

1980

The Right to Appear Pro Se: Developments in the Law

Donald D. Schneider

University of Nebraska College of Law, donschneiderlaw@yahoo.com

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Donald D. Schneider, *The Right to Appear Pro Se: Developments in the Law*, 59 Neb. L. Rev. (1980)

Available at: <https://digitalcommons.unl.edu/nlr/vol59/iss1/10>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

The Right to Appear Pro Se: Developments in the Law*

I. INTRODUCTION

In recent history, a constitutional and statutory right to appear pro se¹ in a criminal case has been recognized in thirty-six states² and in several federal circuits.³ Moreover, this right has been the subject of several articles by legal commentators.⁴ In 1975, the Supreme Court recognized for the first time in *Faretta v. California*,⁵ an independent constitutional right to appear pro se in a state criminal case, when waiver of the right to counsel is knowingly and intelligently made.⁶ The *Faretta* decision has been extensively analyzed and debated elsewhere.⁷ Although both the

* This comment was awarded the first Robert G. Simmons Nebraska Law Practice Award.

1. Pro se means "for himself." BLACK'S LAW DICTIONARY 1364 (4th ed. 1951).

2. *Faretta v. California*, 422 U.S. 806, 813-14 nn.9 & 10 (1975).

3. See, e.g., *United States v. Plattner*, 330 F.2d 271, 273 (2d Cir. 1964). The position of each circuit is cited in Note, *An Accused May Voluntarily and Intelligently Elect to Exercise His Constitutional Right to Self-Representation in a State Criminal Proceeding*, 6 CUM. L. REV. 703, 705 n.16 (1976); as is the position of each state, *id.* at 705-06 nn.20-24.

4. See, e.g., Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479 (1971).

5. 422 U.S. 806 (1975).

6. *Id.* at 807.

7. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977); Schwab, *How Far Faretta: Creating Implied Constitutional Rights*, 6 SAN FERN. V. L. REV. 1 (1977); Comment, *Faretta v. California, An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN RIGHTS L. REV. 553 (1975-76); Comment, *The Constitutional Right of Self-Representation: Faretta and the "Assistance of Counsel"*, 3 PEPPERDINE L. REV. 336 (1976); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423 (1976); Note, *Faretta v. California and the Pro Se Defense: The Constitutional Right of Self-Representation*, 25 AM. U. L. REV. 897 (1976); Note, *The Sixth Amendment—Self-Representation and the Assistance of Counsel*, 29 ARK. L. REV. 546 (1976); Note, *Faretta v. California: The Constitutional Right to Defend Pro Se*, 5 CAP. U. L. REV. 277 (1976); Note, *Criminal Procedure—Independent Right of Self-Representation in Sixth Amendment Permits Defendant to Act as Own Lawyer at State Criminal Trials*, 61 CORNELL L. REV. 1019 (1976); Note, *supra* note 3; Note, *A Con-*

majority and dissenting opinions noted that significant legal problems might result from elevating the right to a constitutional level,⁸ the majority opinion is striking in its failure to offer any guidance as to how such issues might be resolved.

This comment focuses on the development of case law since *Faretta* concerning the right to appear pro se. In general, the cases have consistently reflected the Supreme Court's position that the right of self-representation is grounded on the concept of personal freedom,⁹ rather than on the concepts of justice and fairness that underlie the right to counsel.¹⁰ Because implementation of the right might impede achieving the goal of a fair trial,¹¹ most courts have avoided expansion of the right, and in particular have been unsympathetic to attempts by criminal defendants to use the right as a manipulative device.¹² The right has been jealously protected by the courts, however, when knowingly and intelligently exercised by a defendant in a non-disruptive manner.¹³ There is no evidence that the right of self-representation has improved the

stitutional Right to Self-Representation—*Faretta v. California*, 25 DEPAUL L. REV. 774 (1976); Note, *Faretta v. California: A Dissenter's Point of View*, 1976 DET. C. L. REV. 337; Note, *Faretta v. California: The Law Helps Those Who Help Themselves*, 28 HASTINGS L.J. 283 (1976); Note, *Sixth Amendment—Appearing Pro Se*, 4 HOFSTRA L. REV. 449 (1976); Note, *A Criminal Defendant Who Makes an Intelligent and Knowing Choice Has a Constitutional Right of Self-Representation*, 53 J. URB. L. 333 (1975); Note, *Criminal Law—Defendant Has Constitutional Right To Defend Himself*, 41 MO. L. REV. 433 (1976); Note, *The Right to Defend Pro Se in Criminal Proceedings*—*Faretta v. California*, 37 OHIO ST. L.J. 220 (1976); Note, *A Defendant in a State Criminal Trial Has a Constitutional Right, Implicit in the Sixth Amendment, to Proceed Without Counsel When He Voluntarily and Intelligently Elects to Do So*, 1976 S. ILL. U. L.J. 271; Note, *The Right to Defend Pro Se*—*Faretta v. California: Due Process and Beyond*, 11 TULSA L.J. 365 (1976); Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403 (1975).

See, e.g., Schwab, *supra*, at 1-11; Note, S. ILL. U. L.J., *supra* at 273-79, for examples of the heated debate over the validity of the Court's historical and constitutional analysis.

8. 422 U.S. at 835-36 (majority opinion), at 845-46 (Burger, C.J., dissenting), at 852 (Blackmun, J., dissenting).

9. "The right to defend is personal." *Id.* at 834.

10. *Id.* at 832-33.

11. Self-representation is contrary to the public interest in a fair trial because all but an extraordinarily small number of pro se defendants are capable of representing themselves adequately at trial. *Id.* at 834. Further, they are equally incapable of challenging procedural errors made by a prosecutor. This tends to guarantee a prosecutor victory, a fact which was recognized by the court in *Faretta*. *Id.* at 838-39.

12. See, e.g., notes 47-53 and accompanying text *infra*. A typical manipulative device is the attempt by some pro se defendants to begin trial with a court appointed attorney, then to switch and go pro se with the request for a continuation to "prepare", when in fact all that is sought is a delay in the court proceedings.

13. See, e.g., notes 57-60 & accompanying text *infra*.

functioning of the judicial system or favored the ascertainment of truth. However, because the courts have prevented the use of self-representation from disrupting the judicial system, little or no harm has been done either; and it can be argued that society has benefited from the positive good of having upheld a philosophically appealing right to conduct one's own defense in an otherwise impersonal and hostile criminal justice system.

II. THE *FARETTA* DECISION

Anthony Faretta was charged with grand theft in the Superior Court of Los Angeles County, California. Very early in the proceedings he requested permission to represent himself at trial. Faretta had successfully represented himself at an earlier trial, and did not want to be represented by the public defender's office because he felt the office was overworked and would be unable to handle his case adequately.¹⁴ His request was initially granted. However, at a subsequent pre-trial hearing the trial judge questioned Faretta regarding his knowledge of the California hearsay rule and the rule for voir dire challenges of potential jurors, and because Faretta's answers revealed an inadequate knowledge of the legal complexities involved, the judge revoked his right of self-representation. The judge held that there had not been a knowing waiver of the right to counsel and that there was no constitutional right to self-representation.¹⁵

Faretta was given assistance of counsel by the public defender's office. He was later convicted of the crime. His subsequent appeals on the local level were unsuccessful. Nevertheless, the Supreme Court granted certiorari to hear the case.¹⁶

The question before the *Faretta* Court was narrowly drawn:

The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be . . . punished by imprisonment. . . . The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. . . . [T]he question is whether a State may constitutionally hail a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.¹⁷

14. 422 U.S. 807 (1975).

15. *Id.* at 807-08. The Record also indicated that Faretta had had a high school education.

16. *Id.* at 808-10. The California Supreme Court had previously ruled that there was no constitutional right of self-representation in California. *People v. Sharp*, 7 Cal. 3d 448, 461, 499 P.2d 489, 497, 103 Cal. Rptr. 233, 241 (1972).

17. 422 U.S. at 810-12.

The Supreme Court found three separate bases for implying an independent constitutional right of self-representation: (1) prior case law in the federal circuits;¹⁸ (2) the structure of the sixth amendment itself;¹⁹ and (3) the English and colonial history that led to the enactment of the sixth amendment.²⁰ The opinion concluded with an assessment of some of the inherent limitations and restrictions on the right of self-representation, including the observation that the right is ultimately grounded in a respect for individual freedom, not in improving trial procedure; that the right is only exercised by a knowing and intelligent waiver of the right to counsel; and that the pro se defendant would be bound by the rules of procedure and substantive law and would be unable to complain of ineffective assistance of counsel on appeal.²¹ Dissents by Chief Justice Burger²² and Justice Blackmun²³ questioned the wisdom of the holding.

III. PROCEDURAL ISSUES AFFECTING THE RIGHT TO A PRO SE DEFENSE

The *Faretta* decision is devoid of any practical procedural guidelines for litigants who seek to assert the right of self-representation, or for courts which must decide whether and how the right is to be exercised. In theory, the courts could have expanded the use of self-representation through liberalized rulings on procedural issues. Such expansion could have been justified in that it would promote the concept of individual freedom which lies at the root of the right of self-representation. In practice, however, the opposite has generally occurred—strict procedural rulings have been rendered in order to narrow the right of self-representation. This judicial restraint is justified by the need to avoid abuse or opportunistic manipulation. Since the right of self-representation does nothing to promote fair trials or to increase the chances for ascertainment of truth, the courts have been correct in taking the restrictive approach.

A. Notice of the Right

Justice Blackmun, dissenting in *Faretta*, posed, without answering, the question whether or not every criminal defendant must be advised of his right to appear pro se, and if so, when.²⁴ Not

18. *Id.* at 812-17.

19. *Id.* at 818-21.

20. *Id.* at 821-32.

21. *Id.* at 832-36.

22. *Id.* at 836-46 (Burger, C.J., dissenting).

23. *Id.* at 846-52 (Blackmun, J., dissenting).

24. *Id.* at 852 (Blackmun, J., dissenting).

surprisingly, several commentators are in disagreement on this issue.²⁵

One commentator suggests that notice is not required because the Supreme Court stated in *Schneckloth v. Bustamonte*²⁶ that notice of a constitutional right is required only when the right would promote a fair trial.²⁷ Another writer, however, argues that notice should be given, as failure to give notice makes the right to appear pro se a hollow right.²⁸

The issue has rarely arisen in post *Faretta* cases,²⁹ probably because the only parties litigating pro se issues are those who requested pro se status initially. Four cases which directly addressed the issue all held that there is no requirement that the criminal defendant be informed of the existence of the constitutional right to appear pro se.³⁰ In two of the cases, the courts made no attempt to articulate why the defendant need not be informed, stating only that this issue was not involved in the *Faretta* decision.³¹ In the other two decisions, the courts stated only that such a rule would be "fundamentally unwise,"³² when the right is not

25. See Note, ALB. L. REV., *supra* note 7, at 435-36; Note, AM. U. L. REV., *supra* note 7, at 913; Comment, COLUM. HUMAN RIGHTS L. REV., *supra* note 7, at 557-60; Note, HASTINGS L.J., *supra* note 7, at 297-99; Note, HOFSTRA L. REV., *supra* note 7, at 464; Note, J. URB. L., *supra* note 7, at 344 n.88; Note, OHIO ST. L.J., *supra* note 7, at 231-32; Note, S. ILL. U. L.J., *supra* note 7, at 279 n.58; Note, TULSA L.J., *supra* note 7, at 387-88.

26. 412 U.S. 218 (1973).

27. *Id.* at 237. See Note, ALB. L. REV., *supra* note 7, at 435-36.

28. Note, OHIO ST. L.J., *supra* note 7, at 232. Another author suggested that, "the right of self-representation can only assume its full potential . . . if it is guaranteed the mandatory notice given to most other constitutional rights." Note, HASTINGS L.J., *supra* note 7, at 299.

29. The pre-*Faretta* cases from jurisdictions recognizing the right of self-representation are ambiguous on the issue whether notice must be given to the defendant that he has a right to appear pro se. For instance, in *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964), the court stated it was "incumbent" upon the trial court to inform the defendant that he had both a right to counsel and a right to represent himself. *Id.* at 276. However, the same circuit court stated in a later case that: "Regardless of whether he has been notified of his right to defend himself, the criminal defendant must make an unequivocal request" *Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966). The implication of this dictum seems to be that notice of the pro se right is not required.

