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The *Faretta* Principle: Self-Representation versus the Right to Counsel

*Paul Marcus**

The United States Constitution makes provision for criminal defendants to be represented by counsel. In the federal jurisdiction this principle was vigorously applied, even to indigent persons, very early in the Twentieth Century. The United States Supreme Court, however, was reluctant to impose this requirement on the states except in cases of unusual circumstances where the absence of counsel would have affected the basic fairness of the trial. Finally, in a landmark decision by the Supreme Court, it was held that the right to counsel applies in both federal and state cases. For the past twenty years, federal and state judges have been concerned with the application of this right to counsel: the kinds of persons who are to benefit from it, the types of cases in which counsel is required, and the nature of proceedings other than trial to which the right applies.

In recent years, however, an emerging right has developed, the right of the defendant to represent himself at trial. This right was mandated by the Supreme Court in 1975 and has led to considerable confusion in both the state and federal courts. The relationship between this right and the right to counsel has posed a dilemma for judges and has created practical difficulties at trial.

In this article the basic right to counsel will be explored leading to a discussion of the right of self-representation. Ultimately, the tension between these two rights will be evaluated.

THE RIGHT TO COUNSEL

1. *The Principle is Established*

The Sixth Amendment to the Constitution provides in material part: "In all criminal prosecutions, the accused shall enjoy the right. . . . to have the Assistance of Counsel for his Defence." The problems in applying this right have rarely arisen in connection with retained counsel for affluent defendants; instead, the difficulty has been in deciding when counsel had to be provided by the government for persons who could not afford their own lawyers.¹ As

* Professor of Law, University of Illinois. The valuable research assistance of Lee Smalley, University of Illinois, College of Law, 1981, is gratefully acknowledged.

1. The Supreme Court in 1932 held that a hearing "has always included the right

Chief Justice Warren noted:

Regardless of whether petitioners would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.²

In 1938 the Supreme Court held that the Sixth Amendment meant that counsel had to be appointed for indigents in all *federal* cases. Justice Black established the indigent's right to appointed counsel quite clearly:

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court authority to deprive an accused of his life or liberty If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.³

While the federal right was thus well established, considerable question existed as to whether there was a parallel requirement for the *states*, considering that the Sixth Amendment as such was not applied to the states.⁴ In *Powell v. Alabama*⁵ the defendants were black youths who were poorly educated and were strangers in the community where they were arrested. They were hurried to trial for a capital offense without adequate opportunity to consult with counsel. In Alabama at that time the state law required the appointment of counsel for indigent defendants prosecuted for capital offenses. The Court held that under those circumstances "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process."⁶

The difficult question of the general application of the Sixth Amendment right to counsel to the states was left open in *Powell*, however.

Whether this would be so in other criminal prosecutions, or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel,

to the aid of counsel when desired and provided by the party asserting the right." *Powell v. Alabama*, 287 U.S. 45, 68, 77 L. Ed. 158, 53 S. Ct. 55 (1932).

2. *Chandler v. Fretag*, 348 U.S. 3, 9, 99 L. Ed. 4, 75 S. Ct. 1 (1954).

3. *Johnson v. Zerbst*, 304 U.S. 458, 465, 467-68, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).

4. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1883).

5. 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932).

6. 287 U.S. at 71.

and is incapable adequately of making his own defence 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. . . .⁷

In 1942, the Supreme Court resolved this right to counsel issue. In *Betts v. Brady*⁸ the petitioner was convicted of robbery in the state courts of Maryland. Because of his poverty he was unable to employ counsel and requested that the judge appoint a lawyer to represent him. The judge refused the request because at that time only defendants charged with murder or rape were entitled to appointed counsel. The Court began its discussion with the notation that the defendant's position was that in all criminal cases, whether state or federal, indigent defendants charged with crimes must be furnished counsel by the state. The Court went on to discuss the application of the Sixth and Fourteenth Amendments.

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.⁹

The Court held that the due process clause did not demand that in every case, whatever the circumstances, the state must furnish a lawyer to an indigent defendant. It was in the trial court's discretion "if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness."¹⁰ Absent unusual circumstances rising to a level of a due process violation, criminal indigent

7. *Id.*

8. 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942).

9. 316 U.S. at 461-62.

10. *Id.* at 471-72.

defendants generally do not have the right to appointed counsel in state cases.

