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Pro Se Defense--Due Process: Faretta v. California, 422 U.S. 806 (1975)

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DUE PROCESS—PRO SE DEFENSE

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

On June 30, 1975, the United States Supreme Court handed down a decision in *Faretta v. California,*[1] which dealt with the right of an accused in a state criminal trial "to make a defense as we know it."[2] The Court held that a criminal defendant possesses an affirmative right of self-representation, which is implied in the sixth amendment[3] and incorporated into the fourteenth amendment through the due process clause.[4] The right of self-representation is independent of the guarantee of assistance of counsel, and a defendant who knowingly and intelligently refuses counsel and insists upon conducting his own defense may not be deprived of that right by the trial court.

Faretta involved an indigent criminal defendant who claimed that he would be prejudiced by the public defender's heavy case load. Following his arraignment on a charge of grand theft in the Superior Court of Los Angeles, Anthony Faretta applied to the judge for permission to dispense with the services of the appointed public defender and to represent himself. The court reluctantly granted his request but subsequently called a hearing to inquire into Faretta's ability to conduct his own defense. After questioning the defendant as to his knowledge of the hearsay rule and *voir dire* procedures, the judge ruled that he had not made a knowing and intelligent waiver of his right to counsel,[5] and that he had no constitutional right to conduct his own defense.[6] Faretta's later request to act as co-counsel was denied, as were his motions for the appointment of counsel other than the public defender. The trial court, having heard the case presented by the public defender, convicted Faretta and sentenced him to prison. The California court of appeals upheld the ruling against self-representation and affirmed the conviction,[7] and the California Supreme Court denied review.

[1] 422 U.S. 806 (1975).

[2] *Id.* at 818. In another decision rendered on the same day. Herring v. New York, 422 U.S. 853 (1975), the Court found that the right to make a defense includes the right to make a summation. In *Herring* the Court struck down a New York statute, N.Y. CRIM. PRO. LAW § 320.20(3) (c) (McKinney 1971), which permitted the judge in a nonjury criminal trial to deny counsel permission to make closing arguments, thereby violating the defendant's sixth amendment guarantee of the right to assistance of counsel in his defense.

[3] 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 . . . 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.

[4] Not all rights guaranteed in the Bill of Rights against infringement by the federal government are automatically incorporated into the due process clause of the fourteenth amendment. Palko v. Connecticut, 302 U.S. 319 (1937). In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held the sixth amendment right to assistance of counsel obligatory upon the states, and in Pointer v. Texas, 380 U.S. 400 (1965), the sixth amendment guarantee of confrontation was made applicable to the states. Once the federal right is found to apply to the states, the distinctions between federal and state requirements disappear.

[5] The standard for waiver of counsel in federal criminal trials was delineated in Johnson v. Zerbst, 304 U.S. 458 (1938). In this case, the defendants were indicted on one day and without benefit of counsel were arraigned, tried, convicted and sentenced to the penitentiary two days later. The Supreme Court found no merit in the Government's contention that, since the defendants had proceeded to trial without requesting counsel, they had waived the right. The Court held that the trial judge has the responsibility of determining whether an accused has competently, knowingly and intelligently waived the right to counsel, and that this determination should appear on the record. *See also* Carnley v. Cochran, 369 U.S. 506 (1962), where the Court found that the principles of *Johnson v. Zerbst* are, under the fourteenth amendment, equally applicable to asserted waivers of the right to counsel in state criminal proceedings.

[6] 422 U.S. at 811–12.

[7] Both lower courts relied upon a recently-decided California Supreme Court decision, People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), which had determined that a defendant in a criminal proceeding has no right of self-representation under either the California or United States Constitutions. In *Sharp,* the accused advised the trial court through his court-appointed attorney that he wished to represent himself but also desired to have a lawyer "sit by me and give me a little advice." The court denied his request. The state supreme court affirmed, holding that although the United States Supreme Court had recognized the right to waive counsel, the fact that it had imposed conditions on the right of waiver gave that right less stature than the constitutional right which was being waived.

