People v. Sharp: Death Knell for Pro Se Representation in Criminal Trials in California

Sheila Vassey

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol24/iss3/5

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
PEOPLE v. SHARP: DEATH KNELL FOR PRO SE REPRESENTATION IN CRIMINAL TRIALS IN CALIFORNIA?

Contemporaneously with the latest expansion of the criminal defendant's right to the assistance of counsel,1 judicial decision, a constitutional amendment, and legislative enactments in California have recently combined to severely curtail if not eliminate the criminal defendant's ability to proceed in propria persona.2 At the primary election of June 6, 1972, the voters of California adopted Proposition 3,3 amending the California Constitution. The amendment deleted wording in the constitution which had been interpreted to give a defendant the right to defend himself without the aid of counsel.4 The amendment also authorized the legislature to require the defendant in a felony case to have the assistance of counsel.5 In addition, several penal code sections,6 requiring that the defendant in a capital case be represented by counsel, became operative on the adoption of the amendment.7

1. See Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (right to counsel applies in misdemeanor and petty offense cases if imprisonment may be imposed).
2. In propria persona literally means "in one's own proper person." Pro se means "for himself; in his own behalf; in person." BLACK'S LAW DICTIONARY 899, 1364 (4th ed. 1951).
3. Proposition 3 was a legislatively proposed constitutional amendment of California State Senator Cologne on behalf of Attorney General Evelle Younger, S.C.A. 42, Cal. Reg. Sess. (1971). Interestingly enough, the measure had the express support of, among others, the Judicial Council of California, the District Attorneys and Peace Officers Associations, and Los Angeles County Superior Court, the court from which People v. Sharp arose. See San Francisco Examiner, June 7, 1972, at D, col. 1, for a breakdown of the statewide vote count on Proposition 3.
4. Compare CAL. CONSR. art. I, § 13 (1879): "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend, in person and with counsel . . . ." with id., as amended June 6, 1972: "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to have the assistance of counsel for his defense . . . and to be personally present with counsel. . . . The Legislature shall have the power to require the defendant in a felony case to have the assistance of counsel." See also cases cited in note 9 infra.
7. Id. The new constitutional amendment requires representation by counsel in those cases designated as "capital cases" at the time the foregoing penal code sections were adopted or modified. The subsequent California Supreme Court decision holding the death penalty unconstitutional, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), and recent passage of a voter initiative favoring re-
One month later, the California Supreme Court extended the rationale of Proposition 3 to all criminal cases. The court ruled unanimously in People v. Sharp\(^8\) that there is no federal or state constitutional right to appear pro se.\(^9\)

The United States Supreme Court in recent years has laid increasing emphasis on the necessity for the “guiding hand of counsel” to ensure fundamental fairness to the criminal defendant.\(^10\) In Gideon v. Wainwright,\(^11\) the Sixth Amendment right to counsel was made applicable to the states by reason of the Fourteenth Amendment due process clause:\(^12\)

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed 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. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.\(^13\)

\(^8\) 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).

\(^9\) Id. at 453, 499 P.2d at 491, 103 Cal. Rptr. at 235. Sharp distinguished a long line of decisions finding a state constitutional right of self-representation. See, e.g., People v. Mattson, 51 Cal. 2d 777, 788-89, 336 P.2d 937, 945-46 (1959): “The foregoing sections [CAL. CONST. art. I, § 13 (1879), CAL. PEN. CODE §§ 686, 858-59, 987 (West 1970)] accord the accused not only a right to counsel but also a right to represent himself if he so elects. Except in certain situations not here pertinent, the court cannot force a competent defendant to be represented by an attorney” cited in People v. Vaughn, 71 Cal. 2d 406, 419, 455 P.2d 122, 129, 78 Cal. Rptr. 186, 193 (1969) and People v. Harmon, 54 Cal. 2d 9, 15, 351 P.2d 329, 332, 4 Cal. Rptr. 161, 164 (1960); People v. Hagen, 6 Cal. App. 3d 35, 49, 85 Cal. Rptr. 556, 565 (1970) (“The defendant's constitutional right to be represented by counsel at all stages of the proceeding, and his constitutional right to represent himself are on a parity.”); People v. Jackson, 186 Cal. App. 2d 307, 315, 8 Cal. Rptr. 849, 853 (1960) (“By constitutional provision and statute an accused is guaranteed the right to be represented by counsel or to represent himself.”); cf. People v. Crovedi, 65 Cal. 2d 199, 205-08, 417 P.2d 868, 872-74, 53 Cal. Rptr. 284, 288-90 (1966) (indicating that a right of self-representation is part of procedural due process) (dictum).

However, the court in Sharp concluded that these cases finding a state constitutional right of self-representation had either misinterpreted or taken portions of the constitutional language out of context, and that the California Supreme Court had never held, when the question was at issue, that there was a constitutional right to defend pro se. 7 Cal. 3d at 458-59, 499 P.2d at 495-96, 103 Cal. Rptr. at 239-40.


\(^12\) Id. at 342-45.

\(^13\) Id. at 344.
The right is not limited to serious criminal offenses. In Argersinger v. Hamlin, the Court held that, absent a knowing and intelligent waiver, a defendant could not be imprisoned even for a misdemeanor or petty offense unless he was represented by counsel. The Court recognized that such offenses often involve complex problems and reiterated the classic observation of Justice Sutherland: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”

However, the Supreme Court has never ruled specifically on the constitutionality of the correlative right, the right of self-representation. Nevertheless, the Court has consistently held that the right to counsel may be knowingly and intelligently waived. While “courts indulge every reasonable presumption against waiver” of fundamental constitutional rights and “do not presume acquiescence in the loss of fundamental rights,” the Supreme Court in Adams v. United States ex rel. McCann held that the right to counsel may be waived if the accused “knows what he is doing and his choice is made with eyes open”: “[T]he Constitution does not force a lawyer upon a defendant.”