Justice Black vigorously dissented.¹¹ He argued that the right to counsel in criminal trials was "fundamental" and that the denial of that right raised due process concerns.¹²

A practice cannot be reconciled with "common and fundamental ideas of fairness and rights", which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, the denial of counsel has made it impossible to conclude with any satisfactory degree of certainty, that the defendant's case was adequately presented.¹³

In spite of this powerful dissent, it was thus clear after *Betts* that the Sixth Amendment as such did not mandate the appointment of counsel in all cases in which indigents were on trial for criminal offenses. *Betts*, when taken with *Powell*, did indicate that in at least some criminal cases counsel would be required for fairness purposes under the due process clause. For instance, in *Bute v. Illinois*¹⁴ the Court adopted the view that counsel would be required in all state capital cases. Moreover, with further analysis of the so-called special circumstances requirement for counsel under the due process clause it became apparent that very little was needed to demonstrate special circumstances. See, e.g., *Chewning v. Cunningham*,¹⁵ where the petitioner raised claims under the Virginia recidivist statute; he did not, however, show that the denial of his request for appointed counsel necessarily resulted in unfairness at trial. He simply raised possible arguments which a lawyer might have asserted in his defense. The Court held that the possibility of developing such arguments was sufficient to warrant the appointment of counsel under the due process clause.

Double Jeopardy and *ex post facto* application in a law are also questions which . . . may well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests. We intimate no opinion on whether any of the problems mentioned would arise on petitioner's trial nor, if so, whether any would have merit. We only conclude that a trial on a charge of being a habitual criminal is such a serious one, the issues presented under Virginia's statute so complex, and the potential prejudice resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally

11. Along with Justices Douglas and Murphy.

12. 316 U.S. at 475.

13. *Id.* at 476.

14. 333 U.S. 640, 92 L. Ed. 986, 68 S. Ct. 763 (1948).

15. 368 U.S. 443, 7 L. Ed. 2d 442, 82 S. Ct. 498 (1962).

applicable here.¹⁶

Gideon v. Wainwright,¹⁷ decided just 20 years after the *Betts* case, was a landmark opinion for the American criminal justice system. The case, argued for the defendant in the Supreme Court by former Justice Abe Fortas, arose after the defendant was charged with a felony in a Florida state court. The following colloquy took place in the trial court:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.¹⁸

In the 20 years since *Betts* had been decided the composition of the Supreme Court had changed markedly.¹⁹ The clear majority of the Court in 1963 accepted the basic premises argued by Justice Black in *Betts*²⁰ and designated Justice Black to write the majority opinion in *Gideon*. Finding that *Betts* was "an anachronism when handed down",²¹ the Court discussed the great importance of the right to counsel and the need to designate it a fundamental right applicable to the states under the due process clause.

[R]eason and reflection require us to recognize that in our adversary system of criminal 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. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some

16. 368 U.S. at 447.

17. 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963).

18. 372 U.S. at 337.

19. When *Betts* was decided the Court consisted of Chief Justice Stone, and Justices Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson. When *Gideon* was decided, the Court consisted of Chief Justice Warren, and Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White, and Goldberg.

20. Indeed, only Justices Douglas, Clark, and Harlan wrote concurring opinions.

21. 372 U.S. at 345.

countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.²²

While *Gideon* was a seminal case,²³ many questions were not answered by it. *Gideon* had been tried for a serious felony offense, had been sentenced to serve five years, and had only requested counsel for the trial itself. The Supreme Court did not indicate what would happen in a less serious case, one in which no sentence of imprisonment was ordered, or one in which the defendant requested counsel to represent him in non-trial proceedings.

2. *The Indigent Defendant*

In *Gideon* itself the state did not argue that the defendant could afford to employ counsel. To be sure, in many cases the indigency of the defendant is not truly at issue. In some cases, however, the only issue is whether or not the state should have to provide a lawyer for a defendant who is arguably able to pay for it himself. See, for instance, *State v. Hoffman*²⁴ where the court found that the defendant was able to afford an attorney because he had \$160 in the bank.

We take judicial notice that for a fee of less than \$160 the defendant could have obtained counsel.²⁵

Other courts have been considerably less inclined to rely on the defendant's relatively sparse assets in determining need. As stated by the California Supreme Court:

It is not necessary . . . to establish total destitution although he may be required to establish more than that the payment of the required fee would be burdensome or inconvenient.²⁶

Part of the difficulty for the indigency determination was satisfied in a number of states by the adoption of recoupment statutes. In these states, laws were passed which required, as a condition of probation, that the convicted defendant pay back to the state the fees of his appointed attorney. These statutes were upheld by the Supreme Court in *Fuller v. Oregon*²⁷ because, among other provisions, there existed a statutory exemption for defendants who could show that repayment would impose "manifest hardship."

22. *Id.* at 344.

23. The case has been held to be fully retroactive in application; a violation of it is prejudicial error *per se*.

24. 281 N.C. 727, 190 S.E.2d 842 (1972).

25. 190 S.E.2d at 850.

26. *March v. Municipal Court*, 7 Cal.3d 422, 102 Cal. Rptr. 597, 498 P.2d 437 (1972).

27. 417 U.S. 40, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974).

