

Summer 1976

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Recommended Citation

John W. Shaw, *Criminal Law--Defendant Has Constitutional Right to Defend Himself*, 41 Mo. L. REV. (1976)
Available at: <https://scholarship.law.missouri.edu/mlr/vol41/iss3/14>

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CRIMINAL LAW—DEFENDANT HAS CONSTITUTIONAL RIGHT TO DEFEND HIMSELF

*Faretta v. California*¹

Anthony Faretta was charged with grand theft. Although the presiding judge appointed a public defender to represent him, Faretta requested permission to represent himself.² In a preliminary ruling, the judge accepted the defendant's waiver of his right to counsel. However, several weeks thereafter, in a hearing held to determine Faretta's ability to conduct his own defense, the judge ruled that the defendant had not made a knowing and intelligent waiver of his right to counsel. More important, the judge ruled that a defendant does not have a constitutional right to conduct his own defense. Consequently, the judge reappointed the public defender to represent Faretta. At trial, the defendant was convicted and sentenced to prison. The California Court of Appeals affirmed the trial judge's ruling that a defendant has no constitutional right to defend himself, and upheld the conviction.³ The California Supreme Court denied review. On appeal, the United States Supreme Court held that a defendant does have a constitutional right to represent himself. Accordingly, the Court vacated the judgment, and remanded the case.⁴

Although opportunities to consider and rule upon the issue of self-representation have previously been presented, the Supreme Court did not accept the task until *Faretta*. An earlier case, which was believed by some to confer implicitly the right to self-representation, was *Adams v. United States ex rel. McCann*.⁵ In *Adams* the court held that an accused may "competently and intelligently waive his Constitutional right to the assistance of counsel."⁶ Given that a defendant may reject his right to counsel, the logical extension is that he must therefore be allowed to represent himself if he is entitled to any defense at all. Although the *Faretta* Court acknowledged this logical inference,⁷ it emphasized that a right to defend oneself must be shown to flow independently from the Constitution.⁸

1. 95 S. Ct. 2525 (1975).

2. In response to the judge's questions, Faretta revealed that the reason for his request was that he believed that the public defender's office was loaded down with cases. 95 S. Ct. at 2527. For a discussion of the possible reasons to defend *pro se*, see Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1134 (1965).

3. The court relied on *People v. Sharp*, 7 Cal. 3d 448, 449 P.2d 489, 103 Cal. Rptr. 233 (1972), a California Supreme Court decision which held that a defendant had no right under either the state or federal constitutions to conduct his own defense.

4. 95 S. Ct. at 2541.

5. 317 U.S. 269 (1942).

6. *Id.* at 275.

7. 95 S. Ct. at 2531.

8. *Id.* at 2533 n.15. In *Singer v. United States*, 380 U.S. 24, 34-35 (1965), the Court stated: "The ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right."

Through an examination of the text and history of the sixth amendment, the Court found that the Constitution does guarantee such a right.⁹

The Court's examination of those sixth amendment rights which are essential to a defense¹⁰ yielded the view that it was the intent of the draftsmen of that amendment to confer these rights personally upon the accused. The Court found additional weight for this interpretation in the phrase "assistance of counsel." If an accused were forced to accept court-appointed counsel, the defendant would not be the recipient of an assistant, but rather, the subject of a master. An unwanted attorney appointed for a defendant who wishes to represent himself can hardly be said to "represent" that defendant.¹¹

The Court reinforced its reading of the sixth amendment with historical data involving defense personally or by counsel in England and colonial America. In early English history a defendant was required to conduct his own defense. As the English system evolved to encompass a right to counsel, either personally-retained or court-appointed, a defendant was still allowed to speak for himself.¹² The various American colonial charters and declarations of rights reflected this English tradition by establishing rights to defend personally or with the assistance of counsel.¹³ The Judiciary Act of 1789, which was signed one day prior to the proposal of the sixth amendment, guaranteed parties in the federal courts the right to "plead and manage their own causes personally or by the assistance of . . . counsel."¹⁴ The wording in numerous state constitutions also indicates that when one must be defended, he may do so personally or by counsel.¹⁵ An analysis of these "centuries of consistent history" led the Supreme Court to view the right to counsel as adjunct to the right to personally defend oneself.¹⁶

Although the decision in *Faretta* rests on a substantial constitutional foundation, the Court's opinion is unquestionably deficient in its discussion of the procedural aspects of a defendant's right to defend himself.¹⁷ For this reason, a substantial impact of *Faretta* may well be the procedural difficulties entailed in the judicial administration of this right.

