Faretta v. California: The Law Helps Those Who Help Themselves

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“Although the right to defend is fundamental, our concern is with the manner in which that fundamental right is to be exercised.”¹

On July 7, 1972, in People v. Sharp,² the California Supreme Court focused this concern on the right of an accused to represent himself in a criminal trial in a state court. It concluded that such a right, although granted by statute in many jurisdictions, was not to be found in either the federal or California constitutions.

On June 30, 1975, in Faretta v. California,³ the United States Supreme Court asked the same questions, yet arrived at a very different conclusion. Anthony Faretta, charged with grand theft in Los Angeles County, California, requested well before the date of trial that his public defender be dismissed and that he be allowed to represent himself. After questioning revealed that the accused had a high school education and had once before represented himself in a criminal action, the judge granted the request in a “preliminary ruling.”⁴ Several weeks later the judge sua sponte questioned the accused on specific points of the hearsay rule and the state law on jury selection. The judge concluded that the accused had not made a knowing and intelligent waiver of counsel, reversed his earlier ruling, and reappointed the public defender. Defendant Faretta was subsequently convicted and sentenced to prison. The California court of appeal sustained the conviction, citing Sharp,⁵ and the California Supreme Court denied review.⁶ In a 6-3 decision⁷ the United States Supreme Court expressly overruled Sharp and determined that the right was indeed to be found in the United States Constitution and is binding upon the states.

The onset of this new doctrine in California law has generated reactions ranging from fear that our criminal justice system will grind to a halt to simple confusion concerning the day by day application of the ruling. Indeed, a good portion of Justice Blackmun’s dissenting opin-

2. 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).
3. 422 U.S. 806 (1975).--
4. Id. at 807-08.
5. Id. at 811-12.
6. Id.
7. Chief Justice Burger and Justices Blackmun and Rehnquist dissented.
ion in *Faretta* is devoted to the procedural problems allegedly created by the decision. After briefly examining the reasoning process that led the Supreme Court to overrule *Sharp* in *Faretta*, this note will explore eight potential problem areas which may accompany the constitutional right to self-representation in criminal cases. These areas are as follows: (1) the standard for determining eligibility to defend *in propria persona*; (2) forfeiture of the right by abuse or misconduct; (3) waiver of the right by failure to assert it in a timely and proper manner; (4) other limitations to invocation of the right to defend *in pro per*; (5) the appointment of standby counsel to assist the accused; (6) a *pro per* defendant’s ability to appeal an adverse verdict on the grounds of incompetent representation at trial; (7) the necessity of advising all criminal defendants of their right to proceed *in pro per*; and finally, (8) the rights of *pro per* defendants to time for the preparation of their defense and access to legal materials.

In each area the author will attempt to clarify the particular issue or fear and to explore the pertinent case law—particularly the law of California, the state in which *Faretta* arose. Wherever possible, the resolution that is indicated by that law will be discussed, and where the probable resolution to a particular problem is not ascertainable, the author will suggest the approach which seems most reasonable. By this method of analysis the author will demonstrate that the *Faretta* decision has enunciated a valuable and functional new right.

**The Decision: Finding the Right**

Both the California and the United States Supreme Courts agreed that if there was any right of self-representation to be found in the Constitution, it would be found primarily in the sixth amendment. The sixth amendment, by its own words, guarantees to an accused “the Assistance of Counsel for his defence.”

Although both courts agreed that the guaranteed defense is a personal one, they could not agree upon its particular incidents.

When the California Supreme Court searched the sixth amendment for the right to self-representation, they found no “clear inference” or “express support” for it. While accepting that the amendment did not purport to bar a defendant from waiving counsel in a proper case, the court nonetheless decided that the ability to waive the constitutional

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8. 422 U.S. at 852 (dissenting opinion).
9. U.S. Const. amend. VI.
11. Id. at 455, 499 P.2d at 493, 103 Cal. Rptr. 237.
right to counsel did not in itself create the opposing right to self-representation.\textsuperscript{12}

When the United States Supreme Court read the same words, however, it found that "[a]lthough not stated in the Amendment in so many words, the right . . . to make one's own defense personally—is . . . necessarily implied by the structure of the Amendment."\textsuperscript{13} To force counsel upon an unwilling defendant, according to the Court, would violate both the spirit and the logic of an amendment that contemplated counsel as a defense tool for a willing defendant.\textsuperscript{14}

Moreover, the right found was an independent one and did not arise mechanically as a correlative of the right to waive assistance of counsel.\textsuperscript{15} The Court felt that because the sixth amendment guarantees a \textit{personal} defense, any constitutionally adequate defense presented by counsel has to be premised upon consent of the defendant. For "[u]nless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not \textit{his} defense."\textsuperscript{16}