3. *What Kinds of Criminal Trials?*

a. *The Nature of the Trials*

Because the defendant had been charged with a serious offense²⁸ and had been given a substantial sentence,²⁹ the Court in *Gideon* did not have to confront the situation in which the defendant requested counsel when he had neither been charged with a serious offense nor received a sentence of imprisonment. In *Argersinger v. Hamlin*,³⁰ the defendant was charged in state court with carrying a concealed weapon. This offense was punishable by imprisonment up to six months, a \$1,000 fine, or both. The defendant at trial was not represented by counsel and was sentenced to serve 90 days in jail. The Florida supreme court held that the right to government provided counsel extended only to trials "for non-petty offenses punishable by more than six months imprisonment."³¹ The United States Supreme Court rejected the Florida rule and held that no imprisonment may be imposed unless the accused is represented by counsel.

Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions

The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.

The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution

We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the

28. The defendant was convicted of the felony of breaking and entering a pool-room with the intent to commit a misdemeanor.

29. *Gideon* was sentenced to a term of imprisonment of five years in the state prison.

30. 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972).

31. The Florida court linked the right to counsel with the right to trial by jury. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), the Court held that jury trials were required only for non-petty offenses punishable by more than 6 months imprisonment.

presence of counsel to insure the accused a fair trial.³²

Justice Powell, concurring in the result, raised the question of whether the problem in misdemeanor cases which required the presence of counsel might not also be raised even in situations where there was no prospect of imprisonment. Because the defendant had in fact received imprisonment, the Court did not have to face this question.

In *Scott v. Illinois*³³ the question reserved by the Court in *Argersinger* was faced squarely. Scott had been convicted of theft and fined \$50. The state statute set the maximum penalty for the offense at a \$500 fine or one year in jail. Thus, the defendant could have been sentenced to a term of imprisonment but was not. For the dissenting Justices³⁴ the possibility of imprisonment—the “authorized imprisonment” standard—necessitated the appointment of counsel.

The majority in *Scott*, in an opinion written by Justice Rehnquist, rejected the authorized imprisonment standard. Instead, the Court concluded “that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense.”³⁵ As the opinion stated, “actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment.”³⁶

The lesson after *Argersinger* and *Scott* is that *Gideon* will apply to many—perhaps most—criminal cases because prior to the start of trial the judge may not know whether he is likely to impose a sentence of imprisonment. Hence, if there is the possibility of imprisonment the judge would be well advised to appoint counsel. This point was made forcefully in *Baldasar v. Illinois*.³⁷ Under Illinois law certain thefts were deemed misdemeanors, except that for second convictions the defendant would be treated as a felon and could be sentenced to a relatively lengthy prison term. The defendant in the first theft case was not represented by counsel and he received a fine of only \$159, perfectly proper under *Scott*. In the second trial, for an unrelated theft offense, he was represented by counsel. At this trial he was convicted and sentenced under the Illinois enhancement statute to a 1-3 year term in prison. The Supreme Court held that the sentence violated *Scott*, *Argersinger*, and *Gideon* in that it imposed punishment based upon a trial at which the defendant was not represented by counsel. As stated by Justice Stewart in concurrence:

In *Scott v. Illinois*, the Court held that “the Sixth and Fourteenth Amendments to the United States Constitution

32. 407 U.S. at 32-36.

33. 440 U.S. 367, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979).

34. Justices Brennan, Marshall, and Stevens.

35. 440 U.S. at 372-73.

36. *Id.* at 373.

37. 446 U.S. 222, 100 S. Ct. 1585 (1980).

... require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott v. Illinois*.³⁸

b. *Counsel in Non-trial Proceedings*

Soon after the decision of the Supreme Court in *Gideon*, defendants claimed Sixth Amendment rights beyond the scope of that monumental case. In particular, defendants argued that providing counsel at trial was only a partial fulfillment of the Sixth Amendment responsibility of the government. The Supreme Court was persuaded that failing to provide counsel at pre-trial confrontations would violate the Sixth Amendment as well. In *Hamilton v. Alabama*³⁹ the defendant was found to have a right to counsel at a pre-trial arraignment where certain rights could be sacrificed or lost.⁴⁰ Similarly, in *Coleman v. Alabama*,⁴¹ the Court held that the defendant was entitled to the appointment of counsel at a preliminary hearing⁴² even though the hearing was not a mandatory step in the state prosecution, the accused was not required to advance any defenses, and the failure to advance defenses did not preclude him from raising them at trial. The Supreme Court in both *Coleman* and *Hamilton* recognized that counsel was necessary to protect the ultimate fairness at trial. As stated in *Coleman*:

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a

38. 100 S. Ct. at 1586-87.

39. 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961).

40. The arraignment is the defendant's first official court appearance. At this stage he is normally informed of the pending charge and he enters a plea.

41. 399 U.S. 1, 26 L. Ed. 2d 387, 90 S. Ct. 1999 (1970).

