender's office to the case. The judge ruled that Faretta's failure to show satisfactory competence in a make shift evidence and procedure test[4] rendered his waiver of counsel invalid. In addition, the court held that the defendant had no constitutional right to conduct his own defense.[5] Faretta's subsequent motions for leave to act as co-counsel were rejected, and he

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[1] Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

[2] *Id.* at 807.

[3] Faretta disclosed that he did not want the public defender's office to represent him because of their "heavy caseload." *Id. See* Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1498-1507 (1971), and Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 930, 932 (1972) for discussion of the various reasons why a defendant would want to proceed pro se.

[4] 422 U.S. at 808 n.3.

[5] *Id.* at 809-10 n.4. The court based this ruling on People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972) *cert. denied*, 410 U.S. 944 (1973), which held that as a matter of both California and federal constitutional law a defendant has no right to defend pro se. For commentary on *Sharp* see Note, *Where Is The Constitutional Right to Self-Representation and Why is The California Supreme Court Saying All Those Terrible Things About It?* 10 CALIF. WESTERN L. REV. 196 (1973) and Comment, *People v. Sharp, Death Knell for Pro Se Representation in Criminal Trials in California?* 24 HAST. L.J. 431 (1973).

proceeded to trial. The jury found Faretta guilty as charged, and he was sentenced to prison. The California court of appeals affirmed on the basis of *People v. Sharp*,[6] and the California supreme court denied review.[7] The United States Supreme Court vacated Faretta's conviction and remanded for further proceedings.[8]

The purpose of this note is to analyze the practical effects of the Supreme Court's decision in *Faretta* in light of the rationale of the majority and dissenting opinions and the decisions of the various federal circuit courts that have addressed the question of a criminal defendant's constitutional right to defend pro se. This paper will focus on the procedural aspects of the right as well as substantive issues raised by *Faretta* and similar cases.

II. ANALYSIS OF *Faretta*

The Court's holding in *Faretta* rests upon two bases. First, the majority finds that the history of the sixth amendment in light of its text and subsequent interpretations, as well as the history of the right to proceed pro se in England and the United States, commands the finding that the right is protected by the sixth amendment. Second, and much more convincingly, they hold that fifth and fourteenth amendment notions of due process, especially its aspects of human dignity, support the constitutional right to defend pro se. The dissent disagrees with the majority's analysis of history and feels that the due process aspects of the right to counsel cases[9] mandate the opposite result. The dissent does not argue that a defendant can never waive his right to counsel and proceed pro se. It would give the trial judge the discretion to accept or reject a waiver rather than restricting his determination to whether the waiver was made "knowingly and intelligently."[10]

A. *Sixth Amendment Historical and Textural Rationale*

The sixth amendment provides that:

> [I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district

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[6] 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), *cert. denied*, 410 U.S. 944 (1973).

[7] *See* Brief for Petitioner at A.25, A.32; Faretta v. California, 422 U.S. 806 (1975).

[8] 422 U.S. at 836.

[9] *See* Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1962); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[10] 422 U.S. at 836-37 n.1.

> 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.

To the majority, the fact that the sixth amendment was proposed one day after the passage of section 35 of the Judiciary Act of 1789,[11] which granted defendants the right to proceed pro se in federal courts,[12] supports the proposition that the founding fathers considered the right to proceed pro se so fundamental that they must have included it in the sixth amendment's right to the "assistance of counsel" section.[13] To the dissent, this historical fact argues for the proposition that if the founding fathers had considered the right to defend pro se so critical as to be of constitutional dimensions that they would not have left it to implication.[14] The above conflict is illustrative of the historical analysis of both the majority and the dissents. None of the opinions in *Faretta* put forth a conclusive historical answer to the issue before the court.

Justice Stewart, writing for the majority, finds support for his position in three basic areas. First, the recognition by the vast majority of the states of the right to proceed pro se supports the theory that the right is so fundamental that it must be a part of the sixth amendment by implication as well as obligatory on the states through the fourteenth amendment.[15] He draws additional support from the fact that the majority of the federal circuit courts[16] as well as numerous state courts[17] hold that this right is of federal constitutional dimen-

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[11] 1 Stat. 73.

[12] This right is now codified in 28 U.S.C. § 1654, providing: "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." (emphasis added).

[13] 422 U.S. at 812-13.

[14] *Id.* at 845.

[15] *Id.* at 813-14 nn.9 & 10.

[16] Haslam v. United States, 431 F.2d 362, 365 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971); United States v. Warner, 428 F.2d 730, 734 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); Lowe v. United States, 418 F.2d 100, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); United States v. Sternam, 415 F.2d 1165, 1169-70 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir.), *cert. denied*, 384 U.S. 1007 (1965); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); MacKenna v. Ellis, 263 F.2d 35 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959). *See also* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (intimating right is constitutional).

[17] 422 U.S. at 814 n.11.

sions. Finally, through an examination of the history of the pro se defense in England and Colonial America, he argues that the founding fathers must have recognized this right by implication in the sixth amendment.[18]

The fact that various state courts and constitutions recognize the right to proceed pro se, although relevant to the issue of whether the right is inherent in fifth amendment notions of due process as well as being so fundamental that it should be incorporated into the fourteenth amendment due process clause, does not answer the more basic question of whether the *text* of the sixth amendment grants an individual the right to defend pro se.

Justice Stewart argues that the text of the sixth amendment necessarily implies the right to defend pro se in that it is phrased in terms of rights personal to the accused:

> 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.[19]

The dissenters find Stewart's rationale unpersuasive. As to the "personal" aspects of the amendment, Justice Blackmun agrees with Justice Stewart but feels "that the Sixth Amendment [does not] guarantee any particular procedural method of asserting those rights."[20] In this same vein, Chief Justice Burger comments:

> [b]oth the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of the cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense.[21]

Stewart derives further support from prior Supreme Court interpretations of the sixth amendment. Citing dicta in *Adams v. United*

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[18] *Id.* at 821-32.
[19] 422 U.S. at 819.
[20] *Id.* at 848.
[21] *Id.* at 840.