The ability of a defendant to waive counsel and proceed pro se has incurred growing disfavor in a judicial system increasingly concerned with inefficiency and the orderly administration of criminal justice. Delays and continuances, occasioned by assertion of a right of

15. Id. at 37.
16. See id. at 33.
17. Id. at 31, quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Justice Sutherland went on to say: “Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”
22. Id. at 279.
self-representation, are said to hamper the flow of enormous court case-loads and add to the growing cost of criminal trials.\textsuperscript{24} There is also a fear, in response to the controversial and widely publicized trials of such figures as Angela Davis or Bobby Seale, that pro se defendants will abuse their position and disrupt courtroom decorum.\textsuperscript{25} In addition, requests to proceed pro se have been described as routine ploys used by cunning criminals to force appellate court reversals.\textsuperscript{26} These factors formed the background for the decision in \textit{People v. Sharp} and prompted Proposition 3.

\textbf{The Decision}

Sharp was represented in the superior court by a deputy public defender and was convicted of grand theft.\textsuperscript{27} He appealed the conviction,\textsuperscript{28} and the court of appeals reversed on the grounds that the trial court had erroneously denied the defendant's motion to proceed pro se and, therefore, had deprived Sharp of the right of self-representation.\textsuperscript{29} The court of appeals noted that the trial court's inquiry into the defendant's competency to proceed pro se revealed that Sharp was forty-eight years old, had an eleventh grade education, was articulate, had read many petitions and law books, and knew the offense of which he was charged, the lesser included offense, and the punishment which might be imposed.\textsuperscript{30} In addition, Sharp had not asked for a continuance although his motion to proceed pro se was made on the day set for trial, and the relatively simple facts of the case together with the defendant's waiver of jury trial indicated that the trial would not be involved or lengthy.\textsuperscript{31} The defendant's motion was apparently tac-

\textsuperscript{24} See, e.g., Cal. Stat. 1971, ch. 1800, § 6, at 3898: "The Legislature finds that persons representing themselves cause unnecessary delays in the trials of charges against them; that trials are extended by such persons representing themselves; and that orderly trial procedures are disrupted. Self-representation places a heavy burden upon the administration of criminal justice without any advantages accruing to those persons who desire to represent themselves."

\textsuperscript{25} See, e.g., CALIFORNIA SECRETARY OF STATE, PROPOSED AMENDMENTS TO CONSTITUTION, PRIMARY ELECTION, June 6, 1972, at 8: "[T]hrough willful misconduct or innocent ignorance of procedure, persons representing themselves can seriously disrupt a trial. On occasion such persons have abused and insulted judges and witnesses, and have done their best to turn their trial into a shambles."


\textsuperscript{27} CAL. PEN. CODE § 487 (West 1970).

\textsuperscript{28} People v. Sharp, 7 Cal. 3d 448, 451, 499 P.2d 489, 490, 103 Cal. Rptr. 233, 234 (1972).

\textsuperscript{29} Petition for Hearing at 12, People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972) (Appendix A).

\textsuperscript{30} \textit{id.} at 10-12.

\textsuperscript{31} \textit{id.} 11, 12.
tically motivated, based on a belief that his personal knowledge of the facts would make his cross-examination of the witnesses more thorough than that of an attorney. However, the case came to the California Supreme Court on a petition for a hearing, and the conviction was unanimously affirmed. The court found that neither the Sixth Amendment nor due process considerations required that a defendant be accorded the right of self-representation. Nor could the right be found by any rational reading of the state constitution. The court stated that even an abuse of discretion by the trial judge in denying a request to proceed pro se would not result in a reversal except in "very rare circumstances" where the denial impairs the fairness of trial.

Basis for the Decision

The Sixth Amendment

Judicial Precedents

In reaching its decision, the California court noted the absence of any controlling Supreme Court decision although language in *Carter v. Illinois* is often cited in support of a federal constitutional right of self-representation:

Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself... Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.

The court concluded that *Carter* "must be deemed to recognize that there are circumstances when a defendant must be represented." The circumstances which *Carter* refers to, however, consistently with its

32. *Id.* 11.
33. 7 Cal. 3d at 451, 499 P.2d at 490, 103 Cal. Rptr. at 234.
34. *Id.* at 454-57, 459-60, 499 P.2d at 492-94, 496-97, 103 Cal. Rptr. at 236-38, 240-41.
35. *Id.* at 457, 499 P.2d at 495, 103 Cal. Rptr. at 239.
36. *Id.* at 460, 462, 499 P.2d at 496, 498, 103 Cal. at 240, 242.

The Supreme Court in *Carter* cited its decision in *United States v. McCann* v. Adams, 320 U.S. 220 (1943) modifying *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942), where the Court stated in dictum that "[t]he right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law." *See also Price v. Johnston*, 334 U.S. 266, 285 (1948): "The absence of that right [of an accused to argue his own appeal] is in sharp contrast to his constitutional prerogative of being present in person... and to his recognized privilege of conducting his own defense at the trial."

38. 329 U.S. at 174-75.
39. 7 Cal. 3d at 456, 499 P.2d at 494, 103 Cal. Rptr. at 238.
holding, appear to be cases in which the defendant has not knowingly and intelligently waived his right to counsel. The Supreme Court has never held that due process may require forcing counsel on an accused who has knowingly and intelligently waived this right. But alternatively, Carter does not appear to give any direct support to a constitutional right to proceed pro se.

In the federal courts, the right is statutory, and the circuits are split on the question of whether it rises to the status of a constitutional right. The leading case in support of such a right is United States v. Plattner, a Second Circuit decision finding a federal constitutional right to proceed pro se which is unqualified if invoked prior to trial. However, it is established that an unequivocal request to proceed pro se is necessary, no notice of the right is required, the request must be timely, and denial of the request is not reversible error in the absence of a showing of prejudice. And, because an election to pro-

40. Carter held that petitioner had not been denied due process since the common law record before the Court failed to disclose that he had not knowingly and intelligently waived his right to counsel. 329 U.S. at 177-79.