42. At the preliminary hearing the judge determines whether there is sufficient evidence against the accused to warrant a trial. The standard is normally probable cause to believe that the defendant committed the crime.

witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself."⁴³

The Court also concluded that post-trial proceedings could necessitate the right to counsel. At sentencing hearings the defendant was entitled to the appointment of counsel, even in cases where counsel had already served at the guilt determination stage of the trial.⁴⁴ Moreover, the defendant had an absolute right to counsel at his first appeal under the rationale set out in *Douglas v. California*.⁴⁵

Perhaps the greatest difficulty the Court had in resolving right to counsel claims arose in connection with pre-trial identification procedures. In *United States v. Wade*,⁴⁶ the question was whether "courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel."⁴⁷ The question was answered in the affirmative, based on the view that the pre-trial identification procedure was a "critical stage" under the Sixth Amendment.

It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecu-

43. 399 U.S. at 9.

44. In *Mempa v. Rhay*, 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967), the Court required counsel at the sentencing proceeding because the lawyer would insure that the judge relied on accurate information. The lawyer would also protect the defendant's procedural rights with respect to matters such as the right to appeal, the right to withdraw his plea of guilty, and the jurisdiction of the court to impose sentence. It should be noted, however, that the Court was not willing to require counsel at probation and parole revocation hearings. In *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973), the Court distinguished the trial and sentencing cases by finding that the rights of the probationer or parolee were far more limited because that person had already been convicted of a crime at a previous time.

45. 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). *But see*, *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), where it was concluded that the right to counsel did not extend to discretionary appeals such as review before the state and United States Supreme Courts.

46. 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967).

47. 388 U.S. at 219-20.

tion, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. [T]he principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.⁴⁸

While the Court has limited this right to counsel to post-judicial adversary proceedings⁴⁹ in which the accused is personally confronted,⁵⁰ it is readily apparent that the Justices have been quite willing to extend the right to counsel well beyond the criminal trial itself.

THE RIGHT TO SELF-REPRESENTATION: *FARETTA V. CALIFORNIA*⁵¹

The question in *Faretta* was "whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."⁵² The Court concluded that the state could not constitutionally do so.

Faretta was charged with grand theft. The public defender was appointed to represent him at the arraignment. Faretta, however, specifically requested that he be permitted to represent himself. He had once represented himself in a criminal prosecution, he had a high school education, and he did not want to be represented by the public defender because he thought the office was "very loaded down with . . . a heavy case load." The judge advised Faretta that he was making a mistake and told Faretta that he would receive no special favors from the court.⁵³

48. *Id.* at 226-27.

49. *Kirby v. Illinois*, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972).

50. *United States v. Ash*, 413 U.S. 300, 37 L. Ed. 2d 619, 93 S. Ct. 2568 (1973).

51. 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

52. 422 U.S. at 806.

53. You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it.

Id. at 808 n. 2.

The judge, before making a final decision, held a hearing and inquired with some specificity into the defendant's ability to conduct his own defense.⁵⁴ At this hearing the judge ruled that the defendant had not made an intelligent and knowing waiver of his right to

54. THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

How have you been getting along on your research?

THE DEFENDANT: Not bad, your Honor.

Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

THE COURT: Let's see how you have been doing on your research.

How many exceptions are there to the hearsay rule?

THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

THE COURT: What are the challenges to the jury for cause?

THE DEFENDANT: Well, there is twelve peremptory challenges.

THE COURT: And how many for cause?

THE DEFENDANT: Well, as many as the Court deems valid.

THE COURT: And what are they? What are the grounds for challenging a juror for cause?

THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudice toward the defendant. Any substantial ground that might make the juror prejudice toward the defendant.

THE COURT: Anything else?

THE DEFENDANT: Well, a relative perhaps of the victim.

THE COURT: Have you taken a look at that code section to see what it is?

THE DEFENDANT: Challenge a juror?

THE COURT: Yes.

THE DEFENDANT: Yes, your Honor. I have done—

THE COURT: What is the code section?

THE DEFENDANT: On voir diring a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: I am not aware of the section right offhand.

THE COURT: What code is it in?

THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

THE COURT: Have you looked at any of the codes to see where these various things are taken up?

THE DEFENDANT: No, your Honor, I haven't.

THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

THE DEFENDANT: Yes, your Honor.

THE COURT: What codes?

THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

the assistance of counsel and further ruled that he had no constitutional right to conduct his own defense. Thereafter the public defendant represented Faretta at his trial. The jury found Faretta guilty and the judge sentenced him to prison.

In the federal setting, the right of self-representation had been well established.⁵⁵ Moreover, the constitutions of many states explicitly confer that right. In some states, such as California, however, the right to represent oneself is not so conferred, thus raising the constitutional issue.