States ex rel. McCann,[22] *Snyder v. Massachusetts*,[23] and *Price v. Johnston*,[24] he argues that the Supreme Court has at least implicitly recognized the right to proceed pro se. *Adams* addressed the issue of whether a pro se defendant could waive his right to a jury trial. The Court held:

> [A]n 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.[25]

The majority seems to pass over the phrase "with the considered approval of the court" while dissenters pick up on this phraseology and argue that this language supports their interpretation of the language of the sixth amendment.[26] In *Price*, the Court, in holding that a convicted person has no absolute right to argue his own appeal, remarked that this holding was in "sharp contrast" to his recognized privilege of conducting his own defense at trial.[27] *Price* characterizes the pro se defense as a privilege rather than a right, which would seem to intimate some amount of trial court discretion in its operation.[28] The dictum in *Snyder*, which held that the confrontation clause of the sixth amendment gives the accused the right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence, lends support to the majority interpretation of the sixth amendment. The Court based its holding on the theory that "[the] defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supercede his lawyers altogether and conduct the trial himself."[29] Here, the element of discretion seems to be missing.[30] However, this dictum is only weak support in light of the fact that *Adams* and *Price* are post-*Snyder* cases. Thus, close examination of *Adams*, *Snyder*, and *Price* would seem to support the dissenters' view as to the inter-

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[22] 317 U.S. 269 (1942).

[23] 291 U.S. 97 (1934).

[24] 334 U.S. 266 (1948).

[25] 317 U.S. at 275 (emphasis added).

[26] The majority recognizes that, at any rate, *Adams* is not dispositive of the issue before the court since that case held only that a defendant *may* waive counsel; it did not address the issue of whether the state *must* accept that waiver. 422 U.S. at 814-15.

[27] 334 U.S. at 285-86 (emphasis added).

[28] *See also* Carter v. Illinois, 329 U.S. 173, 174-75 (1946).

[29] 291 U.S. at 106.

[30] *See also* Moore v. Michigan, 355 U.S. 155, 161 (1957).

pretation of the text of the sixth amendment, although this line of inquiry, like most of the historical analysis of the Court, is inconclusive.

Stewart also engages in an examination of English history in an attempt to support his theory that the right to defend pro se was so ingrained in the experience of the founding fathers that they must have had it in mind when they wrote the sixth amendment.[31] His heavy reliance on the infamous Star Chamber is unfortunate since it precludes more rational inquiry into the question at hand. Justice Stewart cites the Star Chamber as the only tribunal in the history of British criminal jurisprudence that forced counsel upon an unwilling defendant in a criminal proceeding.[32] He then goes on to cite authorities that find this institution to be a classic symbol of disregard of basic individual rights.[33] This part of Stewart's historical analysis has more shock value than anything else since the dissenters' position is merely that defendant's right to defend pro se is at the discretion of the trial judge, not absolute, and is thus subject to review under an abuse of discretion theory.[34] They are not advocating a practice analogous to the Star Chamber. The majority then engages in a long chronicle of the development of the right to counsel in England and concludes that the right to self-representation has been judiciously protected.[35] Stewart sums up this section of the opinion by citing *R. v. Woodward*[36] as stating the common law rule that, "no person charged with a criminal offense can have counsel forced upon him against his will."

A similar analysis is made of the history of self-representation in the American colonies.[37] The Court cites various charters, declarations, and constitutions that guaranteed the right to self-representation.[38] It argues that no instances have been found where a colonial court imposed counsel on a defendant in a criminal case, and it points out that the overwhelming colonial practice was self-representation.

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[31] 422 U.S. at 821-26.

[32] *Id.* at 821.

[33] L. FRIEDMAN, A HISTORY OF AMERICAN LAW at 23 (1973). *See also* 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 155-214 (1927).

[34] 422 U.S. at 836-37 n.1.

[35] 422 U.S. at 825-26.

[36] [1944] K.B. 118, [1944] 1 All E.R. 159.

[37] 422 U.S. at 826-32.

[38] *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY at 129, 131, 170, 271, 276, 278, 282, 301, 316, 323, 338, 342, 371 (1971).

Stewart's colloquy on the history of self-representation is impressive, but it must be viewed with caution in light of past historical analysis of the Court in the right to counsel area,[39] and the strong possibility that the question before the Court in *Faretta, i.e.* whether a state must accept a defendant's waiver of the assistance of counsel, was simply not addressed by the framers of the Constitution. In addition, at least one commentator on the English history of self-representation in felony and treason cases does not view pro se representation as a grant of a right, but as a tryannical practice used to keep power in the crown.[40] Indeed, the English refused to grant a defendant the right to *retained* counsel until the mid-nineteenth century.[41] It can be argued that the tyrannical practice of enforced self-representation is what the founding fathers had in mind when the sixth amendment was being discussed. Read in light of the fact that several state constitutions explicitly granted the right to self-representation[42] and that the Judiciary Act of 1789[43] granted a statutory right, a plausible argument can be made that the founding fathers intended to raise only the right to the assistance of counsel to a constitutional level and to leave the question of self-representation, in Chief Justice Burger's words, "to the judgment of legislatures and the flexible process of statutory amendment."[44]

Thus, both a sixth amendment historical and textual argument can be made in support of a federal constitutional right to defend pro se. However, this line of argument is inconclusive. A far more convincing and conclusive rationale for raising to a constitutional level the right to proceed pro se is put forth in *Faretta's* fifth and fourteenth amendment due process analysis.

B. *Due Process Rationale: The Human Dignity Argument Versus the Necessity of Counsel To Achieve Procedural Fairness*

Without question, the Court's decision in *Faretta* cuts against the rationale of the various right to counsel cases.[45] Those cases are

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[39] *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) *with* Betts v. Brady, 316 U.S. 455 (1942).

[40] Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1190-92 (1970).

[41] W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 9 (1955).

[42] 422 U.S. at 829-30 n.38.