The Court found English and colonial history preceding the sixth amendment supportive of reading that amendment to include the right of self-representation. It was not until the early nineteenth century that accused felons in England were even \textit{allowed} counsel,\textsuperscript{17} and then only at the request of the accused.\textsuperscript{18} The Court found a decided aversion to the idea of forced counsel in the American colonies\textsuperscript{19} and concluded that the right of self-representation was expressly omitted from the sixth amendment only because the framers felt it too obvious to warrant recitation.\textsuperscript{20}

\begin{enumerate}
\item \textit{Id.}, \textit{quoting} Singer v. United States, 380 U.S. 24, 34-36 (1965).
\item Fareetta v. California, 422 U.S. 806, 819 (1975).
\item \textit{Id.} at 820.
\item \textit{Id.} at 819-20 n.15.
\item \textit{Id.} at 821 (emphasis in original).
\item \textit{Id.} at 823. The right to counsel was granted by statute in 1836, although judges had been allowing the use of counsel as early as the mid-18th century. \textit{Id.} at 823-25 & n.26.
\item The court in \textit{Sharp} concluded from this same history that "as a practical matter" an accused had to represent himself. People v. Sharp, 7 Cal. 3d at 453, 499 P.2d at 492, 103 Cal. Rptr. at 236.
\item "No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable." Fareetta v. California, 422 U.S. 806, 832 (1975). The California Supreme Court felt that the evil to be prevented was forcing a defendant to pay for unwanted counsel, and found "only vague notions of a fundamental right of self-representation which predated the federal Constitution." People v. Sharp, 7 Cal. 3d 448, 454, 499 P.2d 489, 492, 103 Cal. Rptr. 233, 236 (1972).
\item Fareetta v. California, 422 U.S. 806, 832 (1975).
\end{enumerate}
Believing that both the language and history of the sixth amendment mandated a constitutional right to self-representation, the Supreme Court then attempted to find support in federal case law, a task complicated by the fact that the right of self-representation in federal courts has been provided for by statute since 1789.\(^{21}\) It was therefore generally difficult to tell whether the source of the right granted by a court in any particular case was constitutional or merely statutory.\(^{22}\) The only Supreme Court language on point was contained in dictum.\(^{23}\)

The United States Courts of Appeals, however, have confronted the problem more squarely. In *United States v. Plattner*,\(^{24}\) the court found that the right to assistance of counsel was meant only to buttress "the absolute and primary right to conduct one's own defense *in propria persona.*"\(^{25}\) The courts of appeals of five other circuits had taken similar stands,\(^{26}\) while only one circuit had explicitly concluded the right to be purely statutory.\(^{27}\)

Having thus examined the language and history of the sixth amendment and the case law surrounding it, the *Faretta* majority felt compelled to recognize the constitutional stature of the right to self-representation. The Court noted that it faced a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.\(^{28}\)

The Court was well aware that its decision will often result in an accused receiving a poorer defense than he is entitled to.\(^{29}\) It concluded, however, that the ultimate goal of the sixth amendment was not to guarantee what was *objectively* the best defense—that is, by counsel—but rather to secure what was *subjectively* the best defense—that which


\(^{22}\) See, e.g., *Butler v. United States*, 317 F.2d 249, 258 (8th Cir. 1963) (recognizing statutory aspects of the right, but presenting confusing implications of coexistent constitutional aspect of the right).

\(^{23}\) *Adams ex rel. McCann v. United States*, 317 U.S. 269, 275 (1942). Note that the dictum is in substantial agreement with *Faretta*.

\(^{24}\) 330 F.2d 271 (2d Cir. 1964).

\(^{25}\) Id. at 274.

\(^{26}\) United States v. Warner, 428 F.2d 730 (8th Cir. 1970); United States v. Sternman, 415 F.2d 1165, 1169-70 (6th Cir. 1969); *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969); *Arnold v. United States*, 414 F.2d 1056, 1058-59 (9th Cir. 1969); *McKenna v. Ellis*, 263 F.2d 35, 41 (5th Cir. 1959).

\(^{27}\) *Brown v. United States*, 264 F.2d 363, 365 (D.C. Cir. 1959). The *Faretta* majority brushed this case off as a plurality opinion. 422 U.S. at 817. The *Sharp* court found it more persuasive. 7 Cal. 3d at 457, 499 P.2d at 494, 103 Cal. Rptr. at 238.


\(^{29}\) Id. at 832-34.
the accused personally chooses. For "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"30

**The Standard**

One of the fundamental questions concerning *pro per* representation is the standard or test an accused must meet to be allowed to so proceed. Must any and all requests be automatically granted? If there are limits, what are they and by whom are they to be determined? These questions, of course, will only be answered with certainty by the courts as they interpret and apply *Faretta*. For now, however, they can be tentatively answered by examining the source to which the courts will most likely turn—existing case law.

The most pertinent source of guidance, of course, will be *Faretta* itself. Although there existed ample pre-*Faretta* language on standards for waiver of counsel,31 the Court nonetheless developed new language.32 The Court examined the accused's trial record and found that he had clearly and unequivocally declared to the trial judge that he wanted to represent himself . . . that [he] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.33

Defendant had been warned of the danger of proceeding *in pro per* and advised that he would be held to standard trial procedure.34 In view of these factors, the Court found his degree of technical legal knowledge irrelevant35 and held that forcing counsel upon the accused under these circumstances had deprived him of his "constitutional right to conduct his own defense."36

A most interesting and instructive aspect of this new standard is that the Court declined to adopt verbatim the existing waiver of counsel test. Although the two standards are in many ways identical, there are differences that were apparently of critical importance to the *Faretta* Court. The foundation of the pre-*Faretta* test in the federal system was that any decision to waive counsel and proceed *in pro per* must have been knowingly and intelligently made.37 The question then quickly

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32. 422 U.S. at 835-36.
33. *Id.* at 835.
34. *Id.* at 835-36.
35. *Id.* at 836.
36. *Id.*
became what constituted a knowing and intelligent waiver.