In an opinion by Justice Stewart, the Supreme Court held that the defendant had a constitutionally protected right to represent himself, a right which was not "inferior to the right of assistance of counsel."⁵⁶ The early constitutional history, according to the Court, showed that there was no evidence that the colonists and the framers ever doubted the right of self-representation, or imagined that this right might not be considered equal in stature to the right to counsel.⁵⁷ Moreover, because the "defendant, and not his lawyer or the State, will bear the personal consequences of a conviction"⁵⁸ he must be able to choose whether to represent himself or whether he should be represented by counsel. "[A]lthough 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.'"⁵⁹

Of course, in order to exercise his right of self-representation, the defendant must first knowingly and intelligently waive the right

THE COURT: If you have done extensive research into it, then tell me about it.

THE DEFENDANT: On empaneling a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

Id.

55. In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel . . ." The right is currently codified in 28 U.S.C. § 1654.

Id. at 812-13.

56. *Id.* at 832.

57. *Id.* at 826-32.

58. *Id.* at 834.

59. *Id.*

to counsel. Thus, he would have to be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"⁶⁰ Because Faretta, under the circumstances in the case, had clearly expressed his desire to represent himself, and had knowingly and intelligently decided to relinquish the benefits of counsel, the California courts deprived him of his constitutional right to conduct his own defense.

The Chief Justice⁶¹ dissented. He could find no constitutional basis for the majority's holding; he stressed that such a holding would "only add to the problems of an already malfunctioning criminal justice system."⁶² For him, the determinative factor was that to do justice, in most cases, counsel would be required.

In short, both 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 cases this command can be honored only 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. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge's discretion to decline to accept a plea of guilty.⁶³

As Justice Blackmun⁶⁴ put it:

If there is any truth to the old proverb that "one 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.⁶⁵

BEYOND *FARETTA*

The Court in *Faretta* thus established that a right of self-representation had been established along with the right to counsel. It recognized that this coexistence was an uneasy one in light of the heavy emphasis which the Court had previously placed on the Sixth Amendment right to counsel:

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned

60. *Id.* at 835.

61. Joined by Justices Blackmun and Rehnquist.

62. 422 U.S. at 837.

63. *Id.* at 840.

64. Joined by the Chief Justice and Justice Rehnquist.

65. 422 U.S. at 853.

unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.⁶⁶

Nonetheless, the right was formally affirmed by the Supreme Court and it was left to the lower courts to deal with the manifestation of this right.

1. *Waiver*

Because the self-representation right is an important one under the Constitution, the waiver of it comes within the confines of the rule set out almost a half century ago.

It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.⁶⁷

As this ruling indicates, the waiver⁶⁸ determination depends upon the particular facts in the case, focusing especially on the individual defendant making the decision. Few cases will be as easy as *Faretta* itself in terms of dealing with an intelligent defendant who understood his rights; still, a relatively low threshold of ability is all that is required. For instance, the *Faretta* Court itself held that a lack of legal knowledge was not determinative as to whether the defendant had knowingly waived his right to counsel and chosen to represent himself.

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and advantages of self-representation, so that the record will establish that he "knows what he is doing and his choice is made with eyes open."⁶⁹

The importance of determining that the defendant had sufficient intelligence to understand the dangers and disadvantages of waiving counsel and representing himself has often been emphasized. In one recent case, the defendant's conviction was reversed where the trial record did not affirmatively show that the defendant was competent to knowingly waive his right to counsel. The court held that

66. *Id.* at 832-33.

67. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

68. Of course, the defendant is not simply waiving a single right; rather he is electing between two rights: representing himself and being represented by counsel.

69. 422 U.S. at 835.

in order to establish that the waiver was intelligent and voluntary, the record must reflect that the trial judge inquired into the defendant's background, age, education, and experience. Moreover, the trial judge must inform the defendant of the inherent dangers involved in self-representation, including, among other things: the general nature of the offense and possible penalties that may be imposed; the lack of the defendant's knowledge of technical rules of evidence and procedure in criminal law; the inability of the trial judge to give the defendant any special treatment when he is representing himself.⁷⁰

In addition to the basic question of waiver is the question of whether the trial court has an obligation to give notice to the defendant of his right of self-representation. While the *Faretta* court talked in terms of this right being of great importance, most courts have refused to require the giving of such notice. As stated by the Washington supreme court:

In the vast majority of cases it is contrary to the best interests of a defendant to proceed *pro se*. Routinely informing all defendants of that "right" of inquiry whether they wish to exercise it would encourage many to waive the valuable right to be represented by competent counsel. Further, a defendant cannot claim that by having counsel—because he was not informed of his self-representation right or asked if he wished to waive it—he has been denied a fair trial or due process We hold there is no duty for the trial court to inform the defendant of or ask if he wishes to exercise his right to proceed *pro se*.⁷¹

2. *The Incompetent Defendant*

Related to the question of waiver is the question of the competency of the defendant both to make the initial decision of self-representation and, ultimately, to represent himself at trial. Of course, if the defendant is deemed not to be competent to stand trial, either at the outset of the trial or during the trial, the issue evaporates. No trial can constitutionally be held. The more difficult question is whether a defendant can be competent for some purposes, but not for others. In *People v. Miller*⁷² the defendant was found to be legally insane at her probation hearing. The appellate court nevertheless upheld her conviction finding that she had competently waived her right to counsel before trial. The court relied upon the fact that the trial judge found that she had understood the warnings given and that she had forcefully requested the right to proceed on her own. The defendant contended that a document she had filed during the proceedings along with other evidence should have caused

70. *Geeslin v. State*, 600 S.W.2d 309, 313-14 (Texas 1980).