Although not material to the case, it is interesting to note that while *Sharp* was in the courts, California amended article 1, section 13 of its constitution to delete any right to self-representation and to give the legislature power to

Justice Stewart, writing for the majority,[8] noted the existence of a firm foundation in California rules of procedure upon which the California courts based their decision.[9] Nevertheless, he found a federal constitutional right of self-representation, supported by a history of self-representation in both England and the United States. That right has been protected by statute in federal courts since the Judiciary Act of 1789,[10] enacted by the First Congress. The Court noted that "with few exceptions," the states also recognize a right of self-representation. Thirty-six states have adopted constitutional provisions to that effect,[11] and in addition, many state courts have found a federal constitutional right.[12]

Conceding that the United States Supreme Court has never explicitly held that the right exists, Justice Stewart cites several prior decisions which, he argues, imply or support a constitutional right to represent oneself. In *Adams v. United States ex rel. McCann*,[13] the Court recognized that the right of assistance of counsel implies a "correlative right to dispense with a lawyer's help," while in *Snyder v. Massachusetts*,[14] Justice Cardozo for the majority wrote that the confrontation clause gives the accused the right to be present where fundamental fairness requires it, "for it will be in his power . . . even to supersede his lawyers altogether and conduct the trial himself." In *Price v. Johnston*,[15] the Court

require a defendant in a felony case to have the assitance of counsel.

[8] Justices Douglas, Brennan, White, Marshall and Powell joined in the opinion.

[9] 422 U.S. at 812 n.8. The California courts' decisions were based on several "not unusual" rules of procedure: (1) a criminal defendant has no right to appointed counsel of his choice; (2) the defendant is bound by the decisions of his attorney; and (3) a conviction is valid except where counsel is so incompetent as to make of the trial "a farce and a sham."

[10] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92, *as amended* 28 U.S.C. § 1654 (1970):

> 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.

[11] 422 U.S. at 813. These states are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin.

[12] *Id.* at 813–14.

[13] 317 U.S. 269, 279 (1942). This was a case in which the defendant was charged with using the mails to defraud. He insisted upon representing himself, and after the trial court determined that he was educated, articulate, and had studied some law, he was permitted to conduct his own defense. He waived trial by jury, and was found guilty as charged and sentenced to the penitentiary. On appeal he claimed that his uncounselled waiver of jury trial was invalid. The Supreme Court, relying on Johnson v. Zerbst, 304 U.S. 458 (1938) (*see* note 5 *supra*) and Patton v. United States, 281 U.S. 276 (1930) (in which a unanimous court affirmed the power of a defendant to waive trial by jury), found that the waivers of counsel and of jury were voluntarily, knowingly and intelligently made, and therefore not violative of the sixth amendment. Justice Frankfurter, writing for the Court, did not reach the issue of an affirmative right to self-representation, and it is not clear whether he would find one:

> 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.

317 U.S. at 275 (emphasis added).

Faretta narrows the possible interpretations of what is meant by "the considered approval of the court," and imposes on a judge the duty to acquiesce in a defendant's request to waive counsel so long as the waiver is knowing and intelligent, and the defendant is competent to make the choice.

[14] 291 U.S. 97 (1934). Snyder and his companions were convicted of the murder of a gas station attendant. On appeal Snyder claimed a denial of due process under the fourteenth amendment because at trial the judge had not permitted him to be present while the jury, accompanied by judge, prosecutor and defense counsel, viewed the scene of the crime. Justice Cardozo distinguished between the "privilege of presence" and the "privilege of confrontation," noting that due process requires the privilege of presence only as fairness dictates; the privilege of confrontation is guaranteed as a fundamental right which does not depend on fairness. The privilege of presence at trial is assured to a defendant by the sixth amendment when his presence "bears a relation . . . to his opportunity to defend." *Id.* at 106.

[15] 334 U.S. 266, 285 (1948). In this case, a federal prisoner, alleging that he had been convicted by the knowing use of false testimony, prepared his own petitions for habeas corpus. The district court denied his petitions and he appealed to the Court of Appeals for the Ninth Circuit, asking for an order directing his appearance in court so that he might argue his appeal. The court of appeals held it was without power to make such an order. In a five-to-four decision, the Supreme Court held that the court had discretionary power to call for the appearance of the prisoner for oral argument. Justice Murphy, writing for the majority, raised but did not answer the question of the prisoner who refuses the aid of counsel:

> The difficulty, of course, arises when one of the parties is a prisoner who has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues . . . . [O]rdinarily the court cannot designate counsel for the prisoner without his consent.