30. *People v. Salazar*, 74 Cal. App. 3d 875, 888, 141 Cal. Rptr. 753, 761 (1977); *Tuckson v. State*, 364 A.2d 138, 140 (D.C. 1976); *State v. Branch*, 288 N.C. 514, 548, 220 S.E.2d 495, 518 (1975), *cert. denied*, 433 U.S. 907 (1977); *State v. Fritz*, 21 Wash. App. 354, 359, 585 P.2d 173, 177 (1978).

31. *Tuckson v. State*, 364 A.2d 138, 140 (D.C. 1976); *State v. Branch*, 288 N.C. 514, 548, 220 S.E.2d 495, 518 (1975), *cert. denied*, 433 U.S. 907 (1977).

32. *People v. Salazar*, 74 Cal. App. 3d at 888, 141 Cal. Rptr. at 761; *State v. Fritz*, 21 Wash. App. at 359, 585 P.2d at 177.

one of the essentials of a fair trial.³³ This apparent adoption of the *Schneekloth* rationale is indicative of a post-*Faretta* attitude not to expand or liberalize the narrow holding that criminal defendants have a right of self-representation.

B. Retroactivity

Neither the majority nor minority opinions in *Faretta* mention whether this newly articulated constitutional right to self-representation should be applied retroactively.³⁴ Even after *Faretta*, it would not be an appealable issue if the pre-*Faretta* defendant had not specifically attempted to appear pro se and had been denied.³⁵ Only two *Faretta* commentators have discussed the issue, both concluding that the right should not be retroactive because the rationale of the right is personal freedom rather than the enhancement of the reliability of the truth-determining or fact-finding process.³⁶

The post-*Faretta* cases, consistent with the position not to expand the right, have tended to support the proposition that the right of self-representation is not retroactive and thus will be applicable only to trials commencing after June 30, 1975: the date of the *Faretta* decision.³⁷ The leading case is *People v. McDaniel*,³⁸ which applied the threefold test of *Stovall v. Denno*³⁹ to determine whether or not a decision should be applied retroactively or prospectively. These three criteria are: (1) the purpose of the new rule; (2) the degree of reliance on the old rule; and (3) the effect retroactive application would have on the administration of justice.⁴⁰

The determination of whether a rule is to be given retroactive application is generally made pursuant to a balancing process, wherein the gain to be achieved in the administration of justice by accomplishment of the purpose of the new rule [the first criterion] is balanced against the adverse

33. *People v. Salazar*, 74 Cal. App. 3d at 888, 141 Cal. Rptr. at 761.

34. In earlier retroactive controversies, an essential distinction made was whether the right enhanced the reliability of the truth-determining process. See Rossum, *New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity*, 23 EMORY L.J. 381 (1974).

35. *Dugger v. State*, 543 S.W.2d 374, 376 (Tex. Crim. App. 1976).

36. Schwab, *supra* note 7, at 2-3; Note, CORNELL L. REV., *supra* note 7, at 1041-44.

37. *People v. McDaniel*, 16 Cal. 3d 156, 168, 545 P.2d 843, 850, 127 Cal. Rptr. 467, 474, *cert. denied*, 429 U.S. 847 (1976). *Accord*, *Martin v. Wyrick*, 568 F.2d 583, 588 (8th Cir.), *cert. denied*, 98 S. Ct. 1623 (1978); *Houston v. Nelson*, 404 F. Supp. 1108, 1115 (C.D. Cal. 1975); *Scott v. State*, 345 So. 2d 414, 417 (Fla. App.), *cert. denied*, 434 U.S. 853 (1977). *Contra*, *Chapman v. United States*, 553 F.2d 886, 890 (5th Cir. 1977); *People v. Holcomb*, 395 Mich. 326, 336 n.7, 235 N.W.2d 343, 347 n.7 (1975).

38. 16 Cal. 3d 156, 545 P.2d 843, 127 Cal. Rptr. 467, *cert. denied*, 429 U.S. 847 (1976).

39. 388 U.S. 293 (1967).

40. *Id.* at 297.

effects on the administration of justice resulting from the extent to which the courts have mistakenly but in good faith relied on the prevailing rule [the second criterion] and from an application of the new rule for the purpose of reconsidering determinations already finally made pursuant to the then prevailing rule [the third criterion].⁴¹

The major considerations of the *McDaniel* court were that *Faretta* did nothing to enhance the reliability of the fact-finding or truth-determining processes, while the adverse effect on the criminal justice system would be extremely burdensome.⁴² The court's analysis seems persuasive, and other jurisdictions have employed the same analysis.⁴³

The Michigan case of *People v. Holcomb*,⁴⁴ however, held that the right to appear pro se is to be applied retroactively.⁴⁵ In its analysis, the *Holcomb* majority cited the prior Supreme Court decisions giving retroactive treatment to the right to representation by counsel on grounds that it affected the integrity and reliability of the fact-finding process. It stated that there was "no reason" to treat the pro se right differently, because representation either way, "affects the truth and accuracy of the guilt-determining process."⁴⁶ It would appear that this analysis ignores the distinction between improving the reliability of the system and merely affecting it, particularly in light of the burden a retroactive rule would impose.

A strong dissenting opinion did analyze the retroactivity issue in a manner similar to the one used later by the *McDaniel* court, and concluded that *Faretta* should not be applied retroactively.⁴⁷ The Fifth Circuit, in effect, applied *Faretta* retroactively in *Chapman v. United States*,⁴⁸ but did so on the ground that the right of self-representation had been recognized in the Fifth Circuit prior to *Faretta*.⁴⁹

C. Time and Manner of Asserting the Right

It was noted by Justice Blackmun that one of the procedural issues left open by the majority opinion in *Faretta* was how early in the proceedings the defendant must elect to proceed with coun-

41. *People v. McDaniel*, 16 Cal. 3d at 166, 545 P.2d at 848, 127 Cal. Rptr. at 472.

42. *Id.* at 167-68, 545 P.2d at 849-50, 127 Cal. Rptr. at 473-74.

43. *Martin v. Wyrick*, 568 F.2d 583, 588 (8th Cir.), cert. denied, 98 S. Ct. 1623 (1978); *Houston v. Nelson*, 404 F. Supp. 1108, 1115 (C.D. Cal. 1975); *Scott v. State*, 345 So. 2d 414, 417 (Fla. App.), cert. denied, 434 U.S. 853 (1977).

44. 395 Mich. 326, 235 N.W.2d 343 (1975).

45. *Id.* at 336 n.7, 235 N.W.2d at 347 n.7.

46. *Id.*

47. *Id.* at 344-45, 235 N.W.2d at 351-52 (Coleman, J., dissenting).

48. 553 F.2d 886 (5th Cir. 1977).

49. *Id.* at 890.

sel or to appear pro se, and whether a defendant could change his mind in mid-trial.⁵⁰ The potential abuses and difficulties of being able to assert the right of self-representation (and possibly obtain a continuance for preparation) at any stage of the proceedings should be obvious and the courts have consistently refused to allow criminal defendants to manipulate the system in this way. In *State v. Fritz*,⁵¹ a defendant avoided his first trial date by fleeing the state; on his second scheduled trial date he successfully gained permission for substitute counsel and a continuance. Finally, on his third trial date he asserted a right to self-representation in an obvious attempt to further delay the trial.⁵² Not surprisingly the trial court refused the request. A general rule has developed that for the right to be guaranteed, the request for pro se representation must be timely—that is, it must be asserted before the trial begins—and allowing a request made on or after the date of trial is discretionary on the part of the trial court.⁵³

To protect the sincere pro se request, another rule has developed, namely, that refusal of a timely request is erroneous as a matter of law and *per se* reversible.⁵⁴ This is not to suggest, however, that trial courts normally refuse requests for self-representation made on the day of trial or later. On the contrary, they are usually granted so long as there is no resulting delay.⁵⁵ One court suggested that courts should balance any potential delay or disruption against such factors as the defendant's reason for requesting pro se status, whether the defendant has shown a prior proclivity to substitute counsel or otherwise delay, and the quality of representation by the defendant's present counsel.⁵⁶ Thus, on occasion a trial court has been reversed for refusal to grant a continuance for preparation when a pro se choice was legitimately

50. 422 U.S. at 852 (Blackmun, J., dissenting).

51. 21 Wash. App. 354, 585 P.2d 173 (1978).

52. *Id.* at 361, 585 P.2d at 180.

53. *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); *United States v. Malizia*, 437 F. Supp. 952, 955 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1298 (1st Cir. 1978); *State v. Strickland*, 27 Ariz. App. 695, —, 558 P.2d 723, 726 (1977); *People v. Windham*, 19 Cal. 3d 121, 124, 560 P.2d 1187, 1189, 137 Cal. Rptr. 8, 10, *cert. denied*, 434 U.S. 848, *rehearing denied*, 434 U.S. 961 (1977); *Swinehart v. State*, 376 N.E.2d 486, 490 (Ind. 1978); *Schnepp v. State*, 92 Nev. 557, 560, 554 P.2d 1122, 1124 (1976); *State v. Fritz*, 21 Wash. App. 354, 361, 585 P.2d 173, 178 (1978).

54. See notes 208-15 & accompanying text *infra*.

55. See, e.g. *German v. State*, 373 N.E.2d 880, 883 (Ind. 1978); *Irvin v. State*, 584 P.2d 1068, 1073 (Wyo. 1978). Both cases allowed defendant to dismiss his attorney on the first day of trial and proceed pro se, but refused to grant a continuance for additional preparation. The problem of delay to the courts versus fairness to the defendant is a difficult balance to strike, as indicated by the problem of the Hobson's Choice discussed at notes 106-17 & accompanying text *infra*.

56. *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976).

made on the first day scheduled for trial.⁵⁷

A clear and precise request for self-representation must be made. It would be an intolerable situation if a defendant could vaguely make some comment about wanting to represent himself or wanting a different attorney at some point in the trial, yet thereafter continue through the trial represented by his attorney, and then on appeal gain a reversal on the ground that he was denied his constitutional right of self-representation. Consequently, it has been held that to be reversible on appeal there must be a clear and unequivocal demand for self-representation.⁵⁸ However, it has also been held that even where the demand for self-representation was unequivocally asserted it may be waived by the defendant's subsequent words or conduct in acquiescing in representation by an attorney.⁵⁹ An Indiana court held that a potentially wrongful denial of an unequivocal request for self-representation was rendered moot for appeal when the defendant filed a later motion which included a request for counsel.⁶⁰ Each of these decisions is consistent with a post-*Faretta* tendency to interpret the right of self-representation narrowly and not allow it to become a vehicle for manipulation or second-guessing.

D. Termination of Pro Se Status

The *Faretta* majority indicated that pro se status could be terminated if the defendant "deliberately engages in serious and obstructionist misconduct."⁶¹ There are surprisingly few cases on this point, but those that exist clearly establish that it is within the trial court's discretion to terminate the right of self-representation

57. *Commonwealth v. Cavanaugh*, 371 Mass. 46, 57, 353 N.E.2d 732, 739 (1976). In *Cavanaugh* the appointed attorney had petitioned the court that he was not ready to proceed, but was denied a continuance. This is why the defendant requested a different attorney, and then went pro se when that request was denied. *Id.* A dissenting opinion in *Ash v. State*, 555 P.2d 221 (Wyo. 1976), *cert. denied*, 434 U.S. 842 (1977), argued that it was reversible error not to grant a continuance when defendant changed his mind and requested to be represented by counsel. The dissenting justice condemned the majority for their overriding concern for the convenience to the trial court. *Id.* at 229-31 (McIntock, J., dissenting).

58. *Chapman v. United States*, 553 F.2d 886, 892-93 (5th Cir. 1977); *United States v. Bennet*, 539 F.2d 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); *People v. Potter*, 77 Cal. App. 3d 45, 50, 143 Cal. Rptr. 379, 382 (1978); *Anderson v. State*, 370 N.E.2d 318, 320 (Ind. 1977), *cert. denied*, 434 U.S. 1079 (1978); *Dugger v. State*, 543 S.W.2d 374, 376 (Tex. Crim. App. 1976); *State v. Fritz*, 21 Wash. App. 354, 360, 585 P.2d 173, 177 (1978).

59. *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir.), *cert. denied*, 426 U.S. 908 (1976).

60. *Dorsey v. State*, 357 N.E.2d 280, 283 (Ind. App. 1976).