71. *State v. Garcia*, 600 P.2d 1014, 1015 (Wash. 1979). See also, *People v. Slaughter*, 39 Ill. Dec. 467, 84 Ill. App.3d 88, 404 N.E.2d 1058 (1980).

72. 110 Cal. App.3d 327, 167 Cal. Rptr. 816 (1980).

the trial court to doubt her competence; the appellate court rejected this view.

While bizarre actions and statements are to be noted, they do not establish incompetency warranting deprivation of the right to represent oneself⁷³

With regard to the question of whether a defendant who is found to be competent to stand trial can still be found incompetent to knowingly and intelligently waive his right to counsel and thus represent himself, the courts are in conflict. Some courts take the position that if a defendant is competent to stand trial, he is also competent to intelligently waive his right to counsel and to represent himself. "[F]rom a practical viewpoint it should be even more difficult to formulate a workable, and presumably higher, standard of competency which would not infringe on the defendant's constitutional right 'to appear and defend in person.'"⁷⁴ Many courts, however, disagree with this conclusion. In *People v. Salas*,⁷⁵ the court on appeal held that the trial judge should, when necessary, provide a psychiatric examination to determine whether the defendant has the capacity to knowingly waive representation by counsel. In *Salas*, psychiatric examination showed that the defendant had

(1) low intelligence, (2) impaired capacity for thought, (3) lack of insight into his own psychological and intellectual limitations, (4) lack of comprehension of what competent counsel can and cannot do for him, and (5) significant language impairment.⁷⁶

Upon review of this examination it was found that the defendant was competent to stand trial, but incompetent to knowingly waive his right to counsel and proceed to represent himself.⁷⁷

Perhaps the most forceful argument on this point was made in a recent Wisconsin case. The court there expressly held that "competency to stand trial is not the same as competency to proceed *pro se* and that, even though he has knowingly waived counsel, and elected to do so, a defendant may be prevented from representing himself."⁷⁸ In rejecting the view that a defendant competent to stand trial would necessarily be competent to waive his right to counsel

73. 167 Cal. Rptr. at 818.

74. *People v. Reason*, 37 N.Y.2d 351, 354, 334 N.E.2d 572, 574, 372 N.Y.S.2d 614, 616 (1975).

75. 77 Cal.App.3d 600, 143 Cal. Rptr. 755 (1978).

76. 143 Cal. Rptr. at 757.

77. See also, *Commonwealth v. Glover*, 247 Pa. Sup. Ct. 465, 467, 372 A.2d 919, 920 (1977) [The court held that the defendant who only had a ninth grade education and could not understand the elements of the charges against him with the possible penalties was not capable of making an intelligent waiver, although defendant was competent to stand trial]; *State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977) [There was evidence that the defendant was physically incapable of presenting a defense because stress affected his speech and made him susceptible to seizures and that he was too emotionally disturbed to make an intelligent waiver, the trial court was warranted in rescinding permission to proceed to represent himself].

78. *Pickens v. State*, 292 N.W.2d 601, 610 (Wis. 1980).

and represent himself, the court found that competency to stand trial indicates merely an ability to cooperate with defense counsel. Competency to affirmatively formulate a coherent defense, on the other hand, demands much more of the defendant. The court rejected the test that a knowing and intelligent waiver is all that is required in order for a defendant to claim a constitutional right to defend himself.

When a defendant expresses a desire to proceed *pro se*, the trial court should examine him on the record to determine not only whether his waiver of counsel is knowing and voluntary, but also to determine whether he possesses the minimal competence necessary to conduct his own defense. Factors to consider in making this second determination include the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.⁷⁹

If the defendant is found competent to represent himself, the judge had a continuing responsibility during the trial to supervise the defendant so as to insure that the defendant continues to be competent to present his case.

If, during the course of the trial, it becomes apparent that the defendant is simply incapable, because of an inability to communicate or because of a complete lack of understanding, to present a defense that is at least *prima facie* valid, the trial court should step in and assign counsel. But because the defendant is not to be granted a second chance simply because the first is going badly, counsel should be

79. *Id.* at 611. The court went on to explain its ruling:

The standard for determining competency to stand trial is whether one is able to understand the proceedings against him and to assist in his own defense. This test assumes the defendant will have representation and that he will be required only to assist in his defense. Certainly more is required where the defendant is to actually conduct his own defense and not merely assist in it. "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."