Id. at 280.

found no absolute right of a defendant orally to argue his own appeal, in "sharp contrast" to his "recognized privilege of conducting his own defense at the trial." And in *Carter v. Illinois*,[16] the Court stated: "Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant."[17]

Justice Stewart points out that federal appellate courts have frequently recognized the existence of a constitutional right of self-representation.[18] He cites in particular the holding of the Second Circuit in *United States v. Plattner*,[19] in which the court held that the sixth amendment right to assistance of counsel is a right supplemental to the other rights guaranteed to the defendant and inferior to "the absolute and primary right to conduct one's own defense *in propria persona*."[20]

The majority also found support for its holding in the structure of the sixth amendment itself: the rights to notice, confrontation and compulsory process constituting "the right . . . to make a defense as we know it." These three rights are personal to the accused; they are granted not to his counsel but to him. Thus, the sum of these rights—*i.e.*, the right to make a defense—is also personal to the accused. This right to make one's own defense augments the right to assistance of counsel; it arises generally from the sixth amendment, not merely from the assistance of counsel clause. A lawyer who has been accepted by the defendant may bind that defendant by his decisions, but the lawyer's right to appear at all stems solely from the defendant's consent. If the defendant refuses to give consent, he nevertheless retains a full right to present his own defense in the way he perceives to be in his own best interest. Thus, concludes Justice Stewart, the natural interpretation of the sixth amendment is to imply a right of self-representation which is personal to the accused and may be waived only by him.[21]

In supporting the majority decision, Justice Stewart examines the history of British criminal justice. He notes that no tribunal other than the nefarious Star Chamber has ever required counsel for an unwilling defendant and points out that early common-law practice included self-representation in prosecution for serious crime. The right of counsel developed slowly, and even after it received recognition in civil and misdemeanor cases, it was forbidden for treason or felony.[22] Thus, the right to make a defense was synonymous with the right to appear

[16] 329 U.S. 173, 174–75 (1946). Carter was an uneducated indigent who in the absence of counsel entered a plea of guilty to an indictment for murder. He was found guilty and sentenced to prison for ninety-nine years. Justice Frankfurter for the majority found that the trial judge's attestation that the defendant, with his rights explained, consciously chose to dispense with counsel is sufficient to satisfy due process. The *Carter* majority distinguished that case from Rice v. Olson, 324 U.S. 786 (1945), where the record contained specific allegations bearing on the competence of the defendant to stand trial without the aid of counsel. Four dissenting justices in *Carter* complained of the absence in the record of affirmative evidence of the competence of the defendant and of an intelligent waiver.

[17] As the dissent in *Faretta*, 422 U.S. at 840 (Burger, C. J., dissenting) points out and Justice Stewart concedes, the language cited by the majority is dicta. In both *Adams* and *Carter* the accused, having insisted upon the right to act without a lawyer, was permitted by the trial court to do so. Both defendants later sought to have their convictions set aside, Adams because of an uncounselled waiver of jury and Carter because of an uncounselled guilty plea. The Court found that each defendant had properly waived the assistance of counsel. In *Snyder* the Court held that a defendant has no absolute right to be present with his counsel at a view by the jury, and in *Price* the Court decided that a federal prisoner has no absolute right to appear in person for oral argument before the appellate court. In none of the cited cases was the defendant denied permission to dismiss his court-appointed attorney and to represent himself at trial, so that an affirmative right of self-representation was not in issue.

[18] 422 U.S. at 816.

[19] 330 F.2d 271 (2d Cir. 1964). The defendant was convicted of transporting a stolen automobile in interstate commerce. He filed a petition for a writ of error *coram nobis* alleging his guilty plea had been induced by a prosecutor's unfulfilled promise. The judge granted a rehearing and, without Plattner's consent, appointed an attorney for him, thus refusing the defendant's request to represent himself. The appellate court held that a defendant in the trial of a criminal case, including a *coram nobis* proceeding, has the right to conduct his case *pro se*. Judge Medina for the majority found the right to arise from the sixth amendment, not merely from the federal statute (*see* note 10 *supra*):

> This statute gives more elaborate expression to the meaning of the terse language of the Bill of Rights and indicates, we think, the Constitutional right to "the assistance of counsel" was intended to include the rights of defendants in criminal cases "to plead and manage their own causes personally."