41. See Grano, supra note 23, at 1202.

42. See United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn. 1966): "The validity of the deduction that the right to defend oneself without the assistance of counsel is a constitutional right is questionable. All that has really been said by the Supreme Court [in Carter] is that the Sixth Amendment does not prohibit the right of self-representation."

43. 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." See also Fed. R. Crim. P. 44(a).


45. 330 F.2d 271, 273, 277 (2d Cir. 1964).


47. See, e.g., United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965).

48. See, e.g., United States v. Catino, 403 F.2d 491, 497 (2d Cir. 1968) (motion to proceed pro se after three days of trial denied); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965): "Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed."

49. See United States v. Abbamonte, 348 F.2d 700, 704 (2d Cir. 1965). But see United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964), quoted in United States v. Pike, 439 F.2d 695 (9th Cir. 1971): "Thus we would be required to remand the case, even if no prejudice . . . were shown to have resulted. . . ."
ceed pro se is a waiver of the right to counsel, the trial court “should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. . . .”50 Noting these conditions on the right to waive counsel, the California Supreme Court concluded that those jurisdictions recognizing a constitutional right of self-representation “do not accord to such right the same force and vitality as the constitutional right to counsel. . . .”51

The Historical Analysis

The examination by the California Supreme Court of the right to proceed pro se from an historical perspective52 led to the conclusion that “only vague notions of a fundamental right of self-representation which predated the federal Constitution” could be discerned in the early declarations of rights.53 In addition, because self-representation was the prevailing practice in both England and America in the late eighteenth century, the emphasis appears to have been on abrogating the harsh common law rule denying to the defendant the assistance of counsel. Therefore, the court in Sharp found no compelling historical basis for a fundamental right of self-representation.54

On the other hand, such a basis was found by the Second Circuit in United States v. Plattner.55 The Second Circuit reasoned that section 35 of the Judiciary Act of 1789,56 giving a right to defend “personally or by counsel,” was passed by the First Congress one day before the Sixth Amendment was proposed. Thus, section 35 could be considered a contemporary interpretation of the “terse language” of the Bill of Rights.57 And, statutes and rules now in effect58 give “continued vitality” to the constitutional right to defend personally.59 It is at least arguable that the Sixth Amendment was meant to add the additional element of a right to counsel to the prevailing practice, and nei-

51. 7 Cal. 3d at 456, 499 P.2d at 494, 103 Cal. Rptr. at 238.
52. See generally Grano, supra note 23, at 1190-94. The practice of self-representation was firmly established in precolonial England—the right to counsel being largely nonexistent. The right to counsel in cases of treason was established by statute in 1695, and it was not until 1836 that this right became fully available regardless of the charge. In colonial America, self-representation was also commonplace, but was probably caused in part by a shortage of lawyers. Id. at 1191 & n.86, 1192-93.
53. 7 Cal. 3d at 454, 499 P.2d at 492, 103 Cal. Rptr. at 236. See generally B. Schwartz, The Bill of Rights 140-377 (1971).
54. 7 Cal. 3d at 454, 499 P.2d at 492, 103 Cal. Rptr. at 236.
55. 330 F.2d 271, 274 (2d Cir. 1964).
56. Ch. 20, § 35, 1 Stat. 73, 92-93 (1789).
57. 330 F.2d at 274.
59. 330 F.2d at 275.
ther the language nor the history of the amendment indicate an intent to retract the common law privilege of self-representation.

Plattner also found support for its position in the majority of state constitutions. While the court in Sharp noted that only four state constitutions provide a right to defend in person or by counsel, Plattner points out that an additional six states provide a right to be heard in person or by counsel, or both. At least half of the state constitutions provide a right to be heard in person and by counsel, a provision which many courts have understood to accord a right of self-representation. Thus, many states have recognized in their constitutions the fundamental character of the right of self-representation.

The Fifth and Fourteenth Amendment Guarantees of Due Process

The Analogy to the Singer Decision

In the absence of a compelling historical basis for a fundamental right of self-representation, the court in Sharp found persuasive authority in the reasoning of the Supreme Court in Singer v. United States on which to base a conclusion that “the right to waive a constitutional protection is not necessarily a right of constitutional dimensions.” In upholding the validity of Rule 23(a) of the Federal Rules of Criminal Procedure, requiring that the government and the court consent to the waiver of a jury, the Court in Singer rejected petitioner’s argument that he had a constitutional right to insist on waiver when he felt it to be in his own best interests and stated: “The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.” The California Supreme Court likewise reasoned that, if neither historical precedents nor due process considerations support a finding of a fundamental right of self-representation, there must similarly be no constitutional right to insist upon the opposite of the right to counsel.

60. Id.
61. 7 Cal. 3d at 457, 499 P.2d at 494, 103 Cal. Rptr. at 238.
62. 330 F.2d at 275.
63. See id.
66. 7 Cal. 3d at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237.
67. 380 U.S. at 34-35.
68. See 7 Cal. 3d at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237 where the court stated that “no sufficient reason appears why the waiver of [the Sixth Amendment right to counsel] is a constitutional right when the waiver of the Sixth Amendment’s right to a jury trial is not.”
However, the Court in *Singer* did not consider the question of a waiver of counsel. The *Singer* court’s finding that waiver of jury trial was an “obscure and insignificant procedure” in the common law with no general recognition in the colonies,\(^9\) may be contrasted with the firmly established practice of pro se representation.\(^7\) In addition, the Court noted in *Singer* that if the defendant’s waiver is refused, he is subject to the very thing the Constitution guarantees him.\(^1\) But the Sixth Amendment guarantees only the “assistance” of counsel, and it has been suggested that this guarantee is significantly different from the directory language found in the body of the Constitution and in the Sixth Amendment with regard to jury trials.\(^2\)