[43] *See* note 11, *supra.*

[44] 422 U.S. at 845.

[45] *See* note 9, *supra.*

based on the fundamental premise that, without counsel, there is little chance for a criminal defendant to receive the fair trial guaranteed by due process.[46] However, there is more to procedural due process than simply insuring the reliability of the guilt determining process. It is also necessary to insure that respect is shown for the dignity of the individual.[47] The majority in *Faretta* recognizes the conflict that the right to defend pro se engenders between these two competing notions of procedural due process, and chooses to emphasize the human dignity aspects of due process:

> 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."[48]

The dissenters find this argument unpersuasive in light of the strong *state* interest in seeing that justice is done:

> [the] prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of the public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel . . . . The system of criminal justice should not be available as an instrument of self-destruction.[49]

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[46] The rationale of these cases is best summed up by the widely cited statement of the Supreme Court in Powell v. Alabama, 287 U.S. 45, 69 (1932):

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

[47] Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 347-48 (1957).

[48] 422 U.S. at 834 (citations omitted).

[49] *Id.* at 839-40 (citations omitted).

The dissenters reason that the state's interest in a fair trial is stronger than the defendant's interest in human dignity. However, in applying their balancing test, the dissenters ignore the fact that a fair trial will not necessarily be achieved when counsel is forced upon a defendant who has "knowingly and intelligently" waived such assistance. It is not clear that appointed counsel can do an adequate job when a defendant is unwilling to cooperate with him and their relationship is characterized by distrust. Furthermore, it is very likely that forcing counsel upon an unwilling defendant will undermine the appearance of a just result. The courts must be conscious of how society views the fairness of its processes. The specter of a defendant loudly proclaiming that he is being railroaded to "justice" does not bode well for society's view of the courts or the defendant's prospects for rehabilitation.

In *Faretta*, the dissenters argue that the facts of this case lend support to their position in that the defendant did not object to the defense his appointed counsel gave him, and all indications are that there was a fair trial.[50] However, the petitioner's brief does allege that trial tactic conflicts existed between the defendant and his appointed counsel, which were not a subject of appeal because of the lack of an appealable factual record.[51] This type of off-the-record conflict as to trial tactics is undoubtedly common and poses a problem for a frustrated pro se defendant who is forced to accept the decision of his unwanted counsel.[52] These conflicts often relate to procedural fairness in ways that are not apparent on the record, *e.g.*, the calling or failure to call certain witnesses and the type of defense presented. Thus they are not subject to appellate review in a normal due process context. The defendant's only remedy for a trial that is allegedly procedurally unfair because of attorney-client conflict is to base his appeal on the theory of ineffective assistance of counsel. This method of review imposes a heavy burden on the defendant[53] and is inadequate in its protection of the defendant's right to plan and control his defense. A required appointment of counsel assumes that the lawyer will, in all

[50] *Id.* at 836-37 n.1.

[51] Brief for Petitioner at 43 n.36.

[52] *See* Brookhart v. Janis, 384 U.S. 1, 7-8 (1966), Henry v. Mississippi, 379 U.S. 443, 451 (1965); Fay v. Noia, 372 U.S. 391, 438 (1963). However, there are certain decisions that only the defendant can make: Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea); Patton v. United States, 281 U.S. 276, 312 (1930) (waiver of right to jury trial).

[53] Y. KAMISAR, W. R. LAFAVE, & J.H. ISRAEL, MODERN CRIMINAL PROCEDURE, at 60-63 (4th ed. 1974).

cases, provide a better defense than the pro se defendant could on his own, which is not necessarily the case.

On this point, *Faretta* is readily distinguishable from the cases of *Singer v. United States*[54] and *Santobello v. New York*,[55] cited by the dissenters with approval. In *Singer*, the Court held that a defendant did not have an absolute right to waive trial by jury. The Court stated "[w]e find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."[56] The defendant in *Singer* who is forced to yield to a jury trial *will* get what the constitution guarantees him. As discussed above, such is not necessarily the case when a defendant is forced to accept counsel who has the power to make binding decisions and little or no rapport with the defendant's desires. Likewise, the holding of *Santobello* that a trial judge has discretion to decline a guilty plea is not directly applicable. A defendant who is denied the opportunity to plead guilty, thereby waiving most all of his constitutional rights,[57] is accorded due process at a subsequent trial. This is not necessarily so in the case of the denial of the right to defend pro se.

Therefore, it must be concluded that the dissenters' emphasis on procedural fairness as outweighing the majority's human dignity argument is misplaced. However, this is not to say the dissenters' procedural fairness argument is without merit. Indeed, it demands strong consideration. Nevertheless, a strict reading of the majority opinion lends the procedural fairness issue less support than it should be given. The majority fails to grant the defendant the right to proceed as co-counsel or an absolute right to advisory counsel. As will be discussed more thoroughly later, these options would go a long way toward protecting the procedural fairness of the trial while at the same time protecting the defendant from undue infringement on his right to proceed pro se.

The majority does not provide an answer for the severe burden that the right to proceed pro se places on the due process notions of procedural fairness. They simply hold that the human dignity aspects

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[54] 380 U.S. 24 (1965).

[55] 404 U.S. 257 (1971).

[56] 380 U.S. at 36.

[57] Tollett v. Henderson, 411 U.S. 258 (1973).

of due process outweigh it. While it is true the pro se litigant's defense may be more procedurally fair than if counsel is forced upon him, this will be true only in a small minority of cases. The fact remains that the ordinary layman is simply not competent to present a defense that would be termed adequate by due process standards. Among other deficiencies, he lacks the skill to cross examine witnesses, grapple with the intricacies of the exclusionary rules and adequately digest and present the defenses that may be available to him.[58] The procedural fairness aspects of due process are too ingrained in the American system[59] to be undercut by the all or nothing approach of the *Faretta* majority. The human dignity argument of the majority is a convincing one, but the ultimate holding of the Court infringes on notions of procedural fairness to an unnecessary extent.