61. *Faretta v. California* 422 U.S. at 834 n.46.

for a defendant who engages in disruptive or delaying tactics.⁶² This discretionary power is essential to prevent the right to self-representation from becoming a right to disrupt the judicial process. Two post-*Faretta* cases have stated in *dicta*, that a court which is faced with a defendant who is disruptive from the beginning may use the disruptive behavior as a reason for denying self-representation.⁶³ However, in *Ferrel v. Superior Court*,⁶⁴ it was held that a court cannot terminate a defendant's right of self-representation on account of pre-trial out-of-court abuses of his pro se privileges. The court indicated that self-representation could only be terminated for in-court abuses.⁶⁵ This seems to reflect a high commitment to preserving and protecting the right of self-representation, even at the expense of some inconvenience or annoyance to detainment facility personnel.

The termination issue has arisen in other contexts as well. A dissenting opinion in *People v. Reason*⁶⁶ argued that a court should be able to terminate the pro se status if during the trial it becomes apparent that the defendant is not mentally competent to conduct a defense.⁶⁷ This is precisely what happened in *State v. Doss*,⁶⁸ where the Arizona Supreme Court affirmed the decision of the trial court in rescinding permission to proceed pro se when later psychiatric testimony indicated that the defendant was mentally incompetent to make such a decision.⁶⁹ Furthermore, it has also been held that pro se status can be effectively terminated by the defendant's acquiescence in representation by an attorney.⁷⁰

62. *People v. Brownlee*, 74 Cal. App. 3d 921, 932, 141 Cal. Rptr. 685, 691 (1977); *Payne v. State*, 367 A.2d 1010, 1017 (Del. 1976); *People v. Heidelberg*, 33 Ill. App. 3d 574, 593, 338 N.E.2d 56, 71 (1975).

63. *People v. Manson*, 71 Cal. App. 3d 1, 50, 139 Cal. Rptr. 275, 303 (1977), *cert. denied*, 435 U.S. 953 (1978) (Hinman/Shea murders); *People v. Longuemire*, 77 Mich. App. 17, 20, 257 N.W.2d 273, 274 (1977).

64. 20 Cal. 3d 888, 576 P.2d 93, 144 Cal. Rptr. 610 (1978).

65. *Id.* at 891, 576 P.2d at 95, 144 Cal. Rptr. at 612.

66. 37 N.Y.2d 351, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975).

67. *Id.* at 359, 334 N.E.2d at 577, 372 N.Y.S.2d at 620-21 (Jasen, J., dissenting). The majority in *Reason* upheld the granting of pro se status to a defendant who had previously been institutionalized, and refused to reverse the conviction despite the fact that the defendant drifted off into irrelevant and incoherent ramblings in both his opening and closing statements. *Id.* at 353-54, 334 N.E.2d at 573-74, 372 N.Y.S.2d at 615-16.

68. 116 Ariz. 156, 568 P.2d 1054 (1977).

69. *Id.* at 160, 568 P.2d at 1058.

70. *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir.), *cert. denied*, 426 U.S. 908 (1976); *State v. Armstrong*, 562 P.2d 1129, 1131-32 (Mont.), *cert. denied*, 433 U.S. 912 (1977); *State v. Kirby*, 198 Neb. 646, 648, 254 N.W.2d 424, 425 (1977). See note 159 & accompanying text *infra*.

IV. DEFINING THE RIGHT OF SELF-REPRESENTATION THROUGH RESOLUTION OF SUBSTANTIVE ISSUES

The *Faretta* Court also failed to articulate the parameters of the newly proclaimed constitutional right of self-representation. As with the procedural decisions, the substantive rulings by appellate courts have shown a predilection to *not* expand the right of self-representation beyond the bounds of the *Faretta* decision. However, there has been a consistent and praiseworthy effort by the courts to protect the right of self-representation when timely asserted by the sincere criminal defendant. Balanced against this is a consistent determination on the courts' part of not allowing the right to become a manipulative device for opportunistic defendants.

A. What Constitutes a "Knowing and Intelligent" Waiver of the Right to Counsel

In order to assert the right of self-representation, there must first be a knowing and intelligent waiver of the right to counsel:

[I]n order to represent himself, the accused must knowingly and intelligently forego those relinquished benefits Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.

. . . The record affirmatively shows that *Faretta* was literate, competent, and understanding, and that he was voluntarily exercising his informed free will We need make no assessment of how well or poorly *Faretta* had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.⁷¹

The *Faretta* Court was stating, and subsequent cases have concurred, that lack of legal knowledge (with its inherent implication as to whether the decision is wise or intelligent) is irrelevant to a determination of whether a defendant has knowingly and intelligently waived his right to counsel.⁷² The focus, instead, has been and must be on three other factors: first, whether the defendant was sufficiently informed by the court about the dangers and disadvantages of pro se representation;⁷³ second, whether the defend-

71. *Faretta v. California*, 422 U.S. at 835-36 (citations & footnotes omitted).

72. *People v. Freeman*, 76 Cal. App. 3d 302, 307, 142 Cal. Rptr. 806, 809 (1977); *Barnes v. State*, 258 Ark. 565, 570, 528 S.W.2d 370, 374 (1975).

73. See, e.g. *United States v. Pavich*, 568 F.2d 33, 38 (7th Cir. 1978); *State v. Cunningham*, 222 Kan. 704, 706, 567 P.2d 879, 882 (1977). There has been a minor split over whether this includes the requirement that defendant must specifi-

ant was told of the advantages of representation by counsel, and that counsel would be provided free should he be found unable to pay the expense himself;⁷⁴ and third, whether the defendant was competent to make such a decision even after having been so informed.⁷⁵

Both of the dissenting opinions in *Faretta*⁷⁶ and several commentators⁷⁷ have noted that the Court was opening the door to a judicial quagmire over what does and does not constitute a knowing and intelligent waiver of the right to counsel. The only "rule" that begins to emerge from the plethora of post-*Faretta* cases is: *get something in the record*.

Numerous cases have upheld the *grant* of self-representation where the appellate court found sufficient evidence in the record to support a finding that the waiver of right to counsel was made knowingly and intelligently.⁷⁸ Moreover, a multitude of cases have been reversed on appeal when the trial courts allowed defendants to proceed pro se without providing similar proof in the record.⁷⁹

cally be told the charges and possible penalties facing him. *Compare* State v. Hartman, 134 Vt. 64, 66-67, 349 A.2d 223, 225 (1975) with People v. Heath, 35 Ill. App. 3d 880, 886-87, 342 N.E.2d 452, 456 (1976).

74. See, e.g., Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976); State v. Daniels, 2 Kan. App. 2d 603, 586 P.2d 50 (1978).

75. See, e.g., State v. Doss, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977); People v. Salas, 77 Cal. App. 3d 600, 604-05, 143 Cal. Rptr. 755, 758 (1978).

76. 422 U.S. at 845-46 (Burger, C.J., dissenting); *id.* at 852 (Blackmun, J., dissenting).

77. See, e.g., Note, Mo. L. Rev., *supra* note 7, at 436-37; Note, S. ILL. U. L.J., *supra* note 7, at 280; Note, U. PRIT. L. Rev., *supra* note 7, at 410.

78. United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978) (husband); United States v. Pavich, 568 F.2d 33, 38 (7th Cir. 1978); United States v. Pinky, 548 F.2d 305, 310 (10th Cir. 1977); Konigsberg v. Vincent, 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976); Stepp v. Estelle, 524 F.2d 447, 449 (5th Cir. 1975); People v. Zatko, 80 Cal. App. 3d 534, 543, 145 Cal. Rptr. 643, 648 (1978); People v. Dale, 78 Cal. App. 3d 722, 730, 144 Cal. Rptr. 338, 342, *cert. denied*, 99 S. Ct. 327 (1978); People v. Smith, 33 Ill. App. 3d 725, 727, 338 N.E.2d 207, 208 (1975); State v. Cunningham, 222 Kan. 704, 706, 567 P.2d 879, 882 (1977); Commonwealth v. Flowers, 365 N.E.2d 839, 845 (Mass. App. 1977), *cert. denied*, 434 U.S. 1077 (1978); People v. Reason, 37 N.Y.2d 351, 354, 334 N.E.2d 572, 574, 372 N.Y.S.2d 614, 617 (1975); Irvin v. State, 584 P.2d 1068, 1072 (Wyo. 1978).

79. United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978) (wife); Ford v. Wainwright, 526 F.2d 919, 922 (5th Cir. 1976); Martinez v. Thomas, 526 F.2d 750, 753-54 (2d Cir. 1975); O'Dell v. Municipality of Anchorage, 576 P.2d 104, 108 (Alaska 1978); People v. Lopez, 71 Cal. App. 3d 568, 572, 138 Cal. Rptr. 36, 38 (1977); Wallace v. State, 361 N.E.2d 159, 161 (Ind. App. 1977); State v. Daniels, 2 Kan. App. 2d 603, 586 P.2d 50 (1978); State v. Renshaw, 276 Md. 259, 264, 347 A.2d 219, 224 (1975); Hamilton v. State, 30 Md. App. 202, 206, 351 A.2d 153, 154 (1976); Cason v. State, 31 Md. App. 121, 125, 354 A.2d 840, 843 (1976); Commonwealth v. Cavanaugh, 371 Mass. 46, 57, 353 N.E.2d 732, 739 (1976); State v. Trapp, 52 Ohio App. 2d 189, 193-94, 368 N.E.2d 1278, 1281

The opposite situations have also occurred. Several cases have reversed trial courts for *denying* the right of self-representation when the appellate court found sufficient evidence that the waiver was made knowingly and intelligently,⁸⁰ while other cases have affirmed trial court denials of self-representation when the appellate court agreed that the record showed there was not a knowing and intelligent waiver of the right to counsel.⁸¹ Also, both federal and state courts have on occasion *remanded* cases for a determination whether there was a knowing and intelligent waiver of right to counsel when the appellate court could not make such a determination from the record.⁸²

The fact that the cases have gone five different ways with respect to the "knowing and intelligent waiver" issue seems to indicate that ultimately each case must rest upon its particular set of facts.⁸³ Nevertheless, the common theme of the cases is a consistent attempt to protect and defend the right of self-representation in principle,⁸⁴ while refusing to allow the waiver issue to become a manipulative device.

(1977); *Thomas v. State*, 550 S.W.2d 64, 68 (Tex. Crim. App. 1977); *State v. Hartman*, 134 Vt. 64, 66-67, 349 A.2d 223, 225 (1975).

80. *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977); *Barnes v. State*, 258 Ark. 565, 572, 528 S.W.2d 370, 375 (1975); *People v. Freeman*, 76 Cal. App. 3d 302, 309-10, 142 Cal. Rptr. 806, 810 (1978); *People v. Tyner*, 76 Cal. App. 3d 352, 355, 143 Cal. Rptr. 52, 53 (1977); *Thomas v. Superior Court*, 54 Cal. App. 3d 1054, 1058-59, 126 Cal. Rptr. 830, 832-33 (1976); *People v. Anderson*, 398 Mich. 361, 371, 247 N.W.2d 857, 861 (1976) (second defendant); *Cole v. State*, 569 P.2d 470, 472 (Okla. Crim. 1977).
81. *State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977); *People v. Salas*, 77 Cal. App. 3d 600, 605, 143 Cal. Rptr. 755, 758 (1978); *People v. Manson*, 71 Cal. App. 3d 1, 50-51, 139 Cal. Rptr. 275, 303 (1977), *cert. denied*, 435 U.S. 953 (1978) (Hinman/Shea murders); *People v. Anderson*, 398 Mich. 361, 369, 247 N.W.2d 857, 860 (1976) (first defendant); *Commonwealth v. Glover*, 247 Pa. Super. Ct. 465, 468, 372 A.2d 919, 921 (1977).
82. *Maynard v. Meachum*, 545 F.2d 273, 277 (1st Cir. 1976); *People v. Holcomb*, 395 Mich. 326, 336, 235 N.W.2d 343, 347 (1975); *State v. Garcia*, 21 Wash. App. 58, —, 583 P.2d 1253, 1257 (1978).
83. For example, in *United States v. Gillings*, 568 F.2d 1307 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978), it was held that saying little more than "me too" when one's co-defendant spouse is extensively questioned as to whether he is making a knowing and intelligent waiver of his right to counsel, does not amount to a knowing and intelligent waiver of the right to counsel by the other defendant. *Id.* at 1309.
84. However, two state court decisions have totally ignored the issue whether the waiver of the right to counsel had been knowingly and intelligently made. *People v. Anthony*, 42 Ill. App. 3d 102, 103-04, 355 N.E.2d 680, 681 (1976); *Junior v. State*, 91 Nev. 439, 442, 537 P.2d 1204, 1206 (1975). In these two cases, the state courts upheld trial court decisions which allowed the defendants to represent themselves without having been given explanations of the dangers or disadvantages of self-representation. Though both cases cited *Faretta* it is difficult to see how either case can be reconciled with that decision.