**Procedural Safeguards Ensuring Competent Representation**

In rejecting petitioner’s due process contentions, the Court in *Singer* stated that adequate safeguards such as change of venue and voir dire surround trial by jury to make it as fair as possible.\(^3\) Similarly, the California court concluded that the general availability of competent counsel, whose quality of performance is subject to checks and supervision, affords an accused the opportunity to best defend against the charges: \(^4\) “[T]here is no longer the same threat of an injustice which formerly compelled an accused to risk self-representation.”\(^5\) Therefore, the right of self-representation is not contained within the broader concept of due process.\(^6\)

However, the two main procedural safeguards surrounding a trial with counsel, namely removal of counsel and substitution of another attorney, and post-conviction relief for incompetency of counsel,\(^7\) are available in only very limited circumstances. In California, the sole statutory authority for removal calls for the consent of the attorney and his client or for a court order on the application of either party.\(^8\) But the statute has little relevance for the majority of defendants who

---

69. 380 U.S. at 28, 31.
70. See Grano, supra note 23, at 1190-94.
71. 380 U.S. at 36.
73. 380 U.S. at 35.
74. See 7 Cal. 3d at 460-61, 499 P.2d at 497, 103 Cal. Rptr. at 241.
75. Id. at 461, 499 P.2d at 497, 103 Cal. Rptr. at 241.
76. Id.
are indigent\textsuperscript{79} and, therefore, must rely on assigned counsel or public defender systems. There is no absolute right to more than one appointed counsel,\textsuperscript{80} and the decision whether to allow a substitution of appointed counsel is within the trial judge's discretion.\textsuperscript{81} The increased expense to the state in furnishing another appointed counsel coupled with the likelihood of a delay in the trial weigh heavily against a decision allowing for the substitution.\textsuperscript{82} Generally, a lack of rapport between attorney and client, such as a disagreement over trial tactics or strategy, is not sufficient to compel a substitution in the absence of an allegation of ineffective assistance of counsel.\textsuperscript{83}

Similarly, post-conviction relief on a claim of incompetency of counsel is available only if counsel was ineffective.\textsuperscript{84} The leading case in California finding such ineffective assistance at the trial level is \textit{People v. Ibarra}\textsuperscript{85} which held that to justify relief an extreme case must be shown. The trial must be reduced to a "farce or a sham."\textsuperscript{86} If counsel's failure to make careful factual and legal investigations, as distinguished from his trial strategy and tactical decisions, results in the withdrawal of a "crucial defense," then the defendant has been inadequately represented.\textsuperscript{87} The same principles apply to counsel's duties at the pretrial level when advising a defendant how to plead.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{79} See 2 L. Silverstein, \textsc{Defense of the Poor in Criminal Cases in American State Courts} 81 (1965). In a study of six California counties, the number of defendants who retained their own counsel in 1962 in felony cases ranged from a low of ten percent to a high of thirty-six percent, while the percentage of defendants found indigent varied from sixty-one to ninety percent with a statewide average of sixty-nine percent.
\item \textsuperscript{80} People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 47, 84 Cal. Rptr. 156, 159 (1970).
\item \textsuperscript{81} Id.
\item \textsuperscript{82} See People v. Williams, 2 Cal. 3d 894, 906, 471 P.2d 1008, 1015-16, 88 Cal. Rptr. 208, 215-16 (1970).
\item \textsuperscript{83} See \textit{id.} at 905, 471 P.2d at 1015, 88 Cal. Rptr. at 215; People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 47, 84 Cal. Rptr. 156, 159 (1970). The court in \textit{Williams} stated that neither a disagreement over the defendant's fundamental right to testify nor a dispute concerning trial tactics "necessarily compels the appointment of another attorney" but in a few cases could "signal a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." 2 Cal. 3d at 905, 471 P.2d at 1015, 88 Cal. Rptr. at 215, \textit{quoting} People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 717, 85 Cal. Rptr. 166, 173 (1970).
\item \textsuperscript{84} See, People v. Simms, 10 Cal. App. 3d 299, 313-14, 89 Cal. Rptr. 1, 11 (1970); People v. Ferguson, 1 Cal. App. 3d 68, 77, 81 Cal. Rptr. 418, 423 (1969).
\item \textsuperscript{86} 60 Cal. 2d at 464, 386 P.2d at 490, 34 Cal. Rptr. at 866.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} See \textit{In re Williams}, 1 Cal. 3d 168, 175, 460 P.2d 984, 989, 81 Cal. Rptr. 784,
appellate level, the failure to raise crucial assignments of error has also been held to deprive the defendant of the effective assistance of counsel. In any case, the defendant has the burden of establishing his claim as a demonstrable reality.

In applying the "crucial defense" doctrine of Ibarra, the cases have dealt mainly with the defense of diminished capacity. Counsel's misinterpretation of the law, resulting in failure to object to evidence obtained in an illegal search, has also been held to withdraw a crucial defense. And the Ibarra notion of a trial which was a "farce and a sham" was invoked in one case in which counsel failed to request an instruction on the lesser included offense of simple assault, a serious mistake under the facts of the case. But, allegations of lack of preparation or general incompetence which do not withdraw a "crucial defense", or reduce the trial to a "farce or a sham" have been held insufficient to support a claim of ineffective assistance of counsel.

There is also a line of authority in California which holds that claims of incompetency must be raised by the defendant at trial and generally may not be raised for the first time on appeal. However,
this rule is probably not applicable where the alleged incompetency arises from activities or omissions unrelated to the conduct of trial.\textsuperscript{96} In sum, the reluctance to find ineffective assistance of counsel except in "extreme cases"\textsuperscript{97} and the fact that the defendant may be deprived of relief by failure to object during trial, put in question the adequacy of procedural safeguards surrounding a trial with counsel.

In addition, the Second Circuit raises the issue of an accused who lacks confidence in his counsel, even though counsel may be fully competent.\textsuperscript{98} Having the "means of presenting his best defense" in this situation may require that the accused represent himself\textsuperscript{99} because the attorney cannot effectively represent an accused who refuses to cooperate.