Thus it appears that the Court's decision really turns on the human dignity aspects of procedural due process. On its face, it would appear to be in serious conflict with fundamental notions of procedural fairness. However, the Court does qualify this seemingly absolute right to proceed pro se in various ways. These qualifications, along with those made by the various federal circuit courts that have addressed the issue of the constitutional dimenstions of the right to defend pro se, are the subject of the next section of this note.

III. WHAT WILL BE THE IMPACT OF *Faretta* BOTH PROCEDURALLY AND SUBSTANTIVELY?

> [A]ny new problem where past formulations of wants appear to suggest contrary lines of action requires an examination of alternative modes of action in the context of the problem presented to ascertain the wanted or valued solution. So viewed, what is demanded is not so much the resolution of conflicting values as the accommodation of values—rendering our ultimate wants consistent with our action by ascertaining the common denominator of those tentative want formulations that have arisen from past solutions to other problems.[60]

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[58] *See* L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 21-30 (1973), setting out in greater detail the functions that counsel performs for the criminal defendant and illustrating the inability of almost all criminal defendants to adequately perform those functions.

[59] *See* note 9, *supra*.

[60] Kadish, *supra* note 47, at 348.

The common denominator of both the majority and dissenting opinions in *Faretta* is the striving for procedural justice with minimum imposition on the rights of the individual. The opinion raises many questions. Some of the issues have been resolved by the federal circuit courts, but others have not or demand re-examination in light of *Faretta*. This note will now focus on several issues to see if they can be, or have been, resolved in line with the common denominator that runs through *Faretta*.

A. *Must the Court Advise a Defendant of his Constitutional Right To Proceed Pro Se?*

While it is clear that a defendant must be advised of his right to counsel,[61] it is not equally clear that the defendant must be advised of his right to defend pro se. The courts that have addressed the issue generally feel there is no need to advise the defendant of this right unless there is some indication that the defendant is leaning in that direction. This view stems mainly from fears that are echoed in the *Faretta* dissent, *i.e.* a reversal for failure to advise defendant of this right will undercut the rationale behind the right to counsel cases,[62] and give a convicted defendant the opportunity to reverse an otherwise valid conviction.[63] It seems clear that a convicted defendant should not be allowed to use this notice requirement as a reversal tool. Thus as to the retroactivity of *Faretta*, notice to the defendant of his right to defend pro se should not be required. However, in light of the fact that the lower courts now have a definitive United States Supreme Court opinion to guide them, it would seem that the Court's human dignity argument would require notice in all future cases. The Court's objective in *Faretta* is for the defendant to make a voluntary and intelligent choice as to how his defense should be conducted. It is hard to see how a defendant can accept counsel, with all the consequences that acceptance has,[64] if he is unaware of an alternative method of defense that is also constitutionally guaranteed. Otherwise, it would be a hollow constitutional right, available only to the sophisticated. It must be concluded that the rationale of *Faretta* demands

[61] *See* note 9, *supra*.

[62] *See* note 9, *supra*.

[63] *See* United States v. Jones, 514 F.2d 1331 (D.C. Cir. 1975); United States *ex rel.* Soto v. United States, 504 F.2d 1339 (3rd Cir. 1974); United States v. White, 429 F.2d 711 (D.C. Cir. 1970); United States v. Clausell, 389 F.2d 34 (2d Cir. 1968).

[64] *See* note 53, *supra*.

that a defendant must be advised of his constitutional right to proceed pro se.

B. *How and When Must the Right To Proceed Pro Se Be Asserted?*

This aspect of the *Faretta* opinion is not very clear, but it is clear that the defendant must make a valid waiver of the assistance of counsel before he can assert his right to proceed pro se.[65] The Court cites with approval the waiver standards of *Johnson v. Zerbst*[66] and *Von Moltke v. Gillies*,[67] *i.e.* the waiver must be "knowing and intelligent."[68]

The requirement of waiver of the assistance of counsel is in line with the thinking of the federal circuit courts who have recognized the constitutional dimensions to the right to defend pro se.[69] *United States v. Dujanovic*[70] adds the important idea that it is essential for the judge to personally advise the defendant of the nature of the charge, penalties, etc., on the record to insure that the waiver is "knowing and intelligent."[71]

A clear question and answer waiver, *on the record*, would be invaluable to appellate courts on review and thereby reduce the dilemma the dissent envisions for the trial judge who must determine whether the defendant "knowingly and intelligently" waived his right to counsel with the specter of reversal lurking regardless of his conclusion. Also, a probing waiver colloquy may help to discourage those defendants who are overly encouraged by the judge advising them of

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[65] 422 U.S. at 832.

[66] 304 U.S. 458 (1938).

[67] 332 U.S. 708 (1948).

[68] *See* Von Moltke v. Gillis, 332 U.S. 708, 723-24 (1948), where Justice Black (for a plurality of the court) described what steps a trial judge should take in ascertaining whether the defendant has validly waived the assistance of counsel as follows:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such 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.

[69] *See* note 16, *supra*.

[70] 486 F.2d 182 (9th Cir. 1973).

[71] *See* Hodge v. United States, 414 F.2d 1040, 1048-49 n.E (9th Cir. 1969) (Ely J., dissenting) for a good example of the type of colloquy a judge should engage in with the defendant.

their rights to defend pro se and help to achieve the voluntary and intelligent decision that is prescribed by *Faretta.*

With regard to a valid waiver of the assistance of counsel, it must be remembered that this requirement does not allow the judge to engage in the type of inquiry that the trial judge engaged in in *Faretta. Faretta* emphasized that technical legal knowledge is not relevant to the assessment of whether the defendant made a knowing waiver of his right to counsel.[72] The fact that technical legal knowledge is not needed does not undercut the necessity of a valid waiver of the assistance of counsel. It will not be enough that a defendant has asserted his right to self representation. He must be truly informed of the consequences[73] of this assertion before the court can allow him to proceed pro se.[74]