330 F.2d at 274.

[20] *Id.* As the Chief Justice points out in *Faretta*, no other federal appellate court case cited by the majority found a violation of a right to self-representation. 422 U.S. at 843.

[21] *Id.* at 832.

[22] *Id.* at 823. None of the rights which are regarded as basic to a fair adversary proceeding—the rights to notice, confrontation, compulsory process, or assistance of counsel—were available in sixteenth and seventeenth century England to persons accused of serious crimes. *Cf.* 5 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 190–94 (1924); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1898).

pro se. Modern British law clearly recognizes an affirmative right of self-representation.[23]

The American colonists took for granted the right of self-representation, and coupled this with a healthy distrust of lawyers. As a result, no state or colony, prior to the drafting of the sixth amendment, had ever forced counsel upon an unwilling defendant. "The right to counsel was clearly thought to supplement the primary right of the accused to defend himself, utilizing his personal rights to notice, confrontation and compulsory process." Justice Stewart provides an exhaustive list of colonial and early state court decisions and state constitutional provisions which protected the right of self-representation, and concludes that the sixth amendment, adopted in this climate, "necessarily implies the right of self-representation."[24]

The majority concedes that the basic premise of the right to counsel cases,[25] including *Powell v. Alabama,*[26] *Johnson v. Zerbst,*[27] *Gideon v. Wainwright,*[28] and *Argersinger v. Hamlin,*[29] is that the assistance of counsel is essential to assure a fair trial. But the Court in *Faretta* lays greater stress on the defendant's freedom of choice, and declares that the notion of compulsory counsel is repugnant to our ideas of personal liberty:

> [I]t is one thing to hold that every defendant, rich or poor, has the right to assistance of counsel,[30] and quite another to say that a State may compel a defendant to accept a lawyer he does not want.... To force a lawyer on a defendant can only lead him to believe that the law contrives against him.[31]

Although a trial judge may not force an attorney upon a defendant who has clearly and competently waived assistance of counsel, he must determine whether the waiver was knowingly and intelligently made; he must make the accused aware of the

[23] King v. Woodward, [1944] 1 K.B. 118 (C.A. 1943). The defendant's appointed counsel was changed shortly before trial and the defendant, in the belief that new counsel was not well prepared, asked to be allowed to conduct his own defense. The request was refused. The British court held that the accused "was refused what we think was his right to make his own case to the jury instead of having it made for him by counsel."

[24] 422 U.S. at 832.

[25] In a line of cases from Powell v. Alabama, 287 U.S. 45 (1932) to Argersinger v. Hamlin, 407 U.S. 25 (1972) the Court expanded the application of the sixth amendment right to counsel clause to indigent defendants in state criminal prosecutions, holding that the states have a duty to provide counsel for those who cannot afford to hire a lawyer.

[26] 287 U.S. 45 (1932). In this case, seven young blacks were charged with the rape of two white girls. All the defendants were illiterate and residents of states other than Alabama. No lawyer was named or definitely designated by the Alabama trial court to represent them at their trials. Moreover, each trial began six days after indictment and was completed within a single day. All the defendants were found guilty as charged and sentenced to death. The Court on appeal found that forcing the defendants to trial without providing adequate time for them to obtain counsel and prepare a defense is not consistent with due process of law, and that:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

Id. at 71.

[27] 304 U.S. 458 (1938). *Johnson* held that unless properly waived, the assistance of counsel is a necessary element of the trial court's jurisdiction to proceed to conviction and sentence. *See* note 5 *supra.*

[28] 372 U.S. 335 (1963). The indigent defendant had been indicted for breaking and entering with intent to commit a misdemeanor, a felony offense. The court denied his request that an attorney be appointed for him, ruling that the state need provide counsel only in a capital case. The Supreme Court held that the sixth amendment right to counsel extends to all felony prosecutions, not merely those for capital offenses, and is essential to due process of law:

> [I]n our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

Id. at 344.

[29] 407 U.S. 25 (1972). This indigent defendant was charged with carrying a concealed weapon, a misdemeanor offense punishable under Florida law by up to six months' imprisonment and a $1000 fine. Unrepresented by counsel, he was tried before a judge without a jury, convicted, and sentenced to ninety days in jail. The Supreme Court held that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at trial. Justice Douglas in his majority opinion stated: "The assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* at 31.