The first comprehensive definition—and the one most often cited—was set out in Johnson v. Zerbst: 38

The determination of whether there has been an intelligent waiver of the 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. 39

While generally retaining the "knowing and intelligent" requirement 40 and additionally asserting that legal skills are not important, Faretta asserted that an accused's background and experience were to play no part in the decision. 41 Moreover, his conduct would be relevant only as an indicator of his literacy, competency, and the informed voluntariness of his decision.

In another pre-Faretta case, Adams v. United States, 42 the Court noted that an accused's decision to waive counsel requires that "he knows what he is doing and that his choice is made with eyes open." 43 This sounds compatible with the "informed free will" language of Faretta. Yet just what constitutes "informed free will" is a point critics fear Faretta has left unsettled. However, although the Court made no specific citations, it seems likely that the Faretta majority would approve of language in Von Moltke v. Gillies 44 which grafted portions of Zerbst and Adams into a standard compatible with the Faretta holding:

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. 45

So, although the Court in Faretta did not expressly establish a comprehensive standard, it did allow for workable parameters for such a standard by criticizing and restating language of which it disapproved and by impliedly adopting acceptable existing language. Thus, to waive counsel and defend in pro per, an accused must be literate, competent, aware of the charges against him, and apprised of the dangers of proceeding on his own. His background, experience, and legal knowledge are not to be considered. His waiver of counsel must be free and

38. Id.
39. Id. at 464 (emphasis added).
40. 422 U.S. at 835.
41. Id. at 835-36. It is only fair to note that the Court was aware that Faretta had defended himself once before. Id. at 807.
42. 317 U.S. 269 (1942).
43. Id. at 279.
44. 332 U.S. 708 (1948).
45. Id. at 724,
voluntary, and his request to defend in pro per must be clear and unequivocal.

The Effect on California Law

In California the pre-Sharp standard was, on its face, substantially identical to the Zerbst test. In determining whether waiver of counsel was knowing and intelligent, the trial judge was to consider "the nature of the charge, the facts and circumstances of the case, and the background, experience, mental competence and conduct of the accused."46

The acumen and skill of a lawyer were not required47 and could not be the sole basis for denying self-representation.48 All the accused supposedly needed was an "intelligent conception of the consequences of his act"49 and an understanding of the "nature of the offense, the available pleas and defenses, and the possible punishments."50 Indeed, one view of the pre-Sharp California policy was summed up when a court recognized that an accused must be allowed to "venture into the unknown . . . if he is aware of the dangers that lurk therein."51

Although this language would appear to reflect a liberal attitude toward allowing self-representation, trial courts were often very critical of a potential pro per defendant's qualifications. An appropriate illustration of this is the Sharp decision itself. The trial judge denied defendant's motion to proceed in pro per after questioning revealed that the accused possessed only a limited knowledge of the law and legal procedure.52 On review, the California Supreme Court affirmed the decision, noting that the showing of defendant's skills and abilities amounts to little more than bare claims. He claimed general "knowledge of the law" . . . without demonstrating specific or particular knowledge . . . .

In short, defendant's showing consisted, in the main, of a self-serving opinion that he could adequately represent himself.53

The implicit effect of the Sharp decision on California procedure, though ostensibly small, was to give the trial court judge virtually sole

47. People v. Linden, 52 Cal. 2d 1, 18, 338 P.2d 397, 404-05 (1959).
53. Id. at 452 n.2, 499 P.2d at 491, 103 Cal. Rptr. at 235.
power to determine whether an accused could defend *in pro per.*\(^5\) By defining the right to self-representation as less than constitutional, a denial of the right at the trial level would only be grounds for reversal on appeal if it had caused a miscarriage of justice.\(^6\) *Faretta,* however, did not speak of the constitutional right of self-representation in terms of a "harmless error" rule. The Second Circuit, in the *Plattner* decision, had flatly stated that an improper denial of the right would be reversible error *per se.*\(^6\) Although *Faretta* did not directly affirm this conclusion, it clearly implied that an improper denial could not be justified either by a showing that the accused received adequate representation by counsel, or by a showing that he would have received inadequate representation proceeding *in pro per.*\(^6\)

So the effect of *Faretta* in California will be primarily twofold: when an accused voluntarily and unequivocally requests to defend *in pro per* and knowingly and intelligently waives counsel with a full understanding of the gravity of his decision, his request must be granted; and where the trial record shows that the defendant complied with these requirements,\(^5\) denial of the right will not be open to retrospective justification.\(^5\)

**Forfeiture**

Perhaps the major fear raised by *Faretta* is that it will further impede the progress of an already painfully slow legal process and will turn our courts into political circuses ringmastered by defendants with very little to lose. In his dissent, Justice Blackmun felt compelled to remark, "I fear that the right to self-representation constitutionalized today frequently will cause procedural confusion without advancing any significant strategic interest of the defendant."\(^6\)

Despite this admonition, a look at state and federal law quickly reveals that fears of such procedural anarchy are simply untenable. The major premise of the fear is that, being of constitutional stature, the right of self-representation is effectively absolute, thereby rendering

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\(^6\) E.g., Juelich v. United States, 342 F.2d 29, 33 (5th Cir. 1965).