Although reference to the trial record is the normal practice for an appellate court in determining whether there was a knowing and intelligent waiver of the right to counsel, several courts have held that the record is not the sole source for such a determination and that other facts and circumstances may be taken into account.⁸⁵ In *People v. Anderson*,⁸⁶ it was held that the second defendant's demeanor and statements clearly showed that his waiver of right to counsel was knowing and intelligent, notwithstanding the fact that he was not given a full colloquy explanation by the court.⁸⁷

At least one *Faretta* commentator believes that objective standards should be established to guide trial courts in determining whether a waiver was knowing and intelligent.⁸⁸ Such standards were attempted in *People v. Lopez*,⁸⁹ where a California court of appeals gave two pages of suggestions on how and what a trial court should build into its record in order to establish whether the attempted waiver of counsel was knowing and intelligent.⁹⁰ The above commentator also believes that if the request for pro se status is granted, the burden of proof that the waiver was not knowingly and intelligently made should fall upon the defendant.⁹¹ This position has been expressly adopted by some courts.⁹²

A significant point of controversy between the courts is whether a defendant who is competent to stand trial can be deemed incompetent to knowingly and intelligently waive his right to counsel. An early post-*Faretta* decision by the New York Supreme Court, *People v. Reason*,⁹³ held that if a defendant is competent to stand trial, he is also competent to assert his right of self-representation.⁹⁴ This holding was made despite the fact that the defendant had a history of commitment to mental institutions and had drifted into incoherent and irrelevant discourses during both his opening

85. *Maynard v. Meachum*, 545 F.2d at 277; *Konigsberg v. Vincent*, 526 F.2d 131, 134 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); *People v. Jackson*, 59 Ill. App. 3d 1004, 1008, 376 N.E.2d 685, 688 (1978); *People v. Heath*, 35 Ill. App. 3d 880, 886-87, 342 N.E.2d 452, 456 (1976); *People v. Smith*, 33 Ill. App. 3d 725, 727, 338 N.E.2d 207, 208 (1975); *People v. Anderson*, 398 Mich. 361, 370-71, 247 N.W.2d 857, 861 (1976).

86. 398 Mich. 361, 247 N.W.2d 857 (1976).

87. *Id.* at 370-71, 247 N.W.2d at 861. There were two defendants in the case. One was found to have made an adequate waiver and the other not to have done so.

88. Note, S. ILL. U. L.J., *supra* note 7, at 282-83.

89. 71 Cal. App. 3d 568, 138 Cal. Rptr. 36 (1977).

90. *Id.* at 572-74, 138 Cal. Rptr. at 38-40.

91. Note, S. ILL. U. L.J., *supra* note 7, at 284.

92. *Maynard v. Meachum*, 545 F.2d 273, 277 (1st Cir. 1976); *Stepp v. Estelle*, 524 F.2d 447, 455 (5th Cir. 1975).

93. 37 N.Y.2d 351, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975).

94. *Id.* at 354-55, 334 N.E.2d at 574, 372 N.Y.S.2d at 617.

and closing statements.⁹⁵ The court reasoned that it would be too difficult to formulate a workable higher standard that would not infringe upon the constitutional right of self-representation.⁹⁶ The dissent cited *Westbrook v. Arizona*⁹⁷ as evidence that the Supreme Court had already distinguished the capacity to stand trial from the capacity to knowingly and intelligently waive a constitutional right.⁹⁸ Despite *People v. Reason*, several *Faretta* commentators suggest that a defendant's incompetence should be grounds for refusing to find a knowing and intelligent waiver of the right to counsel,⁹⁹ and the decisions of other jurisdictions since *Reason* have agreed that a defendant can be found to have been incompetent to knowingly and intelligently waive his right to counsel.¹⁰⁰

In *Martinez v. Thomas*,¹⁰¹ a combination of factors, including clear evidence of extremely low mentality, taken together, indicated a lack of due process to allow the defendant to proceed pro se.¹⁰² However, a mere assertion of incompetence is not sufficient where the court finds other evidence that a defendant is capable of understanding, and the trial court is not required to make a separate psychological exam when it is satisfied that it would be unnecessary.¹⁰³ In *People v. Heidelberg*,¹⁰⁴ it was held permissible for

95. *Id.* at 353; 334 N.E.2d at 573; 372 N.Y.S.2d at 615.

96. *Id.* at 354; 334 N.E.2d at 574; 372 N.Y.S.2d at 616.

97. 384 U.S. 150 (1966).

98. *People v. Reason*, 37 N.Y.2d at 357, 334 N.E.2d at 576, 372 N.Y.S.2d at 619 (Jasen, J., dissenting).

99. Note, *supra* note 3, at 704; Note, ALB. L. REV., *supra* note 7, at 434; Note, MO. L. REV., *supra* note 7, at 436; Comment, PEPPERDINE L. REV., *supra* note 7, at 341-42.

100. *State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977); *People v. Salas*, 77 Cal. App. 3d 600, 604-05, 143 Cal. Rptr. 755, 758 (1978); *People v. Manson*, 71 Cal. App. 3d 1, 50, 139 Cal. Rptr. 275, 303 (1977), *cert. denied*, 435 U.S. 953 (1978) (Hinman/Shea murders); *People v. Manson*, 61 Cal. App. 3d 102, 172, 132 Cal. Rptr. 265, 306 (1976), *cert. denied*, 430 U.S. 986 (1977) (Tate/LaBianca murders); *Cason v. State*, 31 Md. App. 121, 124, 354 A.2d 840, 843 (1976); *Commonwealth v. Glover*, 247 Pa. Super. Ct. 465, 467, 372 A.2d 919, 920 (1977). In *People v. Salas* one significant factor was that the defendant could neither read nor write English. 77 Cal. App. 3d at 604, 143 Cal. Rptr. at 757. One commentator suggests that *Faretta* implied that one minimum requirement for a knowing and intelligent waiver of the right to counsel is being literate, since the Court specifically referred to Anthony Faretta as "literate." 422 U.S. at 835. Note, DEPAUL L. REV., *supra* note 7, at 781.

The original right to counsel case, *Powell v. Alabama*, 287 U.S. 45 (1932), had also stressed the need for counsel when an "illiterate" defendant was involved. *Id.* at 69.

101. 526 F.2d 750 (2d Cir. 1975).

102. *Id.* at 753-54.

103. *People v. Zatko*, 80 Cal. App. 3d 534, 543, 145 Cal. Rptr. 643, 648 (1978). The court affirmatively held that competency to stand trial is a different standard than competency to knowingly and intelligently waive the right to counsel. *Id.* at 541, 145 Cal. Rptr. at 645.

the trial judge to delay a ruling on the defendant's request for self-representation until after receiving reports from a psychological evaluation of the defendant.¹⁰⁵

Another controversial issue, and one upon which the jurisdictions are more sharply divided, is whether there is ever a "knowing and intelligent waiver" of the right to counsel when the defendant seeks different counsel and the trial court forces the defendant to make a choice between remaining with the present undesired counsel or proceeding pro se. Some appellate courts have referred to this as a "Hobson's Choice," referring to the story of the English carrier who owned two horses for hire, and who required his customers to take the horse that happened to be standing beside the stable door.¹⁰⁶ The problem of the Hobson's Choice is amply discussed in a recent article,¹⁰⁷ inspired by the case of *Irvin v. State*,¹⁰⁸ which upheld the lower court's decision to force the defendant to represent himself when he refused to continue with his court-appointed attorney.¹⁰⁹ The obvious distinction should be whether the defendant has a legitimately expressed reason for desiring different counsel, or whether, in the trial court's determination, the defendant is seeking only to delay or disrupt the proceedings. A gross example of the unfairness which results when the distinction is not made is *Ford v. Wainwright*.¹¹⁰ In *Ford*, several days before trial the defendant discovered that his privately retained attorney had been previously disbarred, and that the presiding judge was the prosecuting attorney at the disbarment. The judge would not grant the defendant's request for a new attorney despite the fact that one was presented to the court, and ordered the defendant to proceed with selection of the jury. The judge subsequently offered to appoint a public defender but only on the condition that the defendant agree to forfeit his bail. The judge, nevertheless, then withdrew the bail when the defendant declined the offer.¹¹¹ Although the Fifth Circuit reversed this conviction on appeal, it is indicative of the deference given the trial court's discretion.

A typical example of a forced Hobson's Choice is *King v.*

104. 33 Ill. App. 3d 574, 338 N.E.2d 56 (1975).

105. *Id.* at 590, 338 N.E.2d at 69.

106. *Wright v. State*, 32 Md. App. 60, 64 n.2, 359 A.2d 1, 3 n.2 (1976); *Commonwealth v. Cavanaugh*, 371 Mass. 46, 53, 353 N.E.2d 732, 737 (1976).

107. Comment, *Pro Se Defendants and Advisory Counsel*, 14 LAND & WATER L. REV. 227, 242-47 (1979).

108. 584 P.2d 1068 (Wyo. 1978).

109. *Id.* at 1072.

110. 526 F.2d 919 (5th Cir. 1976).

111. *Id.* at 920-22.

Schubin.¹¹² The appellate court refused to reverse the trial court for forcing a Hobson's Choice upon the defendant who waited until after the trial began to demand a delay and different counsel, but only vaguely alleged a lack of communication as his reason for dissatisfaction with an apparently competent appointed attorney.¹¹³ Several cases have indicated a reluctance on the part of appellate courts to overrule a trial court's discretion for forcing a Hobson's Choice,¹¹⁴ while noting that others have been more willing to intervene and remand on grounds that such a forced choice is not a knowing and intelligent waiver.¹¹⁵ The problem is to protect the right of self-representation without permitting manipulation of the courts. It would seem that a minimum consideration of fairness would require trial courts to at least inquire why a defendant is seeking different counsel before forcing such a choice. However, in *Commonwealth v. Flowers*¹¹⁶ it was held that, where a second request for a different attorney was an obvious dilatory tactic, there was no constitutional obligation to inquire further because it was clear that there was no substantive objection to the present counsel.¹¹⁷

B. Procedural Rules and the Public Interest in a Fair Trial

The rationale for extending a constitutional right to counsel in criminal proceedings was to protect the public interest in fair trials.¹¹⁸ Even the majority in *Faretta* conceded that a constitutional

112. 522 F.2d 527 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975).

113. *Id.* at 529.

114. *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *King v. Schubert*, 522 F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *German v. State*, 373 N.E.2d 880, 882 (Ind. 1978); *Commonwealth v. Flowers*, 365 N.E.2d 839, 845 (Mass. App. 1977), *cert. denied*, 434 U.S. 1077 (1978); *People v. Longuemire*, 77 Mich. App. 17, 23, 257 N.W.2d 273, 274 (1977); *State v. Linsky*, 117 N.H. 866, 880, 379 A.2d 813, 822 (1977); *Irvin v. State*, 84 P.2d 1068, 1074 (Wyo. 1978).

115. *Ford v. Wainwright*, 526 F.2d 919, 921-22 (5th Cir. 1976); *Martinez v. Thomas*, 526 F.2d 750, 756 n.8 (2d Cir. 1975); *State v. Renshaw*, 276 Md. 259, 267, 347 A.2d 219, 225 (1975); *Wright v. State*, 32 Md. App. 60, 63-64, 359 A.2d 1, 3 (1976); *Commonwealth v. Cavanaugh*, 371 Mass. 13, 57, 353 N.E.2d 732, 739 (1976); *Thomas v. State*, 550 S.W.2d 64, 68 (Tex. Crim. 1977); *State v. Garcia*, 21 Wash. App. 58, —, 583 P.2d 1253, 1257 (1978).

116. 365 N.E.2d 839 (Mass. App. 1977), *cert. denied*, 434 U.S. 1077 (1978).

117. 365 N.E.2d at 845.

118. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell* it was stated:

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 an 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 knowl-

right to self-representation worked at cross-purposes to the goal of a fair trial:

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel . . . For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.¹¹⁹

Nevertheless, the *Faretta* majority, relying on an equally strong respect for the right of individual freedom, asserted that it is "quite another to say that a State may compel a defendant to accept a lawyer he does not want. . . . [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored. . . ."¹²⁰

Notwithstanding the above, the *Faretta* Court stated that self-representation is not "a license not to comply with the relevant rules of procedural and substantive law."¹²¹ A knowing and intelligent waiver on the part of a defendant depends on his having been informed that he must follow the "ground rules" of trial procedure.¹²² Consequently, the appellate courts have generally refused to allow obvious procedural errors to be the grounds for reversal when the pro se defendant did not enter a timely objection.¹²³ Likewise, it has been held that a pro se defendant is not entitled to special favors *vis a vis* the discovery process.¹²⁴ The

edge adequately to prepare his defense, even though he had 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, of those of feeble intellect.