**Additional Fair Trial Considerations**

The court in *Sharp* also rejected the idea that due process, in the sense of according the defendant a fair trial, required recognition of a right of self-representation. Fairness is to be predicated on "proceedings which will accord [an accused] the fullest opportunity to preserve all trial rights and successfully defend against the charges."\textsuperscript{100} And the assistance of counsel over the defendant's objection nevertheless accords him the basic "constitutionally compelled requirements of due process."\textsuperscript{101} But the Supreme Court has held that the Constitution does not force a lawyer on a defendant under all circumstances and that due process requirements are satisfied by a knowing and intelligent waiver.\textsuperscript{102}

It has been suggested that procedural due process, besides seeking to minimize the possibility that an innocent man will be punished, manifests an additional concern—respect for human dignity: \textsuperscript{103} "[T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, ..."
using any legitimate means within his resources. . . ."104 For this reason the Second Circuit maintains that "respect for individual autonomy" requires that an accused be allowed to proceed "under his own banner if he makes the choice 'with eyes open'."105 This interpretation of due process is flatly rejected by the California court: "The fairness of a trial is not to be predicated on any purported right of an accused to proceedings which are planned, directed or conducted by him. . . ."106

The positions of the two courts are not mutually exclusive, however. Pro se representation may, in a given case, accord the accused "the fullest opportunity to preserve all trial rights and successfully defend against the charges."107 For example, in prosecutions for crimes of a technical nature the defendant may be more conversant with the subject matter than an attorney could ever hope to be.108 On the other hand, in trials of a political nature109 the defendants may be more concerned with "maintain[ing] the integrity of their political and moral commitments"110 than with contesting the material elements of their offenses. One such example is the trial of the "Milwaukee Twelve" for charges arising from their destruction of selective service records. One writer observed that:

The trial of the Twelve also showed that laymen can achieve a favorable result in a political case by personally interacting with the judge, jury, and prosecutor. In so doing, they questioned one basis for professional representation: that an attorney is better able to articulate the defendant's position than the defendant himself. . . . In political cases where the defense is primarily moral, rather than legal, the defendant can express his justifications as well or better than the attorney.111

With regard to a second highly publicized political trial, the Angela Davis trial, it was also suggested that:

104. People v. Crovedi, 65 Cal. 2d 199, 208, 417 P.2d 868, 874, 53 Cal. Rptr. 284, 290 (1966); cf. Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942) (dictum): "When the administration of the criminal law in federal courts is hedged about as it is by the Constitutional safeguards for protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."


106. See generally Self-Representation in Criminal Trials, supra note 72, at 1498-1507.

107. Id. at 1503.

108. Id. at 1504.
The Angela Davis trial challenges the traditional assumption that . . . only one attorney-client model is appropriate. As a well-educated, articulate person, she, like the Twelve, has the intellectual and verbal abilities to speak on her own behalf.\textsuperscript{112}

Because the abilities of defendants necessarily vary widely, it would appear desirable for the courts to remain flexible in their determination of how a defendant may best defend himself.

The California Constitution

Finally, the California court concluded that the state constitution before amendment\textsuperscript{113} did not confer a right of self-representation.\textsuperscript{114} The court reasoned that the provision giving an accused the right “to appear and defend, in person and with counsel” could not be read “in person or with counsel,” and that the provision manifested no intent that an accused be afforded a right to proceed pro se.\textsuperscript{115}

Contrary to the court’s analysis, such an interpretation would not have been entirely unreasonable. The California Constitutional Convention rejected a motion to adopt the Sixth Amendment in favor of the provision in question.\textsuperscript{116} Arguably, the delegates felt that the provision accorded both the right of self-representation and the right to counsel if the accused was able to pay for it.\textsuperscript{117} However, all controversy has been eliminated by the recent California constitutional amendment, and the court held that general statutory language\textsuperscript{118} similar to that of the constitution before amendment was to be construed as not conferring a right of self-representation.\textsuperscript{119}

The Effect of People v. Sharp

In summation, after examining the federal Constitution in the light of historical precedents, the express language of the Sixth Amendment, and due process considerations, the California Supreme Court in Sharp concluded that the right of self-representation is not constitutionally compelled. The obvious implication of the decision is that the legislature may then require a defendant in any criminal trial to be represented by counsel.

Whether the practical problems perceived to arise from pro se

\textsuperscript{112} Id. at 1506.
\textsuperscript{113} See note 4 supra.
\textsuperscript{114} But see note 9 supra for earlier California cases finding a state constitutional right of self-representation.
\textsuperscript{115} 7 Cal. 3d at 457-58, 499 P.2d at 495, 103 Cal. Rptr. at 239.
\textsuperscript{116} See J. Browne, Debates in the Convention of California 294 (1850).
\textsuperscript{117} Id.
\textsuperscript{118} CAL. PEN. CODE § 686 (West Supp. 1972).
\textsuperscript{119} 7 Cal. 3d at 463-64, 499 P.2d at 499, 103 Cal. Rptr. at 243 (Appendix).
representation will be significantly reduced as a result is debatable. The actual number of defendants who, in the past, have waived counsel and proceeded to trial is very small.\textsuperscript{120} Realistically, the problems of delays and continuances are not likely to be abated—the dilatory tactics of lawyers are notorious.\textsuperscript{121} Post-conviction adjudication will continue to be a problem due to the omnipresent ineffective assistance of counsel claim. And, obviously, a defendant represented by counsel is equally capable of disrupting trial proceedings.