\(^8\) The trial record should contain the factual basis of any decision to proceed *in pro per.* Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

\(^9\) It should be apparent that judicial discretion will still play a part, albeit reduced. Until the phrase "knowingly and intelligently" is reduced to objective certainty, there will be marginal cases demanding human judgment.

\(^6\) *Faretta* v. California, 422 U.S. 806, 846 (1975) (dissenting opinion).
judges powerless to control any defendant with a mind to use this right to disrupt the proceedings.

It has long been established, however, that even a constitutional right cannot be used to subvert a trial\textsuperscript{61} or to effect other dilatory purposes.\textsuperscript{62} The Court made this quite clear in \textit{Faretta}, saying flatly that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."\textsuperscript{63}

That the right is forfeitable in the wake of "disorderly, disruptive and disrespectful" conduct by the accused was clearly established in \textit{Illinois v. Allen}.\textsuperscript{64} After the defendant had violently cast standby counsel's files about the courtroom, he was removed from the chambers and ordered to have counsel conduct the remainder of the case. In approving the trial judge's actions, the Supreme Court noted:

The flagrant disregard in the courtroom of elementary standards of conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.\textsuperscript{65}

It should be noted, however, that although disruptive conduct is clearly grounds for forfeiting the right, the mere apprehension that defendant will so abuse the right, no matter how well founded, cannot justify prospective denial of the right to self-representation. \textit{United States v. Dougherty}\textsuperscript{66} was a case in which the trial court, fearing such conduct, forced counsel upon several defendants. On appeal, the circuit court held that fatal error had been committed, in spite of the fact that the behavior of defendants at trial would indeed have been reason to revoke the right had it been granted. The court went on to clarify "disruptive conduct" as acts showing the "intent to upset or unreasonably delay the hearing."\textsuperscript{67}

From these cases it should be clear that criminal defendants proceeding \textit{in pro per} will not be allowed free rein to frustrate the proceedings by their personal conduct. The right to self-representation is clearly forfeitable in the wake of disruptive conduct.

\textbf{Waiver}

There are additional restrictions permissible to prevent abuse of the

\begin{itemize}
\item \textsuperscript{61} \textit{E.g.}, United States \textit{v. Dougherty}, 473 F.2d 1113, 1125 (D.C. Cir. 1972).
\item \textsuperscript{62} \textit{E.g.}, People \textit{v. Adamson}, 34 Cal. 2d 320, 332-33, 210 P.2d 13, 19 (1949).
\item \textsuperscript{63} 422 U.S. at 834 n.46.
\item \textsuperscript{64} 397 U.S. 337, 343 (1970). \textit{Allen} is cited as approved authority in \textit{Faretta}, 422 U.S. at 834-35 n.46.
\item \textsuperscript{66} 473 F.2d 1113 (D.C. Cir. 1972).
\item \textsuperscript{67} \textit{Id.} at 1127.
\end{itemize}
right. If proper procedure is not observed to invoke and keep the right, it is subject to waiver.

Thus in *People v. Loving* the accused moved to dismiss his counsel and proceed in his own behalf the day before the trial was to start. The court recognized self-representation to be a right of constitutional stature but held that it was nevertheless "subject to regulation and control by the court in the discharge of its duty to safeguard and promote the orderly and expeditious discharge of its business." In denying defendant's motion, the court ruled that a request to proceed *in pro per* must be timely and could not be invoked to delay the proceedings. Under similar facts, another California appellate court stated quite succinctly: "We cannot tolerate such bad faith and we are not constitutionally required to do so."

The court in *United States v. Dougherty* ruled that after commencement of the trial, the right was, in effect, presumptively waived, and any subsequent request to defend *in pro per* was left to the sound discretion of the trial judge. In deciding whether to let the accused proceed on his own after such a waiver, it was ruled that the judge should strike a balance between the inconvenience that would be caused by a dismissal of counsel at that point and the prejudice to the accused that might result from a denial of his request.

**Other Controls**

In addition to waiver and forfeiture, other controls are available from pre-*Faretta* cases which should be appropriate to govern the right to self-representation. For instance, in *In re Connor* the defendant was granted the right to defend *in pro per*, but during the course of the trial requested that counsel be appointed. Believing that the accused was using the opposing rights to counsel and to self-representation in an

69. *Id.* at 87, 65 Cal. Rptr. at 427.
73. 473 F.2d 1113 (D.C. Cir. 1972). In *Dougherty* seven defendants were each convicted of one count of unlawful entry and two counts of malicious destruction of property. Defendants had made timely requests to defend *in pro per*. Several pretrial hearings revealed that the defendants were articulate and well educated. The trial court, however, denied the requests, feeling that the defendants' lack of legal training, the seriousness of the charges, and the complexities of a multi-defendant trial combined to create too great a risk of disruption if self-representation were allowed. The trial judge was aware of rumors that defendants had planned disruptive behavior, but it is not clear what role this played in the decision.
74. *Id.* at 1124.
75. 16 Cal. 2d 701, 108 P.2d 10 (1940).
attempt to frustrate the legal process, the court denied his request, commenting that constitutional rights "may be invoked only in the course of orderly procedure."76 Having properly secured the right to represent himself, defendant was not free to "interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance."77