[30] 422 U.S. at 833. This oblique reference is the only place in the opinion where Justice Stewart alludes to the notion of equal protection which underlies the right to counsel cases.

[31] *Id.* In his majority opinion in Mayer v. City of Chicago, 404 U.S. 189 (1971), concerning an indigent's right to obtain a free transcript of his trial for use on appeal from a misdemeanor conviction, Justice Brennan voices a similar theme:

> "Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts." Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.

Id. at 197–98, *quoting* Murphy, *The Role of Police in our Modern Society,* 26 RECORD OF N.Y.C.B.A. 292, 293 (1971).

dangers of dispensing with trained counsel; and he must establish an affirmative record that the waiver was properly effected in accordance with the waiver test of *Johnson*[32] and *Adams*.[33] The defendant's legal knowledge and skills are irrelevant to this determination, since the only matter at issue is the defendant's competence to make the choice, not his competence to conduct his defense.[34]

The minority, on the other hand, finds the Constitution silent on a right of self-representation and reminds us of former Chief Justice Warren's view in *Singer v. United States*:[35] "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." The crux of the minority position is the notion that a layman is not capable of conducting his own defense, nor is he capable of judging whether he may safely dispense with an attorney. The three minority Justices feel that basic to the holdings in the right to counsel cases is the premise that the right to counsel is not supplementary, but integral to the defense of an accused, and may be essential to fundamental fairness. Rather than a strict rule, the Court should approve a case-by-case determination. One function of the trial judge should be to determine whether justice requires the rejection of an attempted waiver of counsel.

In his dissenting opinion,[36] joined by Justices Blackmun and Rehnquist, Chief Justice Burger points out that the prosecution in our adversary system is "more than an oridnary litigant" and that, in the pursuit of justice, judge and prosecution are legitimately concerned with the quality of the representation of the accused at trial. The goal of our system of criminal justice is "ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." In the absence of explicit language in the sixth amendment granting a right of self-representation, the amendment guarantees "the fullest possible defense," including the power of the trial judge in his discretion to refuse to accept a waiver of counsel, just as he possesses the discretion to refuse to accept a plea of guilty.[37] A defendant's lack of technical legal skills is very much in point, as it does not serve justice to permit the defendant freedom of choice simply because he superficially understands what he is doing. "The system of criminal justice should not be available as an instrument of self-destruction."[38]

The Chief Justice takes issue with the majority's interpretation of prior cases. He argues that the Court's reliance on the dicta in *Adams*[39] and *Carter*[40] is misplaced; that these cases merely deal with the consequences of waiver and not with an affirmative right of self-representation. All that *Adams* and *Carter* mean, according to the Chief Justice, is that a defendant who waives counsel may not afterwards claim that his uncounselled actions are constitutionally defective. *Snyder*[41] is also declared irrelevant; a defendant's right to supersede his lawyers is rooted by Justice Cardozo in notions of fundamental fairness, not in the confrontation clause. The Court in *Price*[42] made a distinction between the "constitutional prerogative" to be present at trial and the "recognized privilege" of self-representation, implying that the latter stems only from the statute.[43] *Plattner*,[44] the only cited appellate court case in which the right to defend *pro se* was at issue, is a decision which the Chief Justice considers to be "largely based on a misreading of *Adams* and *Price* which the Court perpetuates in its opinion today."[45]

Most of the history which the Court examines is dismissed by the Chief Justice as irrelevant. The only historical fact he finds significant is that the text of the sixth amendment, proposed one day after the

[32] 304 U.S. 458. *See* note 5 *supra*.

[33] 317 U.S. 269. *See* note 13 *supra*.

[34] 422 U.S. at 836.

[35] 380 U.S. 24, 34-35 (1965). In federal district court, the defendant offered to waive trial by jury in order to shorten the trial. The prosecution objected, and the defendant was convicted by a jury. In a unanimous decision, the Court held that the Constitution does not grant criminal defendants a right to have their cases tried before the bench.

[36] 422 U.S. at 836.