\textbf{An Alternative Approach—Pro Se As A Qualified Right}

The alternative position taken by the Second Circuit, recognizing a federal constitutional right of self-representation subject to qualifications,\textsuperscript{122} is preferable to the approach taken in California.\textsuperscript{123} The Second Circuit’s position balances the interest of the trial court in its smooth and efficient administration and that of the litigant in presenting his best defense in the manner he sees fit.\textsuperscript{124} If the defendant does knowingly and intelligently waive his right to counsel and does make a timely and unequivocal request to proceed pro se, the Second Circuit’s position is that his request should be granted and that he should be bound by the results of that decision.\textsuperscript{125} If the pro se defendant should prove to be abusive, the contempt power is available to preserve order and decorum. In addition, the Second Circuit advises that district courts offer appointed counsel as a resource to indigent defendants “to the extent that the defendant may wish to make use of his services.”\textsuperscript{126} Thus, if the defendant later proves to be incompetent to proceed pro se, the trial need not be delayed to appoint counsel unfamiliar with the case.\textsuperscript{127}

\textsuperscript{120} See I L. Silverstein, \textit{Defense of the Poor in American State Courts} 91 (1963). In contrast, the number of pro se defendants seeking post conviction relief may be significantly higher. One study found that nearly twenty percent of the case-load handled annually in the federal courts is accounted for by pro se litigants, the vast majority of whom are state and federal prisoners seeking to challenge the constitutionality of their convictions, the conditions of their confinement or other violations of their civil rights. Zeigler & Hermann, \textit{The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts}, 47 N.Y.U.L. Rev. 159, 159-60 (1972).

\textsuperscript{121} See Argersinger \textit{v.} Hamlin, 407 U.S. 25, 58 (1972) (dictum) (concurring opinion): “We are familiar with the common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff.”

\textsuperscript{122} See text accompanying notes 45-50 supra.

\textsuperscript{123} But see Grano, supra note 23, at 1175-1208; 48 N.C.L. Rev. 678, 682 (1970).

\textsuperscript{124} See Comment, \textit{The Right to Defend Pro Se}, 3 Texas Tech. L. Rev. 89, 96-98 (1971) for an argument that the right to proceed pro se should always be recognized as discretionary whether invoked prior to or during trial.

\textsuperscript{125} Accord, Smith v. United States, 216 F.2d 724, 727 (5th Cir. 1954).

\textsuperscript{126} United States v. Spencer, 439 F.2d 1047, 1051 (2d Cir. 1971).

\textsuperscript{127} See Self-Representation in Criminal Trials, supra note 72, at 1509.
Limitations Upon the Right to Waive Counsel

An additional safeguard would be a more careful screening of defendants who desire to represent themselves and an insistence upon application of definite criteria for determining competency to waive counsel. This would tend to alleviate the problem of appellate court reversals due to the unintelligent waiver of counsel and also to encourage careful consideration of requests to proceed pro se. The problems created by a failure to insist on compliance with definite standards are illustrated in the California situation.

The court in Sharp refers to the standards laid down by the California Supreme Court by which a trial court may determine the competency of an accused to proceed pro se. They require that the defendant have "an intelligent conception of the consequences of his act" and understand "the nature of the offense, the available pleas and defenses, and the possible punishments."128

This, apparently, is in line with constitutional standards for waiver of counsel set forth by the Supreme Court in Johnson v. Zerbst129 and held applicable in state criminal proceedings.130 The Court in Zerbst defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."131 Because of the fundamental nature of the right to counsel, the Court emphasized the "serious and weighty responsibility" of the trial court to clearly determine that this right is competently and intelligently waived. The determination "must depend . . . upon the particular facts and circumstances" of the case and should fittingly and appropriately appear on record.132 In Von Moltke v. Gillies,133 the Court further elaborated on conditions for waiver. The Supreme Court spoke of the duty of the federal judge to "investigate as long and as thoroughly as the circumstances of the case before him demand".134

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.135

129. 304 U.S. 458 (1938).
131. 304 U.S. at 464.
132. Id. at 464-65.
133. 332 U.S. 708 (1948).
134. Id. at 722-24.
135. Id. at 724.
Clearly, a waiver of counsel cannot be implied from a guilty plea or from a silent record.\textsuperscript{137}

In applying these standards, the federal courts have relied on the more general \textit{Zerbst} test of a knowing and intelligent waiver rather than on the defendant's apprehension of specific items.\textsuperscript{138} The \textit{Von Moltke} case is objected to as suggesting "a standard of perfection" which, applied literally would never result in a competent waiver.\textsuperscript{139} The case has been distinguished on the grounds that it is "clearly concerned with waiver of counsel occurring contemporaneously with a plea of guilty,"\textsuperscript{140} although the case itself does not appear to rest on such a distinction.\textsuperscript{141} Finally, it is thought that rigid application of the \textit{Von Moltke} guidelines might lead to a result inconsistent with that obtained by applying the \textit{Zerbst} standard.\textsuperscript{142} Whatever standard is applied, the defendant bears the burden of proving by a preponderance of the evidence that a waiver was not knowing and intelligent;\textsuperscript{143} and the courts will look to the entire record of the case to determine if a waiver was competent.\textsuperscript{144}

The California standard for determining competency to proceed pro se, although less rigorous than the \textit{Von Moltke} formulations, has received a similar treatment. While it is the preferred practice for the