Just as the accused can be refused counsel where the court finds the request to have been made in bad faith, so also can the court force counsel upon an unwilling defendant during trial when it feels that the accused is using his right to self-representation as a tool for dilatory purposes. In People v. Powers78 the court appointed counsel to take charge of a case when the accused, having been granted the right to proceed in pro per, asked for a continuance claiming that he was "unable to testify or understand the mechanics or the consequences of the trial."79

It would appear, then, that in granting the right to defend in pro per constitutional stature, Faretta does not condemn courts to the whims of defendants. Because the right is clearly subject to waiver, forfeiture, and court supervision during trial, judges will remain in control of their courtrooms.80

Standby Counsel

There are two situations in which the issue of standby counsel can arise: when the court demands the right to appoint one over objection of the defendant, and when the defendant demands the right to have one appointed over the objection of the court. As the law stands now, the respective "rights" in issue are dramatically different.

There are numerous reasons why a trial judge might wish to appoint a standby counsel in some pro per cases. Where, for example, there appears to be a strong likelihood that defendant's disruptive conduct will eventually result in a forfeiture of his pro per right, it would be of immeasurable benefit and convenience to all concerned if there were counsel familiar with the case and prepared to take over promptly. Thus, in Dougherty, although the potential unruliness of the defendants could not prospectively justify a denial of the right of self-representation,

76. Id. at 709, 108 P.2d at 15.
77. Id.
78. 256 Cal. App. 2d 904, 64 Cal. Rptr. 450 (1967).
79. Id. at 910, 64 Cal. Rptr. at 454. Apparently defendant hoped that if he was counsel, and counsel was unable to proceed, the case would have to be delayed.
80. Indeed, the fact that the federal courts still exist after some 185 years of exposure to self-representation should be evidence of this.
the court could have properly circumvented subsequent problems by assigning standby counsel before the trial began. 81

The Court in Faretta expressly accepted this policy as compatible with self-representation by citing Dougherty and rather offhandedly concluding:

Of course, a State may—even over objection of the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. 82

In light of this language, the power of the court to appoint standby counsel appears to be unlimited. Indeed, back in 1970, Chief Justice Burger in a concurring opinion to Mayberry v. Pennsylvania, 83 commented that "no circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such 'standby counsel' . . . ." 84 There is nothing in Faretta to imply a weakening of this policy.

This power to insist on standby counsel, however, rests solely in the trial court, for it is well settled that the accused has no right to demand counsel in either an advisory capacity or as an active co-counsel. 85 In Duke v. United States, 86 the accused filed several pretrial motions on his own behalf but appeared at trial represented by counsel. When the accused sought to address the closing argument to the jury, the court refused his demand, asserting that the accused had the right to appear in pro per or be represented by counsel, but that he was not entitled to a "hybrid of the two." 87 This seems to be the well accepted view in the federal system. 88

That the right to counsel is an all-or-nothing proposition is also the established view in California. Indeed, even when the California Constitution phrased the rights in the conjunctive—"to appear and defend, in person and with counsel," 89—allowing an interpretation that con-

81. 473 F.2d 1113, 1124-26 (D.C. Cir. 1972).
82. Faretta v. California, 422 U.S. 806, 835 n.46 (1975).
84. Id. at 468 (concurring opinion).
85. Standby counsel can serve in either of two capacities: more or less passively advising the accused when the accused seeks help, or actively participating in the actual trial presentation. Because the courts uniformly deny pro per defendants the power to insist on standby counsel in either capacity, they will be treated as one for the purposes of this discussion.
86. 255 F.2d 721 (1958).
87. Id. at 725, citing Shelton v. United States, 205 F.2d 806, 812-13 (5th Cir. 1953).
89. CAL. CONST. art. I, § 13, cl. 3 (emphasis added).
tained a “hybrid” right, the courts uniformly construed the language to forbid hybrid representation.\textsuperscript{90}

The courts are understandably reluctant to force an appointed counsel to accept a subservient role to an indigent defendant. But the California Supreme Court has taken the ban on standby counsel somewhat past the logical end of that reluctance. In \textit{People v. Mattson}\textsuperscript{91} the trial court refused to allow defendant to retain, at his own expense, \textit{private} counsel clearly willing to serve in an advisory capacity. In upholding the lower court’s ruling, the California Supreme Court declared that an accused need not be allowed the opportunity to participate actively in the case along with private counsel unless the court on a substantial showing determines that in the circumstances of the case the cause of justice will thereby be served and the orderly and expeditious conduct of the court’s business will not thereby be substantially hindered, hampered or delayed.\textsuperscript{92}

The federal stand on this particular point is not yet clear, nor is it apparent how \textit{Faretta} will bear on the issue. \textit{Duke}, however, where private counsel was also involved, could clearly serve as precedent for accepting a \textit{Mattson}-type rule as the federal standard.\textsuperscript{93}

Thus there would seem to be somewhat of a logical inconsistency in the judicial system’s attitude toward standby counsel. Although the United States Supreme Court has never explicitly ruled on the point, its consistent denial of \textit{certiorari}\textsuperscript{94} to cases challenging the present double standard demands the conclusion that, at least for the foreseeable future, the existing policy will prevail.