Powell v. Alabama, 287 U.S. at 69.

119. 422 U.S. at 832-33 (citations & footnotes omitted).

120. *Id.* at 833-34.

121. *Id.* at 835 n.46.

122. *Id.* at 836.

123. United States v. Pinky, 548 F.2d 305, 310 (10th Cir. 1977) (no matter that complex mail fraud was involved); United States v. Rowe, 565 F.2d 635, 637 (10th Cir. 1977) (introduction of a tape which referred to other past illegal acts); State v. Cunningham, 222 Kan. 704, 707, 567 P.2d 879, 882 (1977) (prosecutor misstatements in closing); Miller v. State, 560 P.2d 739, 740 (Wyo. 1977) (jury instructions that failed to give instructions on the effect of voluntary drunkenness upon specific intent).

Apparently the doctrine of plain error would still apply if the appellate court found plain error (but none here). United States v. Pinky, 548 F.2d at 310; United States v. Rowe, 565 F.2d at 637.

124. State v. Addicks, 34 Or. App. 557, 561, 579 P.2d 289, 291 (1978) held that it was not error that incarcerated defendant did not inspect or copy material available in the prosecutor's office. Defendant had an appointed advisory counsel

defendant is also not entitled to be informed of his right not to incriminate himself as he conducts his defense.¹²⁵

The trial judge is under no obligation to become the advocate or assistant for the inept pro se defendant,¹²⁶ although some courts attempt in their discretion to provide guidance. Thus, the trial judge in *United States v. Pavich*¹²⁷ told the defendant how to lay a foundation, impeach a witness, introduce a document into evidence, and advised him how to avoid the elicitation of damaging evidence.¹²⁸ Furthermore, a footnote in *Pavich* indicates that a trial judge must exercise special care to protect a pro se defendant's rights in matters of law. This duty would include insuring adequate jury instructions, even if the defendant did not object.¹²⁹ Thus far, the majority of the trial courts have not shown an inclination to treat pro se defendants differently than professional counsel,¹³⁰ but there is pre-*Faretta* precedent for it,¹³¹ and at least one commentator has argued that courts should.¹³² The "can't lose" advantage of such a rule militates against its widespread application to reverse trial courts.

On the other hand, some courts seem quite willing to accord some leniency to the pro se defendant as far as conformity to *ap-*

who could have done it, and the prosecutor was held under no obligation to deliver it to the jail.

125. *People v. Owens*, 66 Cal. App. 3d 720, 722, 136 Cal. Rptr. 215, 216 (1977). Defendant had called his accomplice as a witness, whose prior statements to police contained a statement tending to incriminate the defendant.
126. *United States v. Pinky*, 548 F.2d 305, 311 (10th Cir. 1977), noted that by choosing to proceed pro se the defendant acquiesced in the rules. "The trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket." *Id.* at 311. *Accord*, *United States v. Pavich*, 568 F.2d 33, 40 (7th Cir. 1978).
127. 568 F.2d 33 (7th Cir. 1978).
128. *Id.* at 40. Likewise, in *Commonwealth v. Davis*, 479 Pa. 274, 283, 388 A.2d 324, 328 (1978), where the pro se defendant faced a possible death sentence, the court provided advisory counsel and took the defendant aside and carefully explained the concept of mitigating circumstances to him so that the defendant could raise it in his statement to the jury prior to sentencing.
129. *United States v. Pavich*, 568 F.2d at 40 n.5. *Contra*, *Miller v. State*, 560 P.2d 739, 740 (Wyo. 1977).
130. See notes 125-29 & accompanying text *supra*.
131. In *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970), the Colorado Supreme Court acknowledged that there was a knowing and intelligent waiver of the right to counsel. Nevertheless, it reversed a lower court conviction on the ground that the trial court erred in not providing an instruction on a defense which, if believed, would have eviscerated an essential element of the crime. This was the case despite the fact that the defendant did not make an objection to the instructions. The court reasoned that with no defense attorney present and an inept defendant, the result was so lacking in due process that reversal was necessary. *Id.* at 87, 470 P.2d at 29.
132. Note, ALB. L. REV., *supra* note 7, at 440-42.

pellate procedural rules is concerned. In *Potts v. Estelle*¹³³ the Fifth Circuit declined to summarily reject a pro se habeas corpus petition on the ground that it technically failed to allege a necessary element of the indigency, despite the strong urging of the State of Texas that it do so.¹³⁴ Similarly, in *People v. Heidelberg*¹³⁵ the appellate court accepted a late appeal when the pro se defendant was not informed of the deadline.¹³⁶

C. Standby or Advisory Counsel

The appointment of a standby or advisory counsel is a device that helps insure a fair trial, while still respecting the right to self-representation. Although courts are not always consistent in their terminology, standby should refer to counsel appointed solely for a "standby" purpose—ready to take-over if the pro se status is relinquished or terminated, but not actually assisting the pro se defendant.¹³⁷ Advisory counsel, in contrast, is appointed with the additional function of being able to assist the pro se defendant, although the position may vary from an active advisory role, to one only giving advice when requested to do so by the defendant.¹³⁸ Although it used the term "standby," the majority opinion in *Faretta* recognized a role for both standby and advisory counsel:

Of course, a State may—even over objection by 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.¹³⁹

Likewise, the American Bar Association has recommended that trial judges appoint standby counsel to assist pro se litigants.¹⁴⁰

133. 529 F.2d 450 (5th Cir. 1976).

134. *Id.* at 452. The court noted:

Though it is a close question, we are of the opinion that appellant's *pro se* petition could not be dismissed on the basis of an inadequate allegation of indigency. The standard against which we measure *pro se* complaints and petitions is and should be loose enough to accommodate the inartful pleader.

Id.

135. 33 Ill. App. 3d 574, 338 N.E.2d 56 (1975).

136. *Id.* at 579, 338 N.E.2d at 61. The court stressed, however, that it accepted the appeal in its discretion, and did not thereby establish a precedent.

137. Comment, *supra* note 107, at 228.

138. *Id.* at 229-30. A third variation is the hybrid or co-counsel relationship, discussed at notes 160-68 & accompanying text *infra*.

139. 422 U.S. at 835 n.46.

140. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE 6.7 (1972);

When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion.

Although it would be pointless to list the vast number of post-*Faretta* cases that have employed standby or advisory counsel in one form or another, certain important issues concerning the practice have emerged. One question, asked by Justice Blackmun in his dissent, was whether a defendant who has elected self-representation has a constitutional right to the assistance of a standby counsel?¹⁴¹ Three *Faretta* commentators argue that standby or advisory counsel should be available by right.¹⁴² However, as another *Faretta* commentator notes, an important distinction exists between a situation where the court wants an advisory or standby counsel appointed (which is the typical situation), and a situation where the defendant wants it.¹⁴³ Cases which have considered the issue have held that the pro se defendant cannot, by right, force a court to appoint standby counsel, but rather such an appointment has been held to be in the discretion of the court.¹⁴⁴

The right of trial courts to restrict or expand the role of standby or advisory counsel has also been upheld as being in the discretion of the trial court.¹⁴⁵ *Moore v. State*¹⁴⁶ upheld a court directive that the advisory counsel must remain passive and only confer with the pro se defendant when requested to do so by the defendant.¹⁴⁷ *Moore* also illustrates the principle that activity or non-activity by standby or advisory counsel, when the defendant has knowingly and intelligently waived his right to counsel, cannot become grounds for a claim of ineffective representation by advisory counsel.¹⁴⁸

As previously noted, the *Faretta* majority stated that standby

Professor Yale Kamisar made a similar recommendation before the delegates to the 20th Annual Michigan Judicial Conference. Remarks, 55 MICH. ST. B. J. 335 (1976).

141. 422 U.S. at 852 (Blackmun, J., dissenting).

142. Note, ARK. L. REV., *supra* note 7, at 551-53; Note, CAP. U. L. REV., *supra* note 7, at 290; Note, HOFSTRA L. REV., *supra* note 7, at 469-71. The Hofstra article argued that the fifth amendment's due process requirement, with its implications for a fair trial, should require a right to appointment of standby counsel. The Arkansas commentator argued that the *Faretta* language that "counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant," implies that a willing defendant has a right to standby counsel. Note, ARK. L. REV., *supra* note 7, at 551-53 (quoting 422 U.S. at 820).

143. Note, HASTINGS L.J., *supra* note 7, at 293.

144. *United States v. Olson*, 576 F.2d 1267, 1270 (8th Cir.), *cert. denied*, 99 S.Ct. 256 (1978); *Reliford v. People*, 579 P.2d 1145, 1147 (Colo. 1978). As the *Olson* court noted, appellate courts routinely approve the appointment of advisory counsel when made in the discretion of the trial court. *United States v. Pilla*, 550 F.2d 1085, 1093 (8th Cir.), *cert. denied*, 432 U.S. 907 (1977).

145. *State v. Randall*, 530 S.W.2d 407, 409 (Mo. App. 1975).

146. 142 Ga. App. 145, 235 S.E.2d 577 (1977).

147. *Id.* at 146, 235 S.E.2d at 578.

148. *Id. Accord*, *State v. Randall*, 530 S.W.2d 407, 410 (Mo. App. 1975).

counsel could be appointed even over the objection of the pro se defendant.¹⁴⁹ Such an appointment was upheld in *United States v. Taylor*.¹⁵⁰ In *People v. Heidelberg*,¹⁵¹ appointment of standby counsel as a preventive measure in anticipation of a disruptive pro se defendant was upheld;¹⁵² and in *German v. State*¹⁵³ the appointment of the standby attorney to take over the case when the defendant became disruptive was approved.¹⁵⁴ Conversely, in *Chaleff v. Superior Court*,¹⁵⁵ it was held not contempt for a public defender to refuse to continue as advisory counsel where further participation would force the attorney to compromise himself under the California Rules of Professional Conduct.¹⁵⁶

Because of the high public interest in fair trials and in maintaining the integrity of judicial proceedings, it was held in *United States v. Taylor*¹⁵⁷ that it was not error to allow the advisory attorney to participate in the trial (cross examination of witnesses and closing statement), where the pro se defendant assumed a posture of silence and non-participation.¹⁵⁸ However, such a course of action may lead to unexpected results. Two state courts and the Tenth Circuit have held that defendants who had asserted a desire to represent themselves but who later acquiesce in representation by an attorney thereby waive their right to appear pro se.¹⁵⁹

D. Right to Co-Counsel Status

If a defendant has a constitutional right to counsel, as well as a constitutional right to self-representation, does he have a corresponding constitutional right to both simultaneously? Such a situation is usually called co-counsel, mixed, or hybrid representation,

149. 422 U.S. at 835 n.46. See note 139 & accompanying text *supra*.

150. *United States v. Taylor*, 569 F.2d 448, 452 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978).

151. 33 Ill. App. 3d 574, 338 N.E.2d 56 (1975).

152. *Id.* at 592, 338 N.E.2d at 70.

153. 373 N.E.2d 880 (Ind. 1978).

154. 373 N.E.2d at 883.

155. 69 Cal. App. 3d 721, 138 Cal. Rptr. 735 (1977).

156. *Id.* at 724-25, 138 Cal. Rptr. at 737. The pro se defendant wanted the public defender to participate in a defense (namely to offer no defense) which was contrary to the public defender's understanding of and commitment to the California Rules of Professional Conduct governing public defenders. *Id.* at 725 n.2, 138 Cal. Rptr. at 37 n.2.

157. 569 F.2d 448 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978). See note 150 & accompanying text *supra*.

158. *United States v. Taylor*, 569 F.2d at 451-52.