[37] The Chief Justice cites Santobello v. New York, 404 U.S. 257 (1971), in which he wrote the majority opinion. In this case, the defendant entered a plea of guilty in reliance upon a promise made by the prosecutor. A new prosecutor breached the bargain, and the defendant sought to withdraw his plea. The Justices were unanimous in holding that plea bargaining when properly administered should be encouraged, but split on the proper relief in this case. Five Justices held that the state should have the option of determining the proper remedy, while four Justices felt that the defendant must be permitted to withdraw his plea. In the course of his opinion, the Chief Justice, in discussing FED. R. CRIM. P. 11, wrote: "There is, of course, no absolute right to have a guilty plea accepted . . . . A court may reject a plea in the exercise of sound judicial discretion." *Id.* at 262.

[38] 422 U.S. at 840.

[39] 317 U.S. 269 (1942). *See* notes 13 and 17 *supra*.

[40] 329 U.S. 173 (1946). *See* note 16 *supra*.

[41] 291 U.S. 97 (1934). *See* note 14 *supra*.

[42] 334 U.S. 266 (1948). *See* note 15 *supra*.

[43] Compare Justice Cardozo's discussion of "the privilege" of presence and "the privilege" of confrontation of witnesses in Snyder v. Massachusetts, 291 U.S. at 107.

[44] 330 F.2d 271 (2d Cir. 1964). *See* note 21 *supra*.

[45] 422 U.S. at 843.

Judiciary Act[46] was signed, does not explicitly guarantee a right of self-representation. Mention of the right in the Act and its omission from the amendment leads to the conclusion that the omission was intentional. Furthermore, if the right of self-representation had been considered by the framers to be so important as to require constitutional protection, it appears to the Chief Justice highly unlikely that they would have left it to implication.

Chief Justice Burger concludes with an argument to which he is no stranger: the impact of the decision on our already-overcrowded courts. "Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered."[47] He finds the majority indifferent to these considerations, and points out that if many defendants avail themselves of this new right, their inexperienced handling of their defense may cause trials of longer duration which are more subject to reversal in the appellate courts.

Justice Blackmun, joined by the Chief Justice and Justice Rehnquist in his dissenting opinion,[48] is also concerned about the effect on our criminal justice system of the constitutionalization of the right to self-representation, particularly the possibility of frequent procedural confusion. Closely analyzing the Court's reasoning as to a sixth amendment source of the right, Justice Blackmun disagrees with the majority's position that "because the accused has a personal right to 'a defense as we know it,' he necessarily has a right to make that defense personally." Although the rights are personal, the procedural mechanism to insure them is not defined by the amendment:

> If an accused has enjoyed a speedy trial by an impartial jury in which he was informed of the nature of the accusation, confronted with the witnesses against him, afforded the power of compulsory process, and represented effectively by competent counsel, I do not see that the Sixth Amendment requires more.[49]

Historically, the evidence of a fundamental right of self-representation is inconclusive, argues Justice Blackmun. The right to self-representation was important only so long as the defendant was disqualified as a witness, as he was until the middle of the nineteenth century. With the abolition of this common-law disqualification, the *raison d'être* of the right to self-representation disappeared.[50] In addition, the Court's elaboration of the right to counsel has been based on the premise that representation by counsel is essential to insure a fair trial. Justice Blackmun urges that protection of the defendant's right of free choice is not a sufficient reason to curb the interest of the State in the administration of justice, for the solemn business of conducting a trial should not depend on the whim of the defendant.[51]

Justice Blackmun concludes with a list of procedural problems which he sees as besetting trial courts in the future when confronted with an accused who insists on defending *pro se:*

> Must every defendant be advised of his right to proceed *pro se?* 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? If a defendant has elected to exercise his right to proceed *pro se,* 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 midtrial? 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?[52]

Justice Blackmun's questions are not the only ones which are stimulated by the decision. In a joint trial of two or more conspirators, where one defendant insists upon his right of self-representation, granting that request will prejudice the rights of his co-defendants? Or if, during the course of a trial, the presiding judge determines that absence of counsel in the case before him is detrimental to the existence of a fair trial, may he then constitutionally appoint counsel over the objections of the defendant? Questions are also raised as to the rights of a defendant representing himself during the pre-trial period. One issue is whether an incarcerated defendant must be given freedom through bail, temporary release, or otherwise, to interview witnesses and to take such other steps as may be needed to prepare an effective defense.