The fact that *Faretta* requires a valid waiver of the assistance of counsel illustrates how much the real rationale is based on due process as opposed to a sixth amendment textual or historical argument. It would seem that if a textual and historical interpretation of the sixth amendment were the real basis of the right to defend pro se, this right would not be subordinate to a valid waiver of the "assistance" of counsel.[75] It is indeed a novel reading of the constitution that requires two textually granted rights to be mutually exclusive. This requirement undoubtedly represents *Faretta's* attempt to balance the competing due process values of procedural fairness and human dignity. However, as will be discussed *infra*, this is not the only way to

[72] 422 U.S. at 835. Justice Stewart asserts that the defendant must waive the assistance of counsel in accordance with the *Von Moltke* guidelines yet he insists that the court cannot deny a defendant the right to proceed pro se because he lacks the legal ability. It seems that a court must examine a defendant's legal knowledge in order to comply with the *Von Moltke* standard. Thus, these two aspects of *Faretta* appear to be somewhat contradictory. The practical effect of this conflict may well be to undercut the *Von Moltke* test and reduce the determination to whether the defendant is mentally capable of understanding and appreciating the consequences of his waiver. The standard of mental competency needed would arguably be the competency to stand trial that the Supreme Court discusses in Jackson v. Indiana, 406 U.S. 715 (1972). However, it seems that the standard should be somewhat higher since the defendant must not only stand trial, but also present a defense to the charges. *See* Dusky v. United States, 362 U.S. 402 (1960); Burt, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L.R. 66 (1972); and Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967); for further discussions of competency to stand trial.

[73] *See* notes 86 and 97, *infra* and accompanying text.

[74] *But see* United States v. Rosenthal, 470 F.2d 837, 845 (2d Cir. 1972); United States *ex rel.* Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975); where the Second Circuit felt that the constitutional dimensions of the right to proceed pro se allow the court to accept a waiver of the assistance of counsel if the "factual background" of the waiver is sufficient despite the judge's failure to give "explicit warning and advice."

[75] 422 U.S. at 820.

balance these two goals and indeed may be a very inefficient method of achieving the desired result.

In addition to the requirement that a valid waiver of the assistance of counsel be made, it has been held that a defendant who desires to defend pro se must make an unequivocal demand to do so.[76] This seems to be a rational requirement that will help to avoid frivolous appeals that worry the dissenters in *Faretta*. It will make the right to defend pro se less of a tool for the defendant who is bent on overturning a valid conviction by whatever means possible.

As to when a defendant must assert his right to proceed pro se, the definitive federal circuit court opinion is *United States ex rel. Maldonado v. Denno*.[77] In that case the court stated:

> The right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial. Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being riven to the trial judge's assessment of this balance.[78]

Maldonado is widely followed, but it is not clear that the distinction made between the assertions of the right before the trial begins and during the trial is valid in light of *Faretta*. One of the cornerstones of *Faretta* is the fear of counsel representing the defendant in a manner the defendant strongly disagrees with.[79] Thus it would seem that *Faretta* would demand extreme deference to a defendant's assertion of his right to defend pro se even after the trial begins. This seems especially compelling in light of the fact that a defendant has no absolute right to appointed counsel of his choice or to require appointment of new counsel in the wake of a mid-trial disagreement with court appointed counsel.[80] Also, the delay that would justify the trial judge's refusal to appoint new counsel in the middle of the trial is not present when the defendant elects to proceed pro se.

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[76] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965); Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973).

[77] 348 F.2d 12 (2d Cir. 1965).

[78] *Id.* at 15 (citations omitted). *See also* Butler v. United States, 317 F.2d 249 (8th Cir. 1963).

[79] 422 U.S. at 820-21.

[80] *See* Grano, *supra* note 40 at 1181 nn.28 & 29 (collecting authorities).

Presumably, the defendant will be able to continue with only a minimal amount of delay. On balance, it is hard to find any more compelling reason for denying a defendant the right to proceed pro se during the trial than there is before the trial.[81]

C. *Can the Right to Defend Pro Se Be Waived by the Later Actions of the Defendant?*

The Court in *Faretta* makes it quite clear that a criminal defendant who engages in deliberate disruptions of the proceedings can have his or her pro se defense terminated if the extent of the disruptions warrants.[82] The circuit courts are in agreement with this qualification.[83] In theory, the judge's discretion to terminate a defendant's pro se defense for disruptions seems clear, but it can be a difficult factual question to determine when the defendant's disruptions are serious enough to justify termination of the pro se defense. In *United States v. Price*[84] the Ninth Circuit reversed the trial court's refusal to let a defendant proceed pro se when the right was not asserted until after the trial began. The Ninth Circuit found unimpressive the government's argument that defendant's disruptive conduct before he asserted the right justified denial. Therefore, when dealing with disruptive conduct, a great deal of discretion must be given to the trial judge's decision. Failure to do so will impede the trial judge to an extent not sanctioned by *Faretta. Faretta's* clear command is that, at times, the dignity of the courtroom must stand above even the defendant's constitutional rights.[85]

D. *What Amount of "Assistance" Can the Trial Court Give to the Pro Se Defendant Without Unduly Infringing on his Right To Defend Pro Se?*

Extending assistance to a pro se defendant can take many forms, two of which will be treated here. First, it seems clear that a trial

[81] In United States v. Price, 474 F.2d 1223 (9th Cir. 1973), *rehearing denied*, 484 F.2d 485 (1973), the court reversed on an abuse of discretion theory when the request to defend pro se was denied because the jury had been seated. *See also* United States v. Garcia, 517 F.2d 272, 277 n.4 (5th Cir. 1975), a post-*Faretta* case where the court felt that *Faretta* cast doubt on the line of cases that said the right to proceed pro se after the trial had begun was not absolute.

[82] 422 U.S. at 834-35 n.46; *See also* Illinois v. Allen, 397 U.S. 377 (1940).

[83] *See* United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

[84] 474 F.2d 1223 (9th Cir. 1973), *rehearing denied*, 484 F.2d 485 (1973).