Other disabilities, besides mental diseases and defects of the type that render one incompetent to stand trial, may likewise make meaningful self-representation impossible. *Faretta* itself indicates that although technical legal knowledge is not relevant, literacy and a basic understanding over and above the competence to stand trial may be required. Surely a defendant who, while mentally competent to be tried, is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimal understanding necessary to present a defense, is not to be allowed "to go to jail under his own banner." Neither the state, nor the defendant, is in any sense served when a wrongful conviction is easily obtained as a result of an incompetent defendant's attempt to defend himself. Thus, despite the fact that a defendant has been found competent to stand trial, it may nevertheless be determined that he lacks the capacity to represent himself.

Id.

appointed after trial has begun, or a mistrial ordered, only where it appears the defendant should not have been allowed to proceed *pro se* in the first place.⁸⁰

3. Compliance with Court Rules

The Supreme Court in *Faretta* stated very clearly that the right of self-representation will not alter the rules of procedure in trials.

The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.⁸¹

Of course, granting lay persons the right to represent themselves opens the door to wholesale procedural and evidentiary errors at trial. Following *Faretta*, courts have refused to allow such errors to be grounds for reversal. In recent cases, defendants have lost even though they: failed to object to the introduction of inadmissible evidence,⁸² failed to object to misstatements made in closing arguments,⁸³ called adverse parties as their own witnesses.⁸⁴

Despite the fact that the defendant representing himself will have no legal expertise, the courts consistently state that such persons "should receive no greater rights or privileges than counsel would have representing him."⁸⁵ The trial judge is to operate as an impartial force in the proceeding and cannot "assist" the defendant who is representing himself. As stated in *United States v. Pinkey*:⁸⁶ "[T]he trial court is under no obligation to become 'advocate' for or to assist and guide the *pro se* layman through the trial thicket." To be sure, when the trial judge does go beyond his role as impartial arbiter, constitutional errors can arise. See, for instance, *People v. Nelson*,⁸⁷ where the trial court, frustrated with the *pro se* defendant who was unable effectively to examine witnesses, appointed counsel for the defendant. The defendant's conviction was reversed on appeal.

That the defendant lacked the technical legal knowledge for effective examination of witnesses was not a basis for terminating his *pro se* defense. Although it may have contributed to the Court's impatience and led it to conclude that the interest of justice required that defendant's *pro se* right to defend be terminated, we find nothing in this record justifying such conclusion in light of defendant's constitutional right.

If the defendant does not comply with the procedural or evidentiary

80. *Id.*

81. 422 U.S. at 834-35, n. 46.

82. *United States v. Rowe*, 565 F.2d 635, 637 (10th Cir. 1977).

83. *State v. Cunningham*, 222 Kan. 704, 707, 567 P.2d 879, 882 (1977).

84. *People v. Owens*, 66 Cal.App.3d 720, 722, 136 Cal. Rptr. 215, 216 (1977).

85. *State v. Brincefield*, 43 N.C.App. 49, 52, 258 S.E.2d 81, 84 (1979).

86. 548 F.2d 305, 311 (10th Cir. 1977).

87. 72 A.D.2d 64, 67-68, 424 N.Y.S.2d 543, 546 (1980).

rules of the court, and indeed renders the trial a mockery, he is prohibited from raising that issue on appeal.

Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."⁸⁸

As explained by the Second Circuit in *United States v. Denno*:⁸⁹

[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open."

The rationale given for these holdings is that if the defendant willingly takes on the responsibility of representing himself, he has no one to blame but himself if errors occur. And, this choice by the defendant is of constitutional proportion.

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.⁹⁰

4. *The Disruptive Defendant*

In *Faretta* the State of California asserted that granting the right of self-representation created problems as to defendants who actively disrupted the proceedings of the trial court. The Supreme Court, however, was not persuaded by this contention.

We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructive misconduct.⁹¹

The leading Supreme Court decision discussing the disruptive defendant is *Illinois v. Allen*.⁹²

88. *Faretta*, 422 U.S. at 834-35, n. 46.

89. 348 F.2d 12, 15 (2nd Cir. 1965), *cert. denied*, 384 U.S. 100.

90. *Faretta*, 422 U.S. at 820.

91. *Id.* at 834-35, n. 46.