9. 95 S. Ct. at 2532-40.

10. The Court quoted the following extract from the sixth amendment: In all criminal prosecutions, the accused shall enjoy the right . . . 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.

95 S. Ct. at 2532.

11. 95 S. Ct. at 2533-34.

12. *Id.* at 2535-36.

13. *Id.* at 2538. See I.B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971).

14. *Id.* at 2539. Parties in federal court are currently guaranteed this right. 28 U.S.C. § 1654 (1970).

15. Mo. CONST. art. I, § 18 (a) provides: "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel. . . ."

16. 95 S. Ct. at 2540.

17. Section V of the opinion only briefly refers to abstract standards to be followed in the procedural application of the right. 95 S. Ct. at 2541.

The initial procedural problem will undoubtedly involve a determination that the defendant has "knowingly and intelligently" waived his right to the assistance of counsel.¹⁸ In earlier decisions establishing the right to counsel, the Court emphasized the necessity of counsel in criminal cases to guide the accused through the intricacies of a criminal defense in order that he may have a fair trial.¹⁹ The *Faretta* Court noted that the defendant who decides to defend himself should be made aware of the disadvantages that may arise from the lack of counsel.²⁰ The Court did not indicate what procedure should be followed to instill such awareness, nor did it suggest what level of awareness should be required.

The holding in *Faretta*, coupled with the existing ambiguity as to the standard for determining a valid waiver, places the trial court in a dilemma. Denial of an asserted constitutional right to defend *pro se* may constitute reversible error.²¹ However, if the court, apprehensive of possible reversal, grants the request to proceed *pro se*, the defendant who incompetently defends himself may appeal on the ground that his waiver was not knowingly and intelligently made. This problem was illustrated in *United States v. McGee*,²² where the Supreme Court vacated judgment and remanded because the defendant's waiver of counsel was made in ignorance of a possible defense to the charge.²³ The defendant who ineffectively defends *pro se* could also use his incompetent performance at trial as evidence of his lack of awareness. The question arises as to how far a judge must go in informing the defendant of the nature of his defense in order to insure a valid waiver.

Past decisions of the Supreme Court offer some guidance as to the standards to be applied when a defendant wishes to waive his right to counsel. In *Johnson v. Zerbst*²⁴ the Court enunciated a test of knowing and intelligent waiver,²⁵ but it did not require that the defendant be made aware of the specific difficulties attendant upon his particular defense.²⁶ In *Von Moltke v. Gillies*²⁷ Justice Black offered a more specific standard

18. *Id.*

19. *Argersinger v. Hamlin*, 407 U.S. 25, 31-33 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1964); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

20. 95 S. Ct. at 2541.

21. Compare *United States v. Plattner*, 330 F.2d 271, 273 (2d Cir. 1964), noting that appellate courts would be required to reverse and remand even if no prejudice were shown, *with Note*, 48 N.C.L. REV. 678, 680-81 (1970), which contends that reversal would be required because possible prejudice from the denial would be difficult to estimate, and therefore it could not meet the standard that the error be proved harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967).

22. 355 U.S. 17 (1957).

23. *Id.* Although *McGee* involved a waiver coupled with a guilty plea, it is not clear whether the decision would be applicable to the situation of one who conducts his own defense at trial.

24. 304 U.S. 458 (1938).

25. *Id.* at 464-65.

26. Note, *People v. Sharp: Death Knell for Pro Se Representation in Criminal Trials in California?*, 24 HASTINGS L.J. 431, 447 (1973).