\begin{itemize}
\item \textsuperscript{136} See Rice v. Olson, 324 U.S. 786, 788 (1945).
\item \textsuperscript{137} Carnley v. Cochran, 369 U.S. 506, 516 (1961).
\item \textsuperscript{138} See United States v. Warner, 428 F.2d 730, 734 (8th Cir.), \textit{cert. denied}, 400 U.S. 930 (1970); Spanbauer v. Burke, 374 F.2d 67, 72 (7th Cir. 1966), \textit{cert. denied}, 389 U.S. 861 (1967): "It appears that federal courts have looked to the substance of the \textit{Von Moltke} formulations, and not to its formulas." \textit{But see} United States ex rel. Ackerman v. Russell, 388 F.2d 21, 23 (3d Cir. 1968); Shawan v. Cox, 350 F.2d 909, 912 (10th Cir. 1965); Snell v. United States, 174 F.2d 580 (10th Cir. 1949).
\item \textsuperscript{139} Hodge v. United States, 414 F.2d 1040, 1043 (9th Cir. 1969), \textit{noted in} 21 \textit{HASTINGS} L.J. 1002 (1970); \textit{accord}, Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970): The rather vague test proposed by the Ninth Circuit in \textit{Hodge} is "whether the defendant understood the charges against him and was fully aware of the fact that he would be on his own in a complex area where experience and professional training are greatly to be desired." 414 F.2d at 1043.
\item \textsuperscript{140} Hodge v. United States, 414 F.2d 1040, 1044 (9th Cir. 1969).
\item \textsuperscript{141} See 332 U.S. at 722 where the Court in \textit{Von Moltke} states: "It is the solemn duty of a federal . . . judge to make a thorough inquiry and to take all steps necessary to insure the fullest protection of [the] constitutional right [to counsel] at every stage of proceedings." (emphasis added). \textit{See} 21 \textit{HASTINGS} L.J. 1002, 1005 (1970).
\item \textsuperscript{142} See Spanbauer v. Burke, 374 F.2d 67, 72 (7th Cir. 1966).
\item \textsuperscript{143} Moore v. Michigan, 355 U.S. 155, 161 (1957); Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938).
\item \textsuperscript{144} E.g., Townes v. United States, 371 F.2d 930, 934 (4th Cir. 1966); United States v. Redfield, 197 F. Supp. 559, 570 (D. Nev. 1961). \textit{But see} Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965): "It . . . is the holding in \textit{Johnson} v. \textit{Zerbst}, that the fact that a plea was intelligently entered and that counsel was intelligently waived must be ascertained at the time of arraignment or of waiver and not after the fact."
trial court to make a determination of competency at the time a request to waive counsel is made.\textsuperscript{145} The rule is subject to the qualification that an appellate court will look to the entire record to determine if the defendant was in fact competent to represent himself.\textsuperscript{146} Although frequently the trial court's inquiry into the defendant's competency is held to be insufficient,\textsuperscript{147} the trial court's decision is a discretionary matter which will rarely be disturbed on appeal in the absence of abuse.\textsuperscript{148} One court has concluded that the California Supreme Court itself, rather than strictly complying with its own standard, "appears to employ a case by case approach," taking into consideration the background, experience, and conduct of the accused when the intelligent waiver of counsel is in issue.\textsuperscript{149}

Factors considered relevant by the appellate courts to the defendant's competency to waive counsel and, therefore, to his ability to proceed pro se express administrative and substantive concerns. Given the interest of the trial court in the orderly disposition of its docket, it is within the court's discretion to deny requests which threaten delays,\textsuperscript{150} continuances,\textsuperscript{151} or disruption in the courtroom.\textsuperscript{152} The courts will also consider the defendant's demeanor in court\textsuperscript{153} and his per-

\begin{footnotesize}
\bibitem{145} See People v. Miller, 12 Cal. App. 3d 922, 931, 91 Cal. Rptr. 97, 102 (1970).
\bibitem{149} People v. Hill, 268 Cal. App. 2d 504, 511, 74 Cal. Rptr. 180, 183 (1968).
\bibitem{150} See, e.g., People v. Ochoa, 9 Cal. App. 3d 500, 506, 88 Cal. Rptr. 399, 404 (1970) (defendant's request posed a serious threat to the orderly disposition of the court's docket); People v. Hagen, 6 Cal. App. 3d 35, 49-50, 85 Cal. Rptr. 556, 565-66 (1970) (defendant sought to discharge public defender at a time that would have delayed trial for two months).
\bibitem{152} See, e.g., People v. Washington, 257 Cal. App. 2d 112, 116, 64 Cal. Rptr. 478, 481 (1967) (request to waive counsel indicated either a deliberate attempt to disrupt trial or a serious lack of insight); People v. Powers, 256 Cal. App. 2d 904, 914, 64 Cal. Rptr. 450, 457 (1967).
\end{footnotesize}
sonal characteristics, in general, including his age,\textsuperscript{154} education,\textsuperscript{155} previous experience in criminal proceedings,\textsuperscript{156} job status,\textsuperscript{157} mental or emotional stability,\textsuperscript{158} and ability to articulate his grievances.\textsuperscript{159} Also taken into account are extrinsic factors, such as the seriousness or complexity of the offense charged and the penalty sought by the prosecution.\textsuperscript{160}

While each case must necessarily turn on its own facts and circumstances, failure to insist on adherence to a definite standard for determining an accused's competency to waive counsel appears objectionable in at least two respects. First, it has made possible waivers of counsel either by defendants who lack full understanding of the consequences of their act,\textsuperscript{161} for example, ignorant of defenses or circumstances in mitigation which an attorney could profitably have taken ad-

\textsuperscript{154} See, e.g., People v. Floyd, 1 Cal. 3d 694, 704, 464 P.2d 64, 69, 83 Cal. Rptr. 608, 613 (1970) (request to waive counsel denied; defendant was twenty-one); People v. Miller, 12 Cal. App. 3d 922, 931, 91 Cal. Rptr. 97, 102 (1970) (request granted; defendant was twenty-two); People v. Wade, 266 Cal. App. 2d 918, 924, 72 Cal. Rptr. 538, 542 (1968) (request granted; defendant was forty-two).

\textsuperscript{155} See, e.g., People v. Floyd, 1 Cal. 3d 694, 704, 464 P.2d 64, 69, 83 Cal. Rptr. 608, 613 (1970) (tenth or eleventh grade education; request to waive counsel denied); In re James, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952) (no formal education; error to accept waiver of counsel); People v. Wade, 266 Cal. App. 2d 918, 924, 72 Cal. Rptr. 538, 542 (1968) (one year of college and schooling in the army; request to waive counsel granted).

\textsuperscript{156} See, e.g., People v. Floyd, 1 Cal. 3d 694, 704, 464 P.2d 64, 69, 83 Cal. Rptr. 608, 613 (1970) (no prior adult record; request to waive counsel denied); People v. Wade, 266 Cal. App. 2d 918, 924, 72 Cal. Rptr. 538, 542 (1968) (prior representation before the court, once successfully; request granted).

\textsuperscript{157} See, e.g., In re James, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952) (itinerant farm hand; error to accept waiver of counsel); People v. Kranhouse, 265 Cal. App. 2d 440, 448, 71 Cal. Rptr. 223, 228 (1968) (certified public accountant and licensed real estate broker; no error in granting waiver).