92. 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

Although mindful that courts indulge every reasonable presumption against the loss of constitutional rights, we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom.⁹³

In a number of recent cases the *Allen* principle has been applied to allow the trial judge to terminate the defendant's right to self-representation when that defendant engages in disruptive trial tactics. The trial judge in *Parker v. State*⁹⁴ allowed the defendant to represent himself and the defendant refused to enter the courtroom and resisted all attempts by court officials to put him in the courtroom. The trial judge then placed the defendant in a nearby room where he could hear the proceedings and the court continued the trial without his being present. This judicial action was constitutionally proper. Under *Allen*, though, the disruptive activity must take place at trial and must be of a truly serious nature.⁹⁵ As the federal court of appeals said in *Dougherty v. United States*:⁹⁶

[T]he unqualified right of self-representation rests on an implied assumption that the court will be able to achieve reasonable cooperation. The possibility that reasonable cooperation may be withheld, and the right later waived, is no reason for denying the right of self-representation at the start.

To avoid the problems of the wholly ineffective defendant who represents himself and disrupts the trial, many courts appoint attorneys either as "stand-by" counsel or as amicus curiae to aid the accused and be able to assume representation of the defendant should that necessity arise.⁹⁷

Because *Faretta* recognized that the right to counsel and the right of self-representation were separate and independent constitutional rights⁹⁸ most courts have taken the position that a criminal defendant cannot exercise both rights at the same time.

93. 397 U.S. at 344.

94. 556 P.2d 1298 (Okla. Crim. 1976).

95. In *Ferrel v. Superior Court*, 20 Cal.3d 888, 576 P.2d 93, 144 Cal. Rptr. 610 (1978) the state supreme court reversed the conviction of the defendant in a case in which the trial court had wrongfully denied *pro se* status to the jailed defendant on the basis of repeated violations of jail rules which constituted out of court misconduct. The trial judge in *Coleman v. State*, 617 P.2d 243 (Okla. Crim. 1980) had denied the defendant the right to proceed without counsel because the defendant had a prior jail escape record. The appellate court held that concern for security and anticipation of possible future misconduct were not valid bases for denying a defendant his *Faretta* rights.

96. 473 F.2d 1113, 1126 (D.C. Cir. 1972).

97. *Id.*, *Cano v. Municipality of Anchorage*, 627 P.2d 660 (Alaska 1981).

98. 422 U.S. at 819-20, n. 15.

The right to defend *pro se* and the right to defend with the assistance of counsel are but two faces of the same coin. The assertion of one right, of necessity, waives the other. These constitutional rights may not actively co-exist—they do not do cadence in tandem.⁹⁹

The rationale which underlies such statements is a fear of causing chaos in the orderly trial proceedings and disrupting the traditional role of the attorney.¹⁰⁰ Yet, it is not clear that the use of the defendant in part of the trial (perhaps in arguments and in confronting a few witnesses) and the use of an attorney in the same trial (perhaps in making motions and examining other witnesses and making objections) would necessarily be disruptive. Moreover, considering the important nature of the right of self-representation, one may properly ask whether courts should routinely deny the request for this hybrid form of representation. The following statement by Angela Davis makes the point quite well:

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*?¹⁰¹

CONCLUSION

Gideon v. Wainwright and later cases such as *Argersinger*, *Wade*, and *Scott* established the important right to counsel for indigent criminal defendants in both federal and state courts. The Supreme Court in *Faretta v. California* found a constitutional right of the criminal defendant to reject the assistance of counsel and to represent himself. As pointed out by the majority in *Faretta* there are important historical and policy reasons for these independent rights. Nevertheless, the establishment of such independent rights

99. *People v. Woodruff*, 40 Ill. Dec. 788, 85 Ill.App.3d 654, 659, 406 N.E.2d 1155, 1159 (1980). See also, *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981); *United States v. Sacco*, 571 F.2d 791, 793 (4th Cir. 1978), cert. denied 435 U.S. 999; *Wheby v. Warden*, 95 Nev. 567, 598 P.2d 1152 (1979).

100. *Landers v. State*, 550 S.W.2d 272, 275 (Tex. Crim. 1977). For a good discussion of this area, see, DeFoor & Mitchell, *Hybrid Representation: An Analysis of a Criminal Defendant's Right to Participate as Co-Counsel at Trial*, 10 STETSON L. REV. 191 (1981).

101. A. Davis, IF THEY COME IN THE MORNING, 253 (1971) quoted and discussed in Note, THE RIGHT TO DEFEND PRO SE IN CRIMINAL PROCEEDINGS—FARETTA V. CALIFORNIA, 37 OHIO STATE L.J. 220, 237-39 (1976).

has created difficulties for lawyers and judges today.¹⁰²

Still, many of these problems may be more apparent than real. Most defendants do not elect to represent themselves. Moreover, even in those cases where self-representation is the rule, truly serious problems do not generally appear. Even when they do appear, it may be that they are but a small price to pay to insure that the defendant who so desires, can exercise his right of self-representation, a right which is "independently found in the structure and history of the constitutional text."¹⁰³

102. Some of these questions were tracked very well by Justice Blackmun in his dissent in *Faretta*:

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 mid-trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

422 U.S. at 852.

103. *Id.* at 819-20, n. 15.