159. *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir.), *cert. denied*, 426 U.S. 908 (1976); *State v. Armstrong*, 562 P.2d 1129, 1132 (Mont.), *cert. denied*, 433 U.S. 912 (1977); *State v. Kirby*, 198 Neb. 646, 648, 254 N.W.2d 424, 425 (1977). The *Montgomery* and *Armstrong* courts both upheld the trial court's denial of defendant's motion to proceed with his closing statement.

and gives the defendant the advantage of counsel while preserving his right to decide trial strategy and participate in the trial. One year before *Faretta* was decided, the Kentucky Supreme Court held in *Wake v. Barker*,¹⁶⁰ that under both the federal and Kentucky constitutions, a criminal defendant was entitled to mixed representation.¹⁶¹

Cases since *Faretta*, however, have been unanimous in restricting the right of self-representation to its own terms and in rejecting the contention that there is a constitutional right to co-counsel status implicit in *Faretta*. Instead, it has been held that a request for co-counsel status is within the discretion of the trial court,¹⁶² the reasoning being that while there is an *independent* right to counsel,¹⁶³ and an *independent* right to self-representation,¹⁶⁴ the two are mutually exclusive.¹⁶⁵ A major policy consideration behind this refusal is a concern for protecting the traditional prerogatives of counsel,¹⁶⁶ and avoiding potential chaos in the smooth functioning of a criminal trial.¹⁶⁷ Some commentators have argued that the

160. 514 S.W.2d 692 (Ky. 1974).

161. *Id.* at 696. The court held that the defendant could specify for which purposes he wanted the appointed counsel, and that the appointed counsel had to comply. This reversed the trial judge, who had ordered the public defender to represent the defendant in a way the defendant did not want.

162. *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978); *United States v. Dunlop*, 577 F.2d 867, 869 (4th Cir.), *cert. denied*, 99 S.Ct. 174 (1978); *United States v. Sacco*, 571 F.2d 791, 793 (4th Cir.), *cert. denied*, 435 U.S. 999 (1978); *United States v. Bowdach*, 561 F.2d 1160, 1176 (5th Cir. 1977); *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977); *United States v. Bennett*, 539 F.2d 45, 49 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); *United States v. Williams*, 534 F.2d 119, 123 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); *United States v. Wolfish*, 525 F.2d 457, 463 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *Goodspeed v. Estelle*, 436 F. Supp. 1383, 1391 (N.D. Tex. 1977); *United States v. Gaines*, 416 F. Supp. 1047, 1051 (N.D. Ind. 1976); *United States v. Swinton*, 400 F. Supp. 805, 806 (S.D.N.Y. 1975); *People v. Harris*, 65 Cal. App. 3d 978, 987, 135 Cal. Rptr. 668, 673 (1977); *Gibbs v. State*, 359 A.2d 164, 166 (Del. 1976); *People v. Heidelberg*, 33 Ill. App. 3d 574, 591, 338 N.E.2d 56, 69 (1975); *Swinehart v. State*, 376 N.E.2d 486, 490 (Ind. 1978); *State v. Ames*, 222 Kan. 88, 100, 563 P.2d 1034, 1044 (1977); *Callahan v. State*, 30 Md. App. 628, 639-35, 354 A.2d 191, 194-95 (1976); *State v. Burgin*, 539 S.W.2d 652, 654 (Mo. App. 1976); *State v. McCleary*, 149 N.J. Super. Ct. 77, 80, 373 A.2d 400, 401 (1977); *State v. Carter*, 53 Ohio App. 2d 125, 128, 372 N.E.2d 622, 625 (1977); *Stiner v. State*, 539 P.2d 750, 753 (Okla. Crim. 1975); *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. 1977); *Moore v. State*, 83 Wis. 2d 285, 300, 265 N.W.2d 540, 546, *cert. denied*, 99 S. Ct. 356 (1978).

163. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

164. 422 U.S. at 807.

165. *State v. Ames*, 222 Kan. 88, 100, 563 P.2d 1034, 1044 (1977).

166. *United States v. Wolfish*, 525 F.2d 457, 463 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *State v. Pratts*, 71 N.J. 399, 400-01, 365 A.2d 928, 929 (1976).

167. *See, e.g., Landers v. State*, 550 S.W.2d 272, 275 (Tex. Crim. 1977), which described the "well known jailhouse lawyer" as a defendant "who would be im-

right to co-counsel is a necessary implication of *Faretta*, reasoning that one constitutional right should not have to be sacrificed in order to exercise another.¹⁶⁸ Apparently appellate courts are not persuaded by this argument.

E. Time to Prepare and Library Access

It has been suggested that minimum time to prepare and access to materials are fundamental adjuncts to any meaningful right of self-representation.¹⁶⁹ As to access to legal materials, post-*Faretta* decisions have consistently protected the right of self-representation by guaranteeing some sort of access to materials, although this has been effectuated in different ways consistent with the type of prisoners and resources of the detention facility involved. An Illinois decision coming shortly after *Faretta* held that there was no right to law books if the jail did not have a library or other facilities for a pro se prisoner; but the court approved the discretionary efforts of the trial court in relaxing jail rules, providing a telephone in the inmate's cell, directing an advisory attorney to furnish books, and providing special mail and visitor privileges to facilitate contacting witnesses.¹⁷⁰ The court limited its decision, however, to the specific facts before it: "In approving this procedure here, where no previous guidelines existed, we do not intend to establish any precedent for such requirements."¹⁷¹

The right to legal materials was greatly strengthened in *Bounds v. Smith*.¹⁷² The Supreme Court held that minimum requirements of access to legal materials for convicted prisoners (by analogy this should apply to pro se criminal defendants) includes the requirement that prison authorities assist in the preparation and filing of legal papers, and that an adequate law library or assistance from persons trained in the law be provided.¹⁷³ However, faced with a dangerous inmate who did not have access to a law library, a federal district court quickly held that *Bounds* did not guarantee a

possible to work with" should the trial judge have allowed co-counsel status. *Id.* at 275. *Landers* is noted in Note, *Hybrid Representation—Defendant's Right's Not Violated by Denial of His Request to Act as His Own Counsel*, 6 AM. J. CRIM. L. 230 (1978); Note, *Criminal Law—Hybrid Representation*, 9 TEX. TECH. L. REV. 323 (1977-78).

168. Chused, *supra* note 7, at 663-74; Note, ALB. L. REV., *supra* note 7, at 442-44; Note, AM. U. L. REV., *supra* note 7, at 915-19; Note, HOFSTRA L. REV., *supra* note 7, at 466; Note, OHIO ST. L.J., *supra* note 7, at 237-39.

169. Note, HASTINGS L.J., *supra* note 7, at 299-301; Comment, PEPPERDINE L. REV., *supra* note 7, at 347; Note, S. ILL. U. L.J., *supra* note 7, at 281.

170. *People v. Heidelberg*, 33 Ill. App. 3d 574, 591, 338 N.E.2d 56, 70 (1975).

171. *Id.* at 591, 338 N.E.2d at 70.

172. 430 U.S. 817 (1977). See Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds?*, 53 IND. L.J. 207 (1978).

173. *Id.* at 828.

right of personal access to legal materials for violent prisoners in a facility without its own library.¹⁷⁴ Instead, the court upheld the procedure in which an attorney had been appointed as an "assistant," and had been specifically directed to do any research requested by the inmate.¹⁷⁵

Another type of litigation involving prisoner rights to legal materials, of interest to pro se prisoners, is the "prison cases" of recent years. Such cases involve the consolidation of complaints attacking the constitutionality of certain prison operations.¹⁷⁶ In addition to other reforms mandated by these decisions, is the requirement that each prison establish a law library or other facility available to prisoners for legal research and the preparation of legal documents.¹⁷⁷ The application of each decision was limited, of course, to the particular prison involved in the case.

In 1977, the Colorado Supreme Court considered a writ of prohibition from an inmate (apparently non-dangerous with no advisory counsel involved) seeking to force prison officials to allow him access to the prison library.¹⁷⁸ Citing *Bounds*, the court held that when a prison has its own law library, a prisoner has a right of access to that law library to prepare materials for pro se proceedings and motions.¹⁷⁹ However, in the following year the Colorado Court of Appeals, citing the *Bounds* language that the right to make a defense includes "access to law libraries or alternative sources of legal knowledge,"¹⁸⁰ held that where standby counsel was available "to provide secretarial assistance and provide . . . legal materials if requested,"¹⁸¹ that was sufficient.

California apparently adheres to the belief that "regular" pro se privileges include access to the jail law library five times per week, three phone calls per day, and availability of a legal runner.¹⁸² One California court terminated the right of self-representation for an

174. *United States v. West*, 557 F.2d 151, 152 (8th Cir. 1977).

175. *Id.*

176. *See, e.g., Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978); *Owens-El v. Robinson*, 442 F. Supp. 1368 (W.D. Pa. 1978); *Martinez Rodriguez v. Jimenez*, 409 F. Supp. 582 (D.P.R. 1976), *aff'd*, 551 F.2d 877 (1st Cir. 1977).

177. *Wolfish v. Levi*, 573 F.2d at 133; *Owens-El v. Robinson*, 442 F. Supp. at 1387; *Martinez Rodriguez v. Jimenez*, 409 F. Supp. at 584. In response to the argument that pro se prisoners had torn up books and abused what had been made available, the *Owens-El* court observed that the solution lay in better supervision not denial of basic prisoner rights. 442 F. Supp. at 1387.

178. *Hernandez v. District Court*, 568 P.2d 1168, 1168 (Colo. 1977).

179. 568 P.2d at 1168.

180. *People v. Rice*, 579 P.2d 647, 650 (Colo. App.), *cert. denied*, 99 S. Ct. 261 (1978).

181. 579 P.2d at 650.

182. *People v. Harris*, 65 Cal. App. 3d 978, 986 n.3, 135 Cal. Rptr. 668, 672-73 n.3 (1977). The privileges are also cited in *Ferrel v. Superior Court*, 20 Cal. 3d 888, 890 n.2, 576 P.2d 93, 94 n.2, 144 Cal. Rptr. 610, 611 n.2 (1978).

inmate still awaiting trial because of his out-of-court abuses of his pro se privileges.¹⁸³ The state high court reversed, holding that the right of self-representation cannot be terminated due to pre-trial out-of-court abuses of privileges.¹⁸⁴ However, it was suggested to the trial court that although the right to self-representation was protected, the pro se privileges associated with it could be limited or suspended for such abuses, and the pro se defendant could still proceed without counsel if informed of the additional disadvantages.¹⁸⁵

A unilateral restriction on the pro se privileges of an inmate awaiting trial, again involving the Superior Court of Los Angeles County, was challenged in *Wilson v. Superior Court*.¹⁸⁶ In *Wilson*, the sheriff had sharply limited the petitioner's phone privileges and contacts with an investigator following a "fracas" in the jail, apparently unrelated to actual use of pro se privileges. The prisoner was denied personal access to the prison law library but could receive four books each morning and four each afternoon in his cell. The Superior Court refused to grant petitioner a hearing when he sought reinstatement of his pro se privileges.¹⁸⁷ The California Supreme Court expressly declined to decide the case on the basis of a constitutional right of pre-trial detainees to pro se privileges. Instead, the decision was confined to the narrow fact situation involved, where the superior court had established a written policy memorandum clearly delineating the pro se privileges available to prisoners seeking to represent themselves. It was held that when a policy memorandum of the court gives prisoners preparing for trial a "reasonable expectation" of pro se privileges, such privileges are protected due process guarantees and cannot be limited or terminated without notice and hearing except in emergency situations.¹⁸⁸

How courts will grapple with the problems of access to legal materials by incarcerated pro se defendants in the future is uncertain. Presumably, those free on bond have access to public facilities, although no one seems to have discussed whether assistance is owed them for even minimal legal research, let alone preparation of a complete case. An obvious distinction exists between the incarcerated pro se defendant still awaiting trial and the convicted prisoner seeking subsequent relief. *Bounds v. Smith* mandates

183. *Ferrel v. Superior Court*, 20 Cal. 3d at 891 n.3, 576 P.2d at 95 n.3, 144 Cal. Rptr. at 612 n.3. Specifically the detainee had broken a telephone and used his legal runner to pass \$440 obtained through illegal gambling.

184. *Id.* at 891, 576 P.2d at 95, 144 Cal. Rptr. at 612.

185. *Id.* at 892, 576 P.2d at 95, 144 Cal. Rptr. at 612.

186. 21 Cal. 3d 816, 582 P.2d 117, 148 Cal. Rptr. 30 (1978).

187. *Id.* at 820-21, 582 P.2d 120-21, 148 Cal. Rptr. 33-34.

188. *Id.* at 821-22, 582 P.2d at 121, 148 Cal. Rptr. at 34.

minimum protection for the latter, while the rights of the former are still in the hands of an ambiguous and developing case law. Considerations for the safety of others and avoiding potential abuses by opportunistic inmates mandate limitations on such rights.