If, as the Court in *Faretta* holds, the right to make a defense belongs exclusively to the defendant and making a defense includes a right to the assistance of counsel, then the question arises whether the trial court may justifiably exercise sole discretion over the choice of defense counsel. Does *Faretta*

[46] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92, *as amended.* U.S.C. § 1654 (1970).

[47] 422 U.S. at 845.

[48] *Id.* at 846.

[49] *Id.* at 848.

[50] *See* Ferguson v. Georgia, 365 U.S. 570 (1961), in which the Court examined the common-law rule of disqualification.

[51] 422 U.S. 849.

[52] *Id.* at 852.

imply that, after exercising his constitutional right to reject a court-appointed attorney and to manage his own defense, an accused may then exercise his constitutional right to assistance of counsel by demanding a different attorney? A similar problem is posed in that the Court has never explicitly held that a defendant has a constitutional right to *effective* counsel. But if the right to counsel belongs exclusively to the defendant, he may be deprived of his right to assistance of counsel when an attorney appointed by the court is ineffective.[53] In addition, it is clear that the constitutional right to appear *pro se* is not absolute. Under the rule of *Illinois v. Allen*,[54] a defendant who represents himself may forfeit the right to be heard at his trial by conduct which is so unruly that the court finds it necessary to gag him or to order him removed from the courtroom. What other circumstances exist under which it is possible for an accused to lose the right to represent himself?

It may be, as the Chief Justice maintains, that the Court in *Faretta* has broken new ground in finding that due process does not require the assistance of counsel. On the other hand, the decision may be understood as following logically from the equal protection notions of the right to counsel cases; *i.e.*, not that the *presence* of counsel is essential to the existence of a fair trial, but that the state must remove the unfair disadvantage to a defendant who cannot, for financial reasons alone, obtain the assistance of counsel, and that the *opportunity* for criminal defendants to obtain counsel is all that fundamental fairness requires.[55]

The prior cases do not precisely touch the issue which divides the Justices in the instant case: the scope of a trial judge's authority to deny a defendant's waiver of counsel when made voluntarily, knowingly and intelligently. The Court's holding leaves the trial judge with the same discretionary powers that he possesses with regard to other fifth and sixth amendment rights. A judge may not, for example, deny to a competent and willing defendant the opportunity to testify and thereby waive his right against self-incrimination; nor may a judge force an unwilling defendant to subpoena witnesses. In this sense, the Court appears to be saying that the right to counsel is of the same order as other sixth amendment rights and not a panacea which may be relied upon to cure the procedural ills of a criminal trial.

In holding that the individual's freedom of choice is of greater significance than the state's scheme of "ordered liberty," the Court may be attempting to alleviate some growing problems in the field of criminal defense—problems to which the Court's prior decisions have been a contributing factor. First, it is a truism that the segment of the population which is most in need of the services of the public defender is most often distrustful of the establishment. With no right to make his preference for an individual attorney binding upon the court, an indigent defendant may well regard his court-appointed attorney as part of the panoply of state power which is arrayed against him. The Supreme Court has refused to insist that a defendant haled into court on a criminal charge has no choice but to place his future in the hands of one he may regard as his adversary.

Second, it is no secret that public defenders are often inadequately prepared due to lack of time or resources.[56] But their clients may not be able to obtain redress for even the most flagrant case of incompetent representation. For example, if the representation were so unskillful as to violate due process of law, it would be a deprivation of a constitutional right within the meaning of the Civil Rights Acts. However, it is questionable that a section 1983 action[57] may be maintained. The circuits

[53] In dissenting from the notion that an accused must be permitted to conduct his defense personally, Justice Blackmun appears to recognize a due process right to effective counsel. *Id.* at 848.

[54] 397 U.S. 337 (1970). In this case, the defendant, appearing *pro se* during his trial for robbery, engaged in repeated disruptive behavior. At the judge's order, he was removed from the courtroom and the trial continued, the defendant being represented by appointed counsel. In holding that the right to attend trial may be lost by misconduct, Justice Black for the majority listed three "constitutionally permissible" ways for a trial judge to handle an obstreperous defendant: (1) bind and gag him; (2) cite him for contempt; and (3) have him removed from the courtroom until he promises to behave.