[85] *See* note 82, *supra.*

judge should not step into the role of advocate and present the case for the pro se defendant even if the defendant requests it. It is not proper for the judge to step out of his impartial role, and he clearly has no such duty.[86] However, in minor areas such as the preciseness of the pleadings, the Supreme Court has recognized that pro se defendants should not be held to strict compliance with formalistic rules.[87] More importantly, the courts have recognized that the judge has the power to appoint an attorney advisor to *assist* the pro se defendant.[88] In fact, Chief Justice Burger has termed this an absolute right of the trial judge.[89] However, the courts have been careful to temper this right with the qualification that the advisor is not to be used to supercede the pro se defense, but is to be used only if the defendant asks for his assistance. The court cannot short circuit the defendant's pro se defense by working through the attorney advisor.[90] There is controversy over the amount of assistance that the pro se defendant can receive from his advisory counsel and one court has held that if a defendant accepts substantial aid from advisory counsel he may be deemed to have "waived" his right to proceed pro se.[91]

The courts' power to appoint an attorney advisor is another illustration of the courts' struggling to accommodate the two competing requirements of due process, *i.e.* the human dignity aspects versus those of procedural fairness. These requirements would be better balanced if the courts were *required*, as a matter of due process, to appoint standby counsel to *assist* the pro se defendant. This requirement would not overly burden the defendant's right to defend pro se as long as the use of the advisory counsel is totally at the option of the defendant and the court does not try to act through advisory counsel as opposed to the defendant. This would be especially helpful

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[86] United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975). *See also* Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).

[87] Haines v. Kerner, 404 U.S. 519 (1972). *See also* United States v. Odom, 423 F.2d 875, 877 (9th Cir. 1970).

[88] United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); United States v. Spencer, 439 F.2d 1047, 1051-52 (2d Cir. 1971); Brown v. United States, 264 F.2d 363, 369 (D.C. Cir. 1959) (Burger, J., concurring opinion), *cert. denied*, 360 U.S. 911 (1959). *See also* 422 U.S. at 934-35 n.46.

[89] Mayberry v. Pennsylvania, 400 U.S. 455, 467-68 (1971) (concurring opinion).

[90] United States v. Price, 474 F.2d 1223 (9th Cir. 1973), *rehearing denied*, 484 F.2d 485 (1973); Bayless v. United States, 381 F.2d 670 (9th Cir. 1967).

[91] United States v. Condor, 423 F.2d 904 (6th Cir. 1970). *But see* Mayberry v. Pennsylvania, 400 U.S. 455, 467-68 (1970) (Burger, C.J., concurring) where it was stated that advisory counsel may "perform all the services a trained advocate would perform ordinarily by examination and cross examination of witnesses, objecting to evidence and making closing argument."

in light of the fact that the judge may be forced to terminate the defendant's pro se representation because of disruptions. Also, during the course of the proceedings the defendant may decide that he really wants and needs the full assistance of counsel. If there is standby counsel, the judge would not be forced to deny defendant's attempt to renege on his assertion of his right to defend pro se on the grounds of undue delay.[92] The appointment of advisory counsel would accommodate the competing values that divided the Court in *Faretta*.[93]

E. *The Scope of the Pro Se Defendant's Right to Act as Co-Counsel*

In light of *Faretta*, a pro se defendant may argue that he is entitled, as a matter of due process, to the assistance of counsel, to be used as he deems necessary, on the theory that his pro se defense will be rendered ineffective without such assistance. In *Haslam v. United States*,[94] the Ninth Circuit held that the removal of counsel's assistance was not error because the defendant showed no prejudice resulting from that action. This was a backhand way of saying that the defendant must be given at least minimal assistance. It would seem that the constitutional dimensions of the right to proceed pro se that were recognized in *Faretta* would demand a closer examination of the right of a defendant to act as co-counsel than has previously been the case. The courts have recognized that the judge, at his discretion, may allow a defendant to act as co-counsel. Angela Davis[95] and Lynette "Squeaky" Fromme[96] were both allowed, at some point, to proceed as co-counsel. However, the courts have rejected the argument that a right to proceed as co-counsel exists, holding it to be in the discretion of the judge.[97] The rationale behind these decisions is not very clear, but at least several seem to be based

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[92] *Faretta* does not hold that the appointment of advisory counsel is a constitutional necessity, but the opinion does not have to be extended very far to reach that result.

[93] *See* Comment, *Defense Pro Se*, 23 U. MIAMI L. REV. 551, 562 (1969).

[94] 431 F.2d 362 (9th Cir. 1970) *cert. denied* 402 U.S. 976, *aff'd on rehearing*, 437 F.2d 955 (1971). In *Haslam*, the pro se defendant, a prisoner, was given access to a typewriter, telephone and the county law library. The court revoked these privileges when it was found that the defendant was ripping pages out of lawbooks and using improper credentials to make long distance calls. The defendant had advisory counsel available at all times.

[95] People v. Davis, No. 3744 (Cal. Super. Ct., Marin County, filed Nov. 10, 1970) (unreported opinion).

[96] TIME, 106: 43, Nov. 10, 1975.

[97] *See* Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1491-92, 1507-13 (1971); Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 929-30, 940 (1972) (*collecting authorities*).

on the theory that the right to proceed pro se is merely *correlative* to the right to the assistance of counsel.[98] Also, the courts are impressed by the fact that section 35 of the Judiciary Act of 1789[99] provides an either/or situation. Two post-*Faretta* cases have held in accord with the above, but they also failed to enter into a reasoned analysis of the question.[100]

The Court in *Faretta* clearly rejected the idea that the right to defend pro se is merely a *correlative* right to that of the assistance of counsel.[101] It found the right to have an independent basis in the sixth amendment as well as strong support in the human dignity aspects of due process. The only qualifications on the right relate to procedural fairness. Therefore, it is hard to see how giving a defendant the option to proceed as co-counsel is not in complete accord with the rationales of both the *Faretta* majority and dissents. It will enable the pro se defendant to present a procedurally effective defense, while preserving his right to control his defense. If we allow the defendant to choose one or the other means of presenting his defense, why not accommodate the values inherent in both methods and let him choose a hybrid method of representation?