The question of how much time should be given to a pro se defendant to allow for preparation has not been extensively litigated. Obviously, time is one thing the convicted prisoner has an abundance of, and something that a pro se defendant, who asserted his desire for self-representation early in the proceedings, would have by right. However, a different situation occurs when the criminal defendant asserts his right to appear pro se later on, and couples it with a motion for a continuance.¹⁸⁹ The American rule on granting continuances has long been that it is in the discretion of the trial courts.¹⁹⁰ The same standard has been applied by state courts in refusing to reverse convictions of criminal defendants who, on the first day of trial, requested and received permission to proceed without their appointed counsel, but were denied a continuance.¹⁹¹ The rationale is that only by allowing discretion can the trial courts control dilatory tactics by defendants who appear to accept court appointed counsel, only to fire them at the last minute in an effort to delay trial.¹⁹²

F. A Constitutional Right to Commit Suicide?

Faretta, which involved a defendant charged with grand theft, broadly held that a defendant in a state criminal case had a constitutional right to self-representation.¹⁹³ Assuming the defendant is not disqualified for other reasons,¹⁹⁴ nothing in *Faretta* would preclude a defendant facing the death penalty from waiving his right to counsel and proceeding pro se to execution.¹⁹⁵ Although the

189. See notes 67-74 & accompanying text *supra* (time for asserting the right); notes 123-34 & accompanying text *supra* (Hobson's Choice), for discussion of related problems.

190. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

191. *German v. State*, 373 N.E.2d 880, 883 (Ind. 1978); *Irvin v. State*, 584 P.2d 1068, 1073 (Wyo. 1978).

192. *Irvin v. State*, 584 P.2d at 1074.

193. 422 U.S. at 807.

194. For example, untimely request, incapacity to make a knowing and intelligent waiver, later termination due to disruptions are all reasons for disqualification.

195. But see note 226 & accompanying text *infra*, for the rule that the right of self-representation does not carry to the appellate level. Presumably no appellate court would, in its discretion, allow a pro se defendant to argue such a case on appeal.

In *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976), the California Supreme Court did not reach the question whether

Gary Gilmore approach of "[l]et's do it"¹⁹⁶ may strike some as sufficient reason to permit such an eventuality, it would seem that the integrity of the judicial system demands more than homilies concerning individual freedom when the ultimate penalty of predetermined death may potentially be imposed. Thus far, however, there is an indication that even in a case involving a capital offense the right of self-representation will be honored.

In *Thomas v. Superior Court*,¹⁹⁷ the trial judge ruled as a matter of law that there was no right to appear without counsel when the defendant is accused of a capital offense.¹⁹⁸ Prior to trial, the defendant brought a mandate to the California Appellate Court, seeking a review of the trial court's denial of an allegedly knowing and intelligent waiver of the right to counsel. The appellate court reversed the trial court and held that even where a capital offense is involved, a defendant has a constitutional right to appear without counsel when he knowingly and intelligently chooses to do so.¹⁹⁹ Because this appeal came prior to trial, any procedural requirements to insure a fair trial in such a situation were not discussed. Similarly, the New Jersey Supreme Court in *Commonwealth v. Davis*,²⁰⁰ held that when there is clearly a knowing and intelligent waiver of the right to counsel in a capital case, the trial court must grant self-representation, since to do otherwise would bring an automatic reversal under *Faretta*.²⁰¹ The court stated that defendant's rights had been adequately protected by the appointment of an advisory counsel to assist by offering suggestions.²⁰² However, *Davis* did not involve a capital offense, since the Pennsylvania Supreme Court just prior to *Davis* had invalidated the Pennsylvania sentencing statute involved. As a result the court ordered the sentence changed to life imprisonment.²⁰³

the section of the California death penalty statute which sets forth rules concerning representation by counsel when the death penalty is possible would still be constitutional in light of *Faretta*. *Id.* at 442 n.14, 556 P.2d at 114 n.14, 134 Cal. Rptr. at 650.

196. TIME, Jan. 31, 1977, at 48. These were the final words of convicted murderer Gary Gilmore to the warden and four selected friends present for his execution. Gilmore had demanded execution and was obliged by a Utah firing squad on January 17, 1977. *Id.*

197. 54 Cal. App. 3d 1054, 126 Cal. Rptr. 830 (1976).

198. *Id.* at 1056, 126 Cal. Rptr. at 831.

199. *Id.* at 1058, 126 Cal. Rptr. at 832.

200. 479 Pa. 274, 388 A.2d 324 (1978).

201. *Id.* at 283, 388 A.2d at 328. See notes 208-15 & accompanying text *infra*, for discussion of the effect of wrongful denial.

202. *Commonwealth v. Davis*, 479 Pa. at 283, 388 A.2d at 328. The court also held that defendant could not make a claim of ineffective assistance of counsel where the public defender only offered advice and was not allowed to participate in trial activities. *Id.* at 283, 388 A.2d at 328.

203. *Id.* at 283, 388 A.2d at 329.

Although there is no precedent for it, one might suggest that in cases involving a capital offense, where defendant adamantly insists upon his right to appear pro se and the waiver of counsel is clearly knowing and intelligent, the court should be required as a matter of law to appoint an advisory counsel, even over defendant's objection. Alternatively, the court should be required as a matter of law to appoint the pro se defendant and the advisory as "co-counsel" when the pro se defendant will agree to it. This view is advocated because of the compelling state interest in fairness and certainty where a death sentence may be involved, and it should override the legitimate but lesser concern about potential manipulation by a criminal defendant.

G. The Shackled Defendant

In *Lucero v. Lundquist*,²⁰⁴ a pro se defendant appearing at a hearing for the disqualification of the scheduled trial judge, was at all times handcuffed, and in leg irons and belly chain. This total restraint made it impossible for him to write or use his hands to locate the papers he had with him in a file.²⁰⁵ In ordering a new hearing, the Colorado Supreme Court held that a pro se defendant can only be restrained to the extent needed to insure the safety of court personnel or others present. It was ordered that he be able to appear without handcuffs, and only under such other restraints as necessary for security.²⁰⁶ This decision reflects a consistent approach by appellate courts to protect the right of self-representation once it has been asserted, while limiting it as is necessary to protect the safety and property of judicial or detention facility personnel.²⁰⁷

H. Effect of Wrongful Denial

In his dissent in *Faretta*, Justice Blackmun posed the question whether the wrongful denial of a pro se request would ever be harmless error (and thus not cause for reversal).²⁰⁸ *Faretta* would seem to supply the answer, since the majority acknowledged that Anthony Faretta was not knowledgeable of the law and would diminish his chances if he represented himself, yet reversed the lower courts and remanded for a new trial.²⁰⁹ The courts which

204. 580 P.2d 1245 (Colo. 1978).

205. 580 P.2d at 1246.

206. *Id.*

207. See notes 169-90 & accompanying text *supra*.

208. 422 U.S. at 852 (Blackmun, J., dissenting).

209. *Id.* at 834-36. An interesting point mentioned by one commentator is that on remand the prosecutor dropped the charges, the case was dismissed, and Anthony Faretta went free. Note, DET. C. L. REV., *supra* note 7, at 357 (citing

have considered this issue have reversed for incorrect denial of the right of self-representation.²¹⁰ Two cases expressly held that such wrongful denial is reversible error *per se*.²¹¹ Another case stated that because a constitutional right is involved, the harmless error doctrine is not relevant.²¹² The only contrary indication to this rule is found in the *dicta* of the Nebraska Supreme Court in *State v. Kirby*.²¹³ The court held that there was no denial of the right of self-representation where the facts tended to show that defendant fully acquiesced to representation by his appointed counsel.²¹⁴ The court went on to state that the defendant was not prejudiced by counsel or by the denial of self-representation, and that "[t]his court will not reverse a criminal conviction in absence of prejudice to the defendant."²¹⁵ It is difficult to see how this language can be reconciled with the *Faretta* decision, since its practical effect would be to limit the right of self-representation whenever a trial judge might decide to deny it. This is inconsistent with the clear trend in other jurisdictions to jealously protect the right of self-representation when timely asserted in a knowing and intelligent manner.

I. Subsequent Claim of Ineffective Counsel

Because few pro se defendants are apt to be skillful enough to competently conduct a trial, and because self-representation can easily be obtained through a knowing and intelligent waiver of one's constitutional right to counsel, the *Faretta* court took pains to note that: "[w]hatever 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.'"²¹⁶ Despite the Court's

Order of Superior Court of California, County of Los Angeles, Case No. A012485, October 1, 1975).

210. *Barnes v. State*, 258 Ark. 565, 572, 528 S.W.2d 370, 375 (1975); *People v. Anderson*, 398 Mich. 361, 371, 247 N.W.2d 857, 861 (1976).

211. *People v. Freeman*, 76 Cal. App. 3d 302, 310, 142 Cal. Rptr. 806, 810 (1978); *People v. Tyner*, 76 Cal. App. 3d 352, 356, 143 Cal. Rptr. 52, 54 (1977).

212. *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977). Two Commentators agree that harmless error should not apply and reversal should be automatic. Note, ALB. L. REV., *supra* note 7, at 436-37; Note, J. URB. L., *supra* note 7, at 345. Another commentator suggests a possible exception in the situation of co-defendants, where sufficient identity of interest existed, and the other co-defendant had been represented by counsel. Comment, COLUM. HUMAN RIGHTS L. REV., *supra* note 7, at 570.

213. 198 Neb. 646, 254 N.W.2d 424 (1977).

214. *Id.* at 648, 254 N.W.2d at 425.

215. *Id.* at 648, 254 N.W.2d at 426.

216. 422 U.S. at 835 n.46. Justice Blackmun seemed to agree that at least this appeal would be waived. *Id.* at 852 (Blackmun, J., dissenting). Chief Justice

express language, some commentators believe the issue might not be so definite. One commentator cites the possibility that differing concepts of justice might lead to a split in the circuits.²¹⁷ Another suggests that the fifth amendment emphasis on due process might not foreclose such a review.²¹⁸ A third argues that similar considerations under the sixth and fourteenth amendments might invite reversal where the defendant's incompetence was so obvious as to produce a fundamentally unfair trial.²¹⁹ A fourth commentator asserts that a case of truly gross overreaching by the prosecutor might be too difficult for an appellate court to overlook.²²⁰

The courts, nevertheless, have thus far universally rejected any attempt by a pro se defendant who made a knowing and intelligent waiver of right to counsel to gain reversal on the grounds of ineffective counsel.²²¹ Although it is articulated in different ways, the rationale behind the rule is the need to prevent pro se defendants from being able to create a "can't lose" situation, where loss at the trial level guarantees victory on appeal. A typical example is *United States v. Pavich*,²²² in which the defendant was so adamant in the assertion of his right to self-representation that he refused to accept appointment of standby counsel.²²³ Because the record clearly revealed that a knowing and intelligent waiver of the right to counsel was made following an extended colloquy between bench and defendant fully explaining the dangers and disadvantages,²²⁴ it is easy to see why the appellate court was unsympa-

Burger was not so convinced, however, stating: "It is totally unrealistic, . . . to suggest that an accused will always be held to the consequences of a decision to conduct his own defense." *Id.* at 846 (Burger, C.J., dissenting).

217. Note, HASTINGS L.J., *supra* note 7, at 297.

218. Note, OHIO ST. L.J., *supra* note 7, at 239. The author suggested the use of advisory counsel as the best alternative.

219. Note, AM. J. L. REV., *supra* note 7, at 934 n.179. The author also suggests in the alternative that defendants might gain reversal on grounds that the court erred in allowing defendant to waive his right to counsel. *Id.* at 935. It is clear that this has occurred, but on grounds that there was not a knowing and intelligent waiver of the right to counsel rather than on grounds of ineffective counsel. See also note 79 & accompanying text *supra*.

220. Comment, PEPPERDINE L. REV., *supra* note 7, at 348.

221. *United States v. Pavich*, 568 F.2d 33, 39 (7th Cir. 1978); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977); *United States v. Rowe*, 565 F.2d 635, 637 (10th Cir. 1977); *People v. Harris*, 65 Cal. App. 3d 978, 988, 135 Cal. Rptr. 668, 673-74 (1977); *Reliford v. People*, 579 P.2d 1145, 1149 (Colo. 1978); *Moore v. State*, 142 Ga. App. 145, 147, 235 S.E.2d 577, 578 (1977); *People v. O'Neal*, 62 Ill. App. 3d 146, 150, 379 N.E.2d 12, 15 (1978); *State v. Gibson*, 45 Ohio 366, 378, 345 N.E.2d 399, 407 (1976); *Cummings v. State*, 578 P.2d 377, 379 (Okla. Crim. 1978); *State v. Wilson*, 563 P.2d 792 (Utah 1977); *Miller v. State*, 560 P.2d 739, 741 (Wyo. 1977).