[55] *See also* Lane v. Brown, 372 U.S. 477 (1963), in which the Court invalidated Indiana's procedure in denying to an indigent defendant the ability to himself obtain a transcript of his *coram nobis* proceeding while requiring that a transcript is necessary in order to perfect an appeal. This placed the power to appeal completely in the hands of the public defender, who in his discretion could refuse to procure the transcript.

[56] *Cf.* Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y. 1973), where the court held that indigent defendants were denied effective assistance of counsel guaranteed by the sixth amendment because public defenders were overburdened by excessive caseloads.

[57] Civil Rights Act, 42 U.S.C. § 1983 (1970) provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

are in conflict whether a public defender or other court-appointed attorney acts under color of state law and, if he does, whether he has quasi-judicial immunity for his actions during trial.[58] Quasi-judicial immunity may also be raised as a bar to a state action in tort.[59]

Finally, the holding in *Fuller v. Oregon*[60] validating state recoupment statutes leaves the indigent accused open to the possibility of being compelled to assume the burden of paying fees to an attorney he neither wanted nor hired, a burden no other criminal defendant must assume. He is also exposed to the possibility of going to prison for that debt, a consequence of the Court's approval of the Oregon statute's provision that parole might be revoked in the case of a parolee who defaulted on his obligation. Constitutionalizing the right to represent oneself is one method of limiting those possibilities. However, when to the rule in *Fuller* (that a state may compel an indigent defendant who subsequently becomes solvent to pay for legal services during trial) is added the *Faretta* doctrine (that there is no constitutional necessity to provide counsel for a defendant who wishes to represent himself), a "chilling effect" on exercise of the right to counsel may be preceived. There will, of course, be no way of knowing how many, if any, indigent defendants will in the future opt for self-representation to avoid the possibility of later-imposed fees.

While it is arguable that a *pro se* defendant is more likely to lose at trial than one represented by counsel,[61] the Court in *Faretta* has refused to interpret the right to counsel cases to mean that presence of counsel is essential to the existence of a fair trial. It has instead held that (1) due process is satisfied by the exercise of free choice by an accused; (2) the trial court may not appoint counsel over the objections of a competent defendant who wishes to appear *pro se*; and (3) the trial judge's discretion as to a defendant's attempt to refuse assistance of counsel is limited by the Constitution to a determination of whether an attempted waiver of counsel is properly made. The Court has found an accused's freedom of choice to be a right superior to the State's interest in the administration of justice. Clearly, however, the state's system of justice is of legitimate concern to its courts. Thus, the immediate effect of this case will be that the courts must begin the task of laying down rules of procedure for criminal cases in which the defendant seeks to represent himself.

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[58] Some courts have found that public defenders and other court-appointed attorneys have quasi-judicial immunity from suit. *See, e.g.*, John v. Hurt, 489 F.2d 786 (7th Cir. 1973); Davis v. McAteer, 431 F.2d 81 (8th Cir. 1970). *Contra*, McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).

Others have held that court-appointed attorneys do not act under color of state law, and therefore cannot be reached under 42 U.S.C. § 1983 (1970): Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).

[59] *See, e.g.*, the view of the Seventh Circuit in applying the law of Illinois in a diversity malpractice suit: "[T]here are strong reasons of policy . . . to hold that a lawyer, who has been appointed to serve . . . in the defense of an indigent citizen accused of crime, should be immune from malpractice liability." Walker v. Kruse, 484 F.2d 802, 804–05 (7th Cir. 1973). In states in which the legislature has provided tort immunity for state employees, still another barrier may be raised.

[60] 417 U.S. 40 (1974). In this case, the indigent accused entered a guilty plea and, under a work/release program, was given a probationary sentence, the court imposing as a condition of probation that the defendant reimburse the county for fees and expenses of the attorney and investigator which the court had provided. The Supreme Court, Justice Stewart for the majority, held that there was no violation of the fourteenth amendment by the Oregon recoupment statutes, which permit this disposition. ORE. REV. STAT. §§ 161.665, .675, .685 (1971).

[61] Comment, *The Right to Appear Pro Se: the Constitution and the Courts*, 64 J. CRIM. L. & C., 240, 247–49 (1973).