27. 332 U.S. 708 (1948) (opinion of Black, J.).

which required that a defendant have an apprehension of such specific elements as lesser included offenses, range of punishments, and possible defenses in order to make a valid waiver.²⁸ However, because the *Von Moltke* opinion was adopted by only a plurality of the Court, some courts have chosen not to adhere to the specificity which it dictates.²⁹

Related to the proper standard for waiver of counsel is the issue of the defendant's competency to represent himself. Although the *Faretta* Court stated that the defendant need not have the technical skill of a lawyer to assert his right to defend *pro se*,³⁰ some standard of competency to defend oneself is desirable.³¹ To be mentally competent to stand trial, a defendant need only be capable of cooperating with his counsel in the preparation and presentation of his defense.³² This standard of competency does not envision that the defendant will be "led by the guiding hand of counsel at every step in the proceedings."³³ The *pro se* defendant does not merely have to cooperate with counsel; he must be his own counsel. One can be mentally and psychologically capable of being "led by the hand," but still lack the capacity to formulate a criminal defense that would insure a fair trial.³⁴

Therefore, implicit within the standard for a valid waiver of right to counsel, there is necessarily some minimum standard of competency required to defend oneself.³⁵ Presumably, the ascertainment of the defendant's competency could be administered jointly with the determination of the validity of his waiver. It has been suggested that some inquiry be made into the de-

28. *Id.* at 723-24.

29. United States v. Warner, 428 F.2d 730 (8th Cir. 1970); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969); Carter v. State, 243 Ind. 584, 187 N.E.2d 482 (1963); Note, 64 J. CRIM. L. C. & P.S. 240, 242 (1973).

30. 95 S. Ct. at 2541.

31. Comment, *Self-Representation In Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479, 1509 (1971). See Note, *supra* note 2, at 1145, which suggests three different levels of competency with respect to the defendant who requests to proceed *pro se*: (1) the fully competent defendant; (2) the marginal defendant; (3) the submarginal defendant. The author suggests that only the fully competent defendant be permitted to waive his right to counsel.

32. See, e.g., *People v. Wolff*, 61 Cal. 2d 795, 799, 394 P.2d 959, 961, 40 Cal. Rptr. 271, 273 (1964).

33. *Miller v. State*, 498 S.W.2d 79, 86 (Mo. App., D.K.C. 1973).

34. In *Massey v. Moore*, 348 U.S. 105, 108 (1954), the Supreme Court recognized that one might be considered competent to stand trial, yet lack the capacity to face prosecution without the assistance of counsel. This case is a pre-*Gideon* case—i.e., before the right to counsel was held to be essential to a fair trial—and may therefore be viewed merely as the Court's determination at that time of the exceptional circumstances where counsel would always be necessary. However, the mere fact that *Faretta* now gives one the right to proceed *pro se* does not erase the Court's recognition of varying degrees of competency and transform an incompetent defendant into a competent counsel.

35. However, the standard of competency for such a waiver does not appear to be too great. In *United States ex rel. Miner v. Erickson*, 428 F.2d 623 (8th Cir. 1970), the court approved a waiver of counsel made by an illiterate American Indian who could barely speak English. It would be fatuous to contend that such a defendant is competent to defend himself personally. See also *People v. Burson*, 112 Cal. 360, 369, 143 P.2d 1239, 1246 (1957).

defendant's capacity to assimilate the information required for a defense.³⁶ Such factors as the extreme youth or senility of the defendant, or his lack of education or experience surely would be considered by the trial court.³⁷ The trial judge should not be required to honor a request to proceed *pro se* any more than he would be required to accept a guilty plea from one who did not possess the mental faculty for making an intelligent plea.³⁸ Until some procedure is established for determining competency, justice will most certainly suffer. Fearing reversal under *Faretta*, a trial judge may allow a defendant of dubious mental competency to face prosecution on his own.