\textbf{Appeal on Grounds of Incompetent Counsel}

A common criticism of the \textit{Faretta} rule is that it will allow the clever defendant two days in court: the first as his own counsel, the second after he has successfully had the first conviction reversed on appeal because of incompetent representation by counsel.

The majority in \textit{Faretta} squarely confronted this contention. After noting that the right of self-representation did not free an accused from compliance with “relevant rules of procedural and substantive law,”\textsuperscript{95} the Court declared:

\begin{itemize}
  \item \textsuperscript{90} \textit{E.g.}, \textit{People v. Mattson}, 51 Cal. 2d 777, 789, 336 P.2d 937, 946 (1959).
  \item \textsuperscript{91} 51 Cal. 2d 777, 336 P.2d 937 (1959).
  \item \textsuperscript{92} \textit{Id.} at 797, 336 P.2d at 952.
  \item \textsuperscript{93} \textit{See also Brasier v. Jeary}, 256 F.2d 474 (8th Cir. 1958), \textit{cert. denied}, 358 U.S. 867 (1959).
  \item \textsuperscript{95} 422 U.S. at 835 n.46.
\end{itemize}
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." Although this definitive statement should serve adequately to dispel the fears in this area of the ruling, it raises an issue of some importance: a defendant who elects counsel has a right to competent representation, but a defendant who waives counsel also waives completely any right to adequate representation. It is suggested that such a result is unnecessary and has the deleterious effect of conditioning one fundamental right—self-representation—upon waiver of another fundamental right—competent representation.

By the standard test, "poor advice indicative of poor judgment on the part of [counsel]" does not constitute incompetence. Inadequacy is a ground for reversal only where "counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.'" Even when a defendant is acting as his own counsel, it would be the rare case where his representation met the test of inadequacy. The Mattson court stated that a criminal defendant who undertakes his own representation assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken; he is not entitled either to privileges and indulgences not accorded attorneys or to privileges and indulgences not accorded defendants who are represented by counsel.

Faretta clearly affirmed this proposition. An example of representation that is poor yet not inadequate is found in People v. Walker, where counsel's deliberate trial strategy involved not objecting to objectionable and apparently damaging evidence. On a post-conviction appeal, the court held that defendant could not then raise objections waived in the trial court and further held that a retrospective finding that trial counsel's strategy was unfortunately incorrect did not constitute a denial of effective assistance of counsel. Under similar facts, the court in People v. Montigo ruled that a criminal defendant proceeding

96. Id.
100. 422 U.S. at 835 n.46 (noting that the right of self-representation is not "a license not to comply with relevant rules of procedural and substantive law").
101. Id. at 569, 72 Cal. Rptr. at 228.
102. Id. at 569, 72 Cal. Rptr. at 228.
in pro per would be held to the same conditions. "The fact that defendant elected to represent himself and devise his own strategy, which failed him, is not a ground for appeal."

Drawing a possible distinction between intent and true negligence, however, the court in People v. Chessman concluded that although a pro per defendant who deliberately waived objections could not later complain of inadequate counsel, other circumstances might require the court to interpose objections on its own motion.

A literal reading of Faretta would leave no room for such an interpretation. Although affirming that a pro per defendant is not entitled to special privileges, Faretta denies the converse—that a pro per defendant is entitled to the full package of basic rights given to defendants with counsel, including the right to appeal if the representation at trial is inadequate by the established standard. By stating that ineffective assistance can never be the basis of an appeal, the Court has forced the accused to choose clearly and irrevocably between assistance of counsel, which must meet minimum standards of adequacy, and self-representation, which need not meet any minimum standards whatsoever. It is not suggested, of course, that an accused should be allowed to complain later of any deliberate or intentional action on his part that may have contributed to an adverse verdict. It is merely suggested that it is needlessly harsh to deny flatly any reprieve to an accused who attempts in all good faith to defend himself, yet falls seriously short of that goal. Given the modest standard of adequacy required of counsel, it seems insensitive to afford to an accused who is representing himself no protective standard at all. The ability to defend in pro per should not be encumbered by being conditioned on a complete waiver of competent representation.

Notice: Miranda Revised?

Few today would question the soundness of the landmark ruling in Miranda v. Arizona that an accused must be informed of his constitu-

104. Id. at 36, 56 Cal. Rptr. at 35.
105. 38 Cal. 2d 166, 238 P.2d 1001 (1951).
106. The Chessman court said "[w]e are not disposed to permit a defendant who thus [deliberately] develops a record to claim prejudice from it, although the cumulative instances of [the prosecutor's] misconduct might in other circumstances constitute grounds for reversal." Id. at 178, 238 P.2d at 1008 (emphasis added). The inference seems to be that innocently or negligently allowing such misconduct might necessitate action by the court to assist the accused.
tional right to the assistance of counsel. Yet in announcing the correlative constitutional right to self-representation, the Faretta majority gave no indication as to whether notice of this right will also be mandatory. Although the Court did not consider this question, the answer derived from an extensive debate in the federal courts of appeals is a somewhat equivocal "no."