The only major problem with the absolute right to act as co-counsel theory is deciding who is to be in charge of the defense.[102] *Faretta* would answer this by saying that the defendant remains in command, but this presents many practical problems. Hopefully, this problem can be worked out by the defendant yielding some strategic

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[98] *See* United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); United States v. Condor, 423 F.2d 904 (6th Cir. 1970).

[99] 1 Stat. 73.

[100] United States v. Lang, No. 75-1524 (4th Cir. Nov. 4, 1975); United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975).

[101] 422 U.S. at 819-20 n.15.

[102] Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which will be made in circumstances which will not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client "plucks at his sleeve" offering gratuitous suggestions. Some decisions, especially as to which witnesses to call and in what sequence and what should be said in argument to the jury, can be anticipated sufficiently so that counsel can ordinarily consult with his client concerning them. Because these decisions require the skill, training and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that he should completely ignore his client in making them. The lawyer should seek to maintain a cooperative relationship at all stages, while maintaining also the ultimate choice and responsibility for the strategic and tactical decisions in the case.

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control of his defense in return for the assurance that he will be able to play a meaningful part in it.

Angela Davis aptly sums up the needless dilemma that an individual is placed in by an all-or-nothing approach to the pro se defense:

> I consider my own participation decisive for my defense. One might argue that since I am determined to play an active role in the trial, I should fire my lawyers and assume the entire burden of the defense. This is to say, if I wish to exercise my constitutional right to defend myself, I must relinquish the right to counsel. This either/or situation flies blatantly in the face of justice. Rigorously speaking, neither is a *right*, if one must be renounced in order to exercise the other. Should I be penalized because I do not possess the legal knowledge, experience or expertise necessary to proceed entirely *pro se*?[103]

F. *Can a Defendant Attack his Waiver of Counsel on Appeal on the Theory that his Resulting Pro Se Defense Was Totally Inadequate?*

In regard to the issue of whether a defendant properly waived the assistance of counsel, the Court in *Johnson v. Zerbst*[104] limits the inquiry to whether the waiver of counsel was "knowingly and intelligently" made. The manner in which the defendant subsequently conducted his defense is immaterial to the issue of whether he made a valid waiver of the assistance of counsel. *Faretta* is in accord with this theory.[105] However, both of these cases seem directed at the issue of whether the *conduct* of the defendant was such as to be deemed a denial of the effective assistance of counsel. They do not address the issue of the amount of assistance the court must give the pro se defendant in order to insure that his trial is conducted in accord with due process.

If the defendant voluntarily elects to proceed pro se, he should not be allowed to turn his voluntary choice into a clever tool for reversal. The trial judge's task in deciding whether a defendant has properly asserted his right to proceed pro se is difficult enough without adding another complicating factor. However, this part of *Faretta* should not be used to preclude inquiry, on appeal, into the

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[103] A. DAVIS, IF THEY COME IN THE MORNING 253 (1971).
[104] 304 U.S. 458, 468 (1938).
[105] 422 U.S. at 834-35 n.46.

type of issue discussed above, *i.e.* what amount of assistance is the pro se defendant entitled to as a matter of fifth and fourteenth amendment due process.

Again, it should be emphasized that problems in this area could be minimized by requiring court appointment of advisory counsel and giving the defendant the option to proceed as co-counsel if he so desires. If this is done, the pro se defendant has no real grounds on which to rest his appeal since the legal assistance was available for the asking. Moreover, this will help maintain at least the *appearance* of a fair trial when the pro se defendant, on appeal, points out that his pro se defense was a "farce and mockery."

G. Can Denial of the Right to Proceed Pro Se Ever Be Deemed Harmless Error?

The United States Supreme Court in *Chapman v. California*[106] recognized that some denials of constitutional rights can be deemed harmless error. *Faretta* left this issue open although it can be argued that the failure to uphold Faretta's conviction is an implicit recognition of the idea that *Chapman* is not applicable to the denial of the right to proceed pro se. *Chapman* acknowledges that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error . . . ."[107] The Court indicated that deprivation of such rights as the right against the use of coerced confessions, the right to counsel and the right to an impartial judge are examples of areas where the harmless error doctrine can never be applied.[108]

In *People v. Sharp*,[109] the California supreme court used the *Chapman* emphasis on rights "so basic to a fair trial" to hold that even if the right to proceed pro se is of constitutional dimensions, it does not follow that a reversal for denial of that right is automatic. *Sharp* held that unless a trial judge abuses his discretion in not accepting the waiver of the assistance of counsel, "a refusal for good cause to give effect to a waiver accords to the accused the very thing the constitution expressly guarantees him."[110] In accord with *Sharp* is the Second Circuit Court of Appeals.[111] Other circuits have found

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[106] 386 U.S. 18 (1967).

[107] *Id.* at 23.

[108] *Id.*

[109] 7 Cal. 3d 448, 499 P.2d 489 103 Cal. Rptr. 233 (1972), *cert. denied*, 410 U.S. 944 (1973).

[110] 103 Cal. Rptr. at 237.

[111] United States v. Abbamonte, 348 F.2d 700, 704 (2d Cir. 1965). *But see* United States

no need to reverse without a showing of prejudice, but they seem to be referring to the situation where the right to proceed pro se is deemed to only be of statutory dimensions.[112]

In radical contrast to *Sharp* is the opinion of the District of Columbia Circuit in *United States v. Dougherty*,[113] which intimated that the right was of constitutional dimensions and proceeded to give a cogent rationale of why the *Chapman* harmless error doctrine was inapplicable:

> [A] salient aspect of the *pro se* right . . . is directed to considerations distinct from the objective of achieving what would be the best result in the litigation from a lawyer's point of view . . . . It is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause . . . . The denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that the defendant's practical position has not been disadvantaged.[114]

The rationale of the court in *Dougherty* complies with the *Faretta* Court's concern for protection of human dignity. Also, a rejection of the harmless error rationale seems particularly compelling in light of the fact that it will be very difficult for a defendant to show prejudice in the way appointed counsel conducted his defense. Unless we want to encourage disruptive courtroom activities, most of the conflicts between a defendant and his unwanted counsel will remain off the record. The application of the harmless error doctrine to *Faretta* will effectively emasculate a constitutional right that the Supreme Court found sufficiently compelling to articulate in a case where there was no record of conflict between the defendant and his appointed counsel. Thus it must be concluded that the harmless error doctrine should not be applied to a denial of the right to proceed pro

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v. Plattner, 330 F.2d 271 (2d Cir. 1964).