\textsuperscript{158} See, e.g., People v. Floyd, 1 Cal. 3d 694, 704, 464 P.2d 64, 69, 83 Cal. Rptr. 608, 613 (1970) (plea of not guilty by reason of insanity entered although later withdrawn; request to waive counsel denied); People v. Jones, 16 Cal. App. 3d 837, 842, 94 Cal. Rptr. 312, 316 (1971) (defendant seemed dull-witted; error to grant motion to proceed pro se).

\textsuperscript{159} See, e.g., People v. Sharp, 7 Cal. 3d 448, 462, 499 P.2d 489, 498, 103 Cal. Rptr. 233, 242 (1972).

\textsuperscript{160} See, e.g., People v. Floyd, 1 Cal. 3d 694, 704, 464 P.2d 64, 69, 83 Cal. Rptr. 608, 613 (1970) (defendant charged with murder and robbery, and the prosecution seeking the death penalty; request to waive counsel denied).

\textsuperscript{161} See Salazar v. Sigler, 441 F.2d 834, 838-39 (8th Cir. 1971) (dissenting opinion) (twenty-one year old Mexican with a ninth grade education allowed to waive counsel and plead guilty to murder without being informed by the trial court of the nature of the charges, possible defenses, and circumstances in mitigation); Minor v. United States, 375 F.2d 170, 176-79 (8th Cir., cert. denied, 389 U.S. 882 (1967) (dissenting opinion) (no indication the court explained the range of allowable punishments, possible defenses, operation of presumption).
vantage of, or by defendants incapable of intelligently waiving counsel due to some inherent incapacity.\textsuperscript{162} Secondly, a trial judge, who is not obligated to conduct any kind of comprehensive inquiry into the defendant's abilities, is probably more prone to act arbitrarily in disposing of requests to waive counsel.

Thus, it would be desirable to insist on compliance with a definite standard for waiver of counsel in all cases. To this end, the American Bar Association has proposed:

An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of that offer and his capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience. . . .\textsuperscript{163}

This proposal would require that a defendant be fully informed of all the relevant circumstances of his case, including the nature of the charges, available pleas and defenses, circumstances in mitigation, and possible punishments, in order that he be able to assess the risk he is taking by proceeding pro se. Only then can he intentionally and knowingly choose between the alternatives of pro se representation and the assistance of counsel. Although this may involve a time consuming commitment on the part of the trial court, constitutional principles as set forth in \textit{Johnson v. Zerbst}\textsuperscript{64} and \textit{Von Moltke v. Gillies}\textsuperscript{65} require that the defendant be so informed.

In addition, the proposal would necessitate an inquiry into the individual's capacity to evaluate the information given him. Clearly the extreme youth or senility of the defendant, his lack of education or experience and other factors may preclude him from making a meaningful decision.

A second recommendation is that the finding of the trial court appear on the record.\textsuperscript{166} While this has been urged by appellate courts in the past,\textsuperscript{167} in the absence of such a finding, they have inferred com-

\textsuperscript{162} See Spanbauer v. Burke, 374 F.2d 67, 70, 77 (7th Cir. 1966) (waiver held valid although defendant described in mental examination reports as "sociopathic," "very disturbed," "extremely dangerous").
\textsuperscript{163} ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE § 7.3 (Approved Draft 1968).
\textsuperscript{164} See text accompanying notes 129-32 supra.
\textsuperscript{165} See text accompanying notes 133-35 supra.
\textsuperscript{166} See Hodge v. United States, 414 F.2d 1040, 1054 (9th Cir. 1969) (dissenting opinion); 21 HASTINGS L.J. 1002, 1007 (1970).
petent waivers from the entire record of trial. But the requirement of an intentional, knowing waiver should not be satisfied by a "constructive" competent waiver to be inferred after the fact. Also, requiring such a finding, after a comprehensive inquiry into the defendant's competency, would discourage or at least expedite post-conviction attacks.

Finally, requiring a finding on record would discourage trial judges from acting peremptorily in disposing of requests to proceed pro se. While most judges probably do not act arbitrarily, one writer aptly noted that their prior experience with pro se defendants, their legal training, and bureaucratic predispositions influence the judges "to deny such requests through whatever legal means are available."  

**Conclusion**

In conclusion, although the California Supreme Court in *People v. Sharp* held that the right of self-representation is not a federal constitutional right, the better view is that a criminal defendant has a qualified constitutional right to proceed pro se. Support for this position is found in section 35 of the Judiciary Act of 1789 and current federal statutes, in state constitutional provisions, in the language of the Sixth Amendment itself, in the fact that the Supreme Court has consistently held that due process does not justify forcing counsel on an accused who has knowingly and intelligently waived his right to counsel, and in the fact that presently a trial with counsel is not surrounded with sufficient safeguards to ensure the defendant the fairest trial possible. Recognizing a qualified right of self-representation balances the substantial interest of the trial court in orderly and efficient proceedings and that of the defendant in presenting "his best defense" and proceeding "under his own banner."

Because pro se representation is open to abuse, however, several safeguards have been suggested. If the defendant proves to be abusive, the contempt power is available. Greater use of advisory counsel is recommended in order to prevent delays if the defendant for any reason is unable to continue his pro se defense. Finally, requiring the trial judge, in considering a request to proceed pro se, to apply definite criteria in determining competency and to make a finding

---

170. See text accompanying notes 55-59 supra.
171. See text accompanying notes 60-64 supra.
172. See text accompanying notes 19-22 supra.
173. See text accompanying notes 77-97 supra.
on the record should tend to discourage frivolous post-conviction claims of incompetency to waive counsel. Stricter compliance with such standards would have the additional benefits of safeguarding the fundamental right to counsel, protecting the defendant who is incompetent to waive counsel, and encouraging the trial judge to give careful consideration to pro se requests.

*Sheila Vassey

---

* Member, Second Year Class