The Second Circuit, in United States v. Plattner,109 recognized the right as constitutionally guaranteed and suggested that all trial records should contain an initial colloquy between the presiding judge and the accused, during which the judge would explain to the accused that he has

the choice between defense by a lawyer and defense pro se . . . that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself.110

The court indicated, however, that while such notice was preferable, its absence was not reversible error.111 The rationale behind this optional notice rule, explored in some depth in Soto v. United States,112 is "the overwhelming constitutional policy in favor of granting a lawyer to every person . . . ."113 Because the "judicial system is not neutral on the advisability of proceeding to trial without counsel,"114 it has established a policy calling for mandatory notice and automatic operation of the right to counsel while requiring a defendant unequivocally to request his right to self-representation without necessarily having been notified of its existence.115

Soto appears to establish a firm test for the requirement of notice: where the defendant (1) does not assert the desire to defend in pro per, and (2) the court knows his counsel to be competent, there is, as a matter of law, no requirement that the accused be put on notice of his right to proceed in pro per.116 This may imply, however, that if the court has reason to believe that the accused may in good faith wish to defend in pro per, or if the court does not know whether defendant's counsel is competent, it may have the duty to inform the accused of his constitutional right to represent himself.

109. 330 F.2d 271 (2d Cir. 1964).
110. Id. at 276.
111. Id. at 276-77; accord, United States v. Fay, 364 F.2d 219 (2d Cir. 1966).
113. Id. at 237, quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965).
115. Id. at 236; see United States v. White, 429 F.2d 711 (D.C. Cir. 1970); Brown v. United States, 264 F.2d 363 (D.C. Cir. 1959).
In deciding Faretta, the Supreme Court clearly showed considerable respect for the Second Circuit's vanguard decision in Plattner.\textsuperscript{117} It therefore seems plausible that, should the question of notice be squarely presented to the Court, it would once again give weight to the ruling in Plattner and the underlying policy favoring representation by counsel. Although a final decision against mandatory notice would still leave the right intact, it is suggested that a policy favoring representation by counsel is inconsistent with the true spirit underlying the Faretta decision. Much of the language used in Soto as the basis of a policy favoring counsel\textsuperscript{118} was taken from right-to-counsel cases where the real issue was whether an accused could be forced to represent himself. It seems unsound to use this language in a case where the issue is whether an accused will be permitted to represent himself.

The Faretta majority was not unmindful of the reality that an accused is much more likely to get the best representation from counsel. Rather, it acknowledged this concern for the accused's best interests\textsuperscript{119} but concluded that free choice was a more vital concern:

The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.\textsuperscript{120} It would be difficult to reconcile the spirit of this language with the conclusion that defendant's free decision was meant to be an uninformed decision. The notion expressed in Dougherty— that every defendant has "the moral right to stand alone in his hour of trial"\textsuperscript{121}— suggests that the right of self-representation can only assume its full potential and significance if it is guaranteed the mandatory notice given to most other constitutional rights.

\textbf{Time To Prepare & Library Access}

Although it was not mentioned in the Faretta majority or in either dissent, no discussion of the practical ramifications of Faretta would be complete without examining the pro per defendant's right to both adequate time and access to legal materials essential to the preparation of a defense. It is a well established constitutional principle that denial of sufficient time to prepare a defense is tantamount to a denial of effective assistance of counsel.\textsuperscript{122} The California Penal Code\textsuperscript{123} guar-

\begin{itemize}
  \item \textsuperscript{117} Faretta v. California, 422 U.S. 806, 816-17 (1975). See note 24 & accompanying text \textit{supra}.
  \item \textsuperscript{118} 369 F. Supp. at 238.
  \item \textsuperscript{119} 422 U.S. at 834.
  \item \textsuperscript{120} \textit{Id}.
  \item \textsuperscript{121} United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972).
  \item \textsuperscript{122} E.g., Powell v. Alabama, 287 U.S. 45, 58-59 (1932).
  \item \textsuperscript{123} \textsc{Cal. Pen. Code} § 1049 (West 1970).
\end{itemize}
antees a period of at least five days after the plea is entered in which to prepare for trial. The California courts have affirmed that failure to allow this statutory period is a violation of due process which constitutes reversible error.124

In People v. Maddox125 the California Supreme Court held the statute applicable to a criminal defendant proceeding in pro per.126 In that case, the public defender appointed to represent the accused had done virtually no work in preparation during the 2½ months preceding trial. When defendant's repeated requests to proceed in pro per were finally granted on the first day of trial, he was denied a continuance to allow him time to prepare. The case went directly to trial, and defendant was convicted. The California Supreme Court concluded that in light of the defendant's repeated good faith motions to proceed on his own and the public defender's near total lack of effort, the accused was constitutionally entitled to at least the five day preparation period guaranteed in the code.127

This ruling, however, did not deal with the effect of either bad faith by the defendant or diligent preparation by the dismissed counsel on an accused's right to time for preparing his defense. The former problem is in all probability covered by the general proposition discussed earlier, that an accused cannot use his constitutional rights as tools for dilatory purposes.128 Faretta would clearly not allow a defendant to dismiss his counsel and demand the right to represent himself shortly before trial for the primary purpose of delaying the proceedings.129

The latter situation presents a more difficult, though certainly rare, problem. Yet the possibility remains that a case will arise in which defendant should be granted the right to represent himself upon a good faith request shortly before trial is to begin, despite the fact that his counsel has thoroughly prepared. It seems reasonable to conclude that if time before trial is short by no fault of the accused, he should not be found to have waived, impliedly or otherwise, his fundamental right to prepare adequately. Any other result would render the right of self-representation senselessly hollow.