[112] Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); Butler v. United States, 317 F.2d 249 (8th Cir. 1963).

[113] 473 F.2d 1113 (D.C. Cir. 1972). *See also* Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973); United States v. Pike, 439 F.2d 695 (9th Cir. 1971).

[114] 473 F.2d 1113, 1128 (D.C. Cir. 1972).

se. The application of the doctrine would effectively dispense with that right at the whim of the trial court.

IV. CONCLUSION

Faretta v. California is a step forward for criminal justice if it is read in light of the circuit court decisions discussed above and if trial courts, regardless of a constitutional requirement to do so, appoint advisory counsel to assist the pro se defendant. Also, the indigent defendant should be extended the option of acting as co-counsel with his appointed counsel and the nonindigent defendant should be extended the same option with regards to his retained counsel.

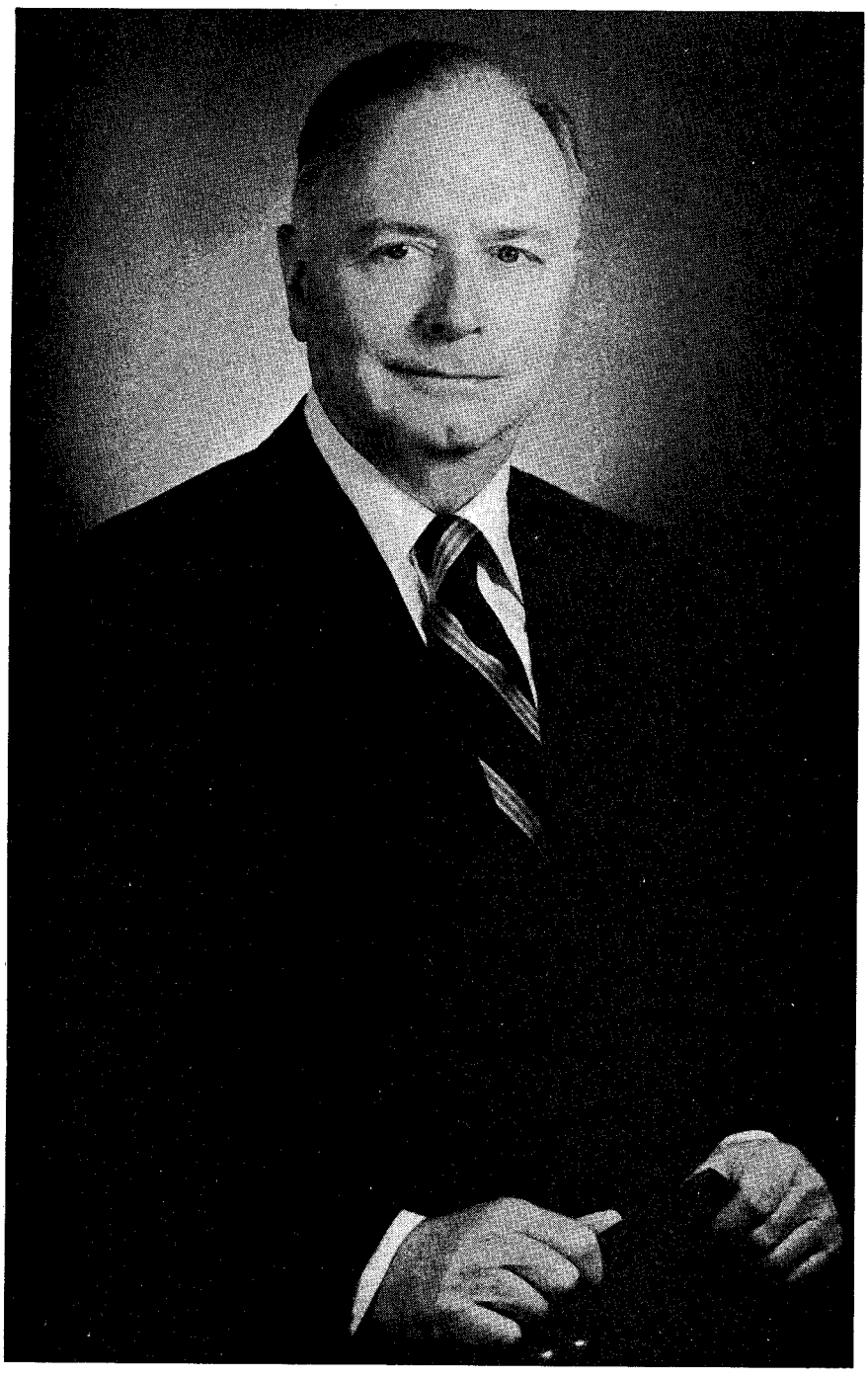
Faretta requires that the trial judge both protect a defendant's right to proceed pro se, and insure the right to the assistance of counsel is not irrationally waived. As the dissenters point out, conducting a criminal trial is a solemn duty in which the state must insure that procedural fairness is achieved. The procedural safeguards discussed above go a long way towards preserving the fairness and integrity of the judicial process as well as protecting the defendant's right to conduct his own defense.

In the final analysis, the paramount concern is individual freedom. The following admonition of Justice Frankfurter, although not dispositive of the case before the Court in *Faretta*, stands as a fine summary of the spirit of the constitution that guided the Court in *Faretta*.

> What were contrived as protections for the accused should not be turned into fetters . . . .
> . . . When the administration of the criminal law in the federal courts 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.[115]

Mark S. Coco

[115] Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942).



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