Given the importance which may be placed upon the defendant's knowledge of certain elements of his defense, the appointment of advisory counsel may be desirable to insure that the *pro se* defendant receives such knowledge. The *Faretta* Court alluded to the possible utilization of this procedure.³⁹ Some courts have not looked favorably upon the role of an advisory counsel, and have rejected any assertion that a *pro se* defendant has a right to such counsel.⁴⁰ A *pro se* defendant's effectiveness may therefore depend upon whether the judge in his jurisdiction is amenable to appointing advisory counsel. Such a variance among jurisdictions may be viewed as inequitable. The advantages of an advisory counsel are several: he can insure the confidence of the *pro se* defendant in the judicial system, thereby preserving courtroom decorum; he can relieve the judge from the burden of providing special attention to a party, while simultaneously attempting to be impartial; and he can provide the defendant with legal advice when requested.⁴¹ However, if the advisory counsel becomes so assertive as to interfere with the *pro se* defendant's management of his case, the possibility of reversible error may arise for forcing counsel, however titled, upon the defendant. Additionally, because advisory counsel may only sit mutely throughout the trial, requiring the appointment of such in all cases could constitute an unjustifiable allocation of scarce manpower.⁴²

36. Note, *supra* note 26, at 450.

37. *Id.*

38. FED. R. CRIM. P. 11 provides that a court may refuse to accept a plea of guilty. *Brady v. United States*, 397 U.S. 742, 756-57 (1970), gives the standard for a voluntary and intelligent plea of guilty.

39. 95 S. Ct. at 2541, n.46. The allusion to the possibility of such procedure in a footnote hardly seems to be a mandate to the lower courts to follow this procedure.

40. *United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970); *Shelton v. United States*, 205 F.2d 806, 812-13 (5th Cir. 1953). In *Shelton*, the court determined that the defendant had no such right and would not accept his interpretation of the phrase, "assistance of counsel," which was quite similar to the reading given in *Faretta*. See text accompanying notes 10-11 *supra*. It is possible that the Court's reading may lend credence to an assertion of a right to advisory counsel, given that counsel is merely one of the tools afforded a defendant to make his personal defense. Justice Blackmun alluded to this possibility in his dissent. 95 S. Ct. at 2549.

41. Comment, *supra* note 31, at 1507-09.

42. Note, *supra* note 2, at 1152.

The defendant in *Faretta* made his request to defend *pro se* well in advance of trial. Consequently, the Court did not indicate whether the right to defend *pro se*, albeit a constitutional one, is subject to limitations dependent upon the timeliness of such a request. This question was raised in the dissent of Justice Blackmun.⁴³ It has been held that a denial of a mid-trial attempt to dismiss appointed counsel is only reversible error if prejudice is shown to outweigh the desirability of avoiding the disruption which such a dismissal might produce.⁴⁴ The effect of such denial might now be considered more prejudicial given the holding in *Faretta*. In *United States v. Plattner*⁴⁵ the United States Court of Appeals for the Second Circuit held that the right to proceed *pro se* was a constitutional one, but it noted explicitly that its opinion did not purport to deal with the situation in which there is a mid-trial assertion of the right.⁴⁶ If a defendant wishes to discharge appointed counsel at mid-trial, the trial judge should determine whether the defendant desires to proceed *pro se*, or merely wants to have new counsel appointed. Without determining and making record of the basis of the defendant's request, the trial judge may impale himself on the horns of a dilemma. A denial of the demand might be a denial of a constitutional right, but an acceptance might constitute an invalid waiver.⁴⁷ In order to facilitate the administration of the trial and avoid delays, the right to defend *pro se* should be subject to some limitation as to when it may be asserted. However, because the right has been raised to constitutional stature by *Faretta*, it is unclear whether it may be so limited.

In holding that a criminal defendant has a constitutional right to represent himself, the United States Supreme Court correctly interpreted the Constitution. It remains for subsequent decisions to resolve the procedural problems which the administration of this right will produce.

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43. 95 S. Ct. at 2549.

44. *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966).

45. 330 F.2d 271 (2d Cir. 1964).

46. *Id.* at 277.

47. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1176 (1970).