In addition to securing time to prepare for trial, pro per defendants probably need access to the legal materials essential for an adequate defense. The California Supreme Court confronted this issue in People

126. Id. at 653, 433 P.2d at 167, 63 Cal. Rptr. at 375.
127. Id. at 654, 433 P.2d at 168, 63 Cal. Rptr. at 376.
128. See note 62 & accompanying text supra.
v. Carter. After granting defendant's motion to proceed *in pro per*, the trial judge offered to take him on what would have been merely a cursory tour of the law library during a court recess, and said that he would try to get defendant any library materials that he needed. When defendant declined the tour, apparently feeling that so brief a visit would be of no value, the court found defendant to have waived his library rights. A guilty verdict followed. On appeal, the court noted that a substantive right to legal materials *does exist* and that although this right can be waived, defendant's actions did not constitute such waiver. As to the scope of the right, however, the court was less definitive:

[A] prisoner awaiting trial who wishes to represent himself should . . . at a minimum, be allowed reasonable access to such legal materials as are available at the facility in which he is confined. Having thus stated the minimum requirements, we leave to the sound discretion of the judge the implementation of the rule, noting only that in many felony cases the minimum may not be sufficient.

The court went on to add that "it is axiomatic that the more serious the crime, the greater the indulgence the trial judge should show towards a defendant." Thus, a defendant proceeding *in pro per* is entitled, barring some waiver, to "adequate" time to prepare a defense and "reasonable" access to legal materials. The precise boundaries of these rights, however, will only become more apparent as the case law becomes more definitive. It need only be noted here that in deciding *Faretta* the Supreme Court presumably intended to pronounce a valuable and respected substantive right. It would be sadly ironic if the trial court's discretion in granting a *pro per* defendant time to prepare and access to legal materials could be used as a means to punish an accused who sought to exercise his right to self-representation. This is not to suggest that discretion should be taken from the trial court and replaced by inflexible rules. What is important is that appellate courts be vigilant and willing to intervene to insure that deliberate or negligent abuse of this discretion does not result in undermining the efficacy of the *Faretta* decision.

**Summary**

It has been the purpose of this note to resolve the fears and clarify the alleged uncertainties raised by *Faretta*. It has been demonstrated that, although the *Faretta* decision did not discuss in detail many of the

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131. *Id.* at 672, 427 P.2d at 219, 58 Cal. Rptr. at 619.
132. *Id.* at 670-71, 427 P.2d at 218-19, 58 Cal. Rptr. at 618-19.
133. *Id.* at 671-72, 427 P.2d at 219, 58 Cal. Rptr. at 619.
134. *Id.* at 672 n.3, 427 P.2d at 219, 59 Cal. Rptr. at 619.
procedural issues that necessarily accompany the right to self-representation, sufficient guidelines already exist either in the case law or in established legal doctrines. Although these guidelines may not be final or precise, they provide a functional framework within which the decision can be applied and thereby refined to the necessary degree.

To recapitulate, there is a constitutional right to self-representation implicit in the sixth amendment. This right can be invoked after a knowing and intelligent waiver of the correlative right to counsel. A knowing and intelligent waiver of counsel is one by a defendant who is literate, competent, aware of the charges against him, and apprised of the dangers of proceeding on his own. The defendant's background, experience and legal knowledge are irrelevant. His waiver of counsel must be free and voluntary, and his request to defend in pro per must be clear and unequivocal. If an accused meets these requirements, his request to defend in pro per must be granted. A denial of the right under these circumstances will be reversible error per se.

The request to proceed in pro per must be timely and made in the course of orderly procedure. If not invoked within a reasonable period of time before trial, the right is presumptively waived and thereafter subject to being granted at the sound discretion of the trial judge. The right cannot be used to subvert the trial or to effect other dilatory purposes. Although a judge cannot use an accused's potential unruliness as a reason to deny the right initially, he can declare the right to have been forfeited in the wake of serious obstructionist conduct by an accused who is defending in pro per.

The trial court has unrestricted authority in the appointment of standby counsel to be available to assist the accused or take over as counsel of record should the defendant's right to self-representation be terminated. The defendant does not have the right to insist that standby counsel be appointed for his benefit. In fact, pro per defendants in California must even get permission from the court to retain private standby counsel at their own expense.

As it stands now, an accused who waives the right to counsel and defends in pro per waives any right to appeal a conviction on the ground of inadequate representation at trial. The author has suggested that the ends of justice might be advanced with relatively little loss of efficiency by holding the pro per defendant to the same modest standard currently used to evaluate the competency of representation by counsel.

Where the defendant has not sua sponte expressed a desire to represent himself and the trial court knows his counsel to be competent, that court is under no affirmative duty to notify the accused of his constitutional right to self-representation. Although the Supreme Court has not yet spoken on this point, the author has suggested that the spirit of the Faretta decision indicates that if the issue is presented to the
Court, it should hold that notice of the right must be given to all criminal defendants.

Finally, the right to self-representation necessarily carries with it the right to be allowed adequate time to prepare for trial and reasonable access to relevant legal materials. The decision as to what time is "adequate" and what access is "reasonable" in each particular case is left to the sound discretion of the trial court. This discretion, however, should not be used in any way to deter a defendant who might otherwise elect to represent himself or to punish a defendant who has already so elected.

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