222. 568 F.2d 33 (7th Cir. 1978).

223. *Id.* at 35.

224. *Id.* at 35-37.

thetic to a claim of ineffective counsel.²²⁵ Although few people would want a situation where a questionable prosecution case is guaranteed victory by an inept pro se defendant, adherence to the rule of no reversal on grounds of ineffective counsel is essential to prevent allowing the right of self-representation to become a manipulative tool.

V. EXTENSIONS OF *FARETTA*

Narrowed to its facts, *Faretta* holds only that a criminal defendant has a constitutional right to represent himself at trial after a knowing and intelligent waiver of counsel. There have been numerous attempts to extend the rationale of *Faretta* to other non-criminal or non-trial situations. There has even been an attempt to use *Faretta* as support for demanding the right to representation by a non-lawyer.²²⁶ Although there have been exceptions, the courts have generally refused to extend the *Faretta* rationale to create pro se rights in other situations. For example, courts have refused to extend such a right to criminal appeals cases, although it has been permitted as a discretionary matter.²²⁷ Likewise an attempt to establish a constitutional right to self-representation in civil cases at the appellate level has also been rejected.²²⁸

In rejecting an attempt to extend the right of self-representation the Second Circuit held in *Phillips v. Tobin*²²⁹ that a plaintiff in a stockholder derivative suit cannot bring the suit in a pro se capacity, notwithstanding *Faretta v. California*, or 28 U.S.C. § 1654²³⁰ which allows parties to plead and conduct their own cases personally in federal courts.²³¹ A primary reason for rejecting self-representation in such cases is that the plaintiff sues not on his own behalf, but on behalf of the corporation.²³² Additionally, since if the plaintiff loses, the state corporation statutes may require the

225. A similar case was *United States v. Rowe*, 565 F.2d 635 (10th Cir. 1977), where defendant totally ignored his standby counsel and required him to sit in the back of the courtroom. *Id.* at 637.

226. See notes 241-45 & accompanying text *infra*.

227. *In re Walker*, 56 Cal. App. 3d 225, 229, 128 Cal. Rptr. 291, 293 (1976); *Callahan v. State*, 30 Md. App. 628, 633, 354 A.2d 191, 194 (1976); *Gilday v. Commonwealth*, 369 N.E.2d 716, 717 (Mass. 1977).

228. *Murin v. Justices of Supreme Court of Nevada*, 415 F. Supp. 1178, 1188 (D. Nev. 1976). Granting self-representation in civil appeals was held to be solely in the discretion of the appellate court.

229. 548 F.2d 408 (2d Cir. 1976).

230. 28 U.S.C. § 1654 (1976). This is the modern equivalent of the provision which has existed since the 1789 Judiciary Act, and which the *Faretta* Court cited as an historical reason for implying a right of self-representation in the sixth amendment. 422 U.S. at 812-13.

231. *Phillips v. Tobin*, 548 F.2d 408, 411-12 (2d Cir. 1976).

232. *Id.* at 412.

corporation to indemnify its directors for their defense expenses,²³³ the state has an interest in insuring that only qualified persons be permitted to prosecute such litigation.²³⁴

Similarly, it has been held that a prisoner cannot prosecute a civil class action suit in a pro se capacity in *Shaffery v. Winter*.²³⁵ Because the action was on behalf of all prisoners similarly situated at a New Jersey prison, the court held that the qualifications and expertise of petitioner's counsel in a class action was of significant importance, since any adverse judgment would be binding on the other prisoners.²³⁶ It was also noted that it would be unfair to allow the legal rights of others to be represented by a litigant with inherent restrictions on resources and materials due to his incarceration.

Although *Faretta* has been unsuccessfully used in attempts to extend self-representation to civil class actions and derivative suits, a 1976 New York case did cite *Faretta*, to overcome the traditional rule that only an attorney can represent a corporation in civil litigation.²³⁷ The case is of limited utility, however, because it involved the single-stockholder of a close corporation seeking the right to appear in bankruptcy court. The bankruptcy judge had allowed the individual to appear on his personal bankruptcy petition, but had dismissed the corporation's petition on ground that a corporation could only be represented by an attorney.²³⁸ The district court noted the high value placed upon self-representation by *Faretta*, and that without allowing this action the corporation had no other practical means of relief.²³⁹ In reversing the trial judge and permitting the individual to represent his corporation, the district court stressed the inherent power of the courts to supervise the administration of justice, and that the attorney-only rule was merely a "technicality" where a one-man corporation was concerned.²⁴⁰

Several attempts have been made to extend the implications of *Faretta* to other aspects of criminal litigation. One that has been universally rejected is the attempt to demand a constitutional right to be represented by a non-lawyer lay person at one's own criminal

233. See, e.g. NEB. REV. STAT. § 21-2004(15)(c) (Reissue 1977).

234. *Phillips v. Tobin*, 548 F.2d at 412.

235. 72 F.R.D. 191, 193 (S.D.N.Y. 1976).

236. *Id.* at 193. However, it was held that the prisoner could litigate his personal complaints of interference by the prison officials. *Id.* at 194.

237. *In re Holliday's Tax Services, Inc.*, 417 F. Supp. 182, 183 (E.D.N.Y. 1976).

238. *Id.* at 183.

239. *Id.*

240. *Id.* at 184. However, the court also held that the bankruptcy judge could later require an attorney (upon pain of dismissal) if, in the judge's discretion, he felt the lay representation threatened disruption of the proceedings.

trial.²⁴¹ Many of these lay-representation cases involved "tax protestors" who were often incensed that their attorneys would refuse to advance their more outlandish interpretations of the constitution as motions to the court.²⁴² Reference was often made to *dictum* in the *Faretta* opinion about representation by friends in colonial times.²⁴³ One of the more thoughtful refutations of this argument is found in *Turner v. American Bar Association*.²⁴⁴ Likewise, it has also been held that a lay person cannot use *Faretta* as a basis for asserting a constitutional right to represent others in violation of state bar association licensing rules.²⁴⁵

In *Cason v. State*,²⁴⁶ the right to self-representation was extended to any probation hearing to which the right to counsel would also attach.²⁴⁷ Two other extensions of *Faretta* were *United States v. Robertson*,²⁴⁸ which held that *Faretta* implies that a criminal defendant has a right not to allow his court appointed attorney to enter an insanity defense against his will, where there was clear evidence that defendant was competent;²⁴⁹ and *Judge v. United States*,²⁵⁰ which held that a criminal defendant has a right to nego-

241. *United States v. Olson*, 576 F.2d 1267, 1270 (8th Cir.), *cert. denied*, 99 S.Ct. 256 (1978); *United States v. Taylor*, 569 F.2d 448, 453 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978); *United States v. Wilhelm*, 570 F.2d 461, 466 (3d Cir. 1978); *United States v. Whitesel*, 453 F.2d 1176, 1180 (6th Cir.), *cert. denied*, 431 U.S. 967, *rehearing denied*, 434 U.S. 881 (1977); *United States v. Kelley*, 539 F.2d 1199, 1203 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *United States v. Shimek*, 445 F. Supp. 884, 888 (M.D. Pa. 1978); *United States v. Corrigan*, 410 F. Supp. 795, 799 (D. Wyo.), *rev'd on other grounds*, 548 F.2d 879 (10th Cir. 1977); *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 478 (N.D. Tex. 1975), *aff'd sub nom.*, *Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976); *State v. Dinsmore*, 34 Conn. Supp. 674, 676, 388 A.2d 439, 442 (1977).

242. *See, e.g.*, *United States v. Gillings*, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

243. 422 U.S. at 820 n.16.

244. 407 F. Supp. 451, 472-74 (N.D. Tex. 1975), *aff'd sub nom.*, *Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976).

245. *United States v. Peterson*, 550 F.2d 379, 381-82 (7th Cir. 1977) (disbarred Wisconsin attorney attempted to represent a defendant in a federal trial held in an area under federal jurisdiction, was convicted for unauthorized practice of law).

246. 31 Md. App. 121, 354 A.2d 840 (1976).

247. *Id.* at 124, 354 A.2d at 842. In *Cason*, defendant faced a probation revocation hearing. According to the court, the right to counsel attaches any time a sentence may be imposed, or for other reasons where it would be an affront to due process not to allow presence of counsel. *Id.* at 124, 354 A.2d at 842. Presumably under this logic any time a criminal defendant has a constitutional right to assistance of counsel he has a corresponding constitutional right to knowingly and intelligently waive the right to counsel and represent himself.

248. 430 F. Supp. 444 (D.C. 1977).

249. *Id.* at 447.

250. 379 A.2d 966 (D.C. 1977).

tiate with the police without telling his attorney.²⁵¹ The problem with these decisions, however, is determining where the line is going to be drawn between approved defendant intrusions on spheres of activity normally reserved for the attorney, and the recognition of a right to co-counsel status, which has been universally rejected.²⁵² Thus, in *State v. Pratts*,²⁵³ it was held *per curiam* that a defendant cannot use an analogy to *Faretta* to demand the right to control his defense attorney's trial strategy.²⁵⁴

Another unforeseen application of *Faretta* was to the issue of whether a criminal defendant can waive his right to representation by an attorney who is free from any conflict of interest. An early post-*Faretta* case, *United States v. Garcia*,²⁵⁵ held that by implication, *Faretta* allows such a choice.²⁵⁶ Several federal cases followed *Garcia*,²⁵⁷ one of the more interesting being *Gray v. Estelle*,²⁵⁸ which involved an attorney who agreed to dismiss his own suit against the defendant for stealing his typewriter in return for the defendant agreeing to let the attorney represent him in the pending criminal case.²⁵⁹ The attorney's motive was to gain experience as a trial lawyer.

However, other federal courts have observed that in the situation of a single attorney representing a group of alleged wrongdoers the public interest in ferreting out conspirators is greatly hampered by a rule permitting defendants to waive their right to conflict-free counsel. Consequently, the Third Circuit in *United States v. Dolan*²⁶⁰ expressly rejected the *Garcia* reasoning, holding that by preventing competing interests to develop through concern for an individual client (*i.e.* plea-bargaining for reduced sentences or turning into a government witness), it is easier for such persons to "stonewall."²⁶¹ The *Dolan* court reasoned that *Faretta* created only an independent right to self-representation, not any implied right of absolute choice of counsel.²⁶² It is unclear

251. *Id.* at 968. In *Judge* the defendant was trying to obtain favorable treatment on another offense by cooperating on the first offense.

252. See notes 160-68 & accompanying text *supra*.

253. 71 N.J. 399, 365 A.2d 928 (1976).

254. *Id.* at 400, 365 A.2d at 929.

255. 517 F.2d 272 (5th Cir. 1975).

256. *Id.* at 277.

257. *Gray v. Estelle*, 574 F.2d 209, 213 (5th Cir. 1978); *United States v. Arredondo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *In re Grand Jury*, 446 F. Supp. 1132, 1139 (N.D. Tex. 1978); *Abraham v. United States*, 426 F. Supp. 53, 57 (S.D.N.Y. 1976).

258. 574 F.2d 209 (5th Cir. 1978).

259. *Id.* at 213.

260. 570 F.2d 1177 (3d Cir. 1978).

261. *Id.* at 1183.

262. *Id.* For an earlier federal district court decision in accord with *Dolan*, see *In*

how future litigation will develop now that there is an apparent split between the circuits, although the *Dolan* rationale seems persuasive when the situation involves multiple defendants attempting to stonewall an investigation or prosecution.

A final comment on extensions of *Faretta* is the case of *State v. Wiggins*.²⁶³ The defendant first had his court appointed counsel dismissed, but then walked out of the courtroom himself and refused to conduct a defense. The trial court allowed the case to continue with no one representing the defendant.²⁶⁴ The appellate court reversed on the grounds the record showed there had not been a knowing and intelligent waiver of the right to counsel.²⁶⁵ However, the court expressly stated that even had there been a knowing and intelligent waiver before the defendant left the courtroom, it would be reversible error to conduct the trial *in absentia*, because *Faretta* does not imply a correlative right to waive one's own personal defense while also waiving representation by counsel.²⁶⁶ The trial court was obligated to appoint an attorney to take over when the defendant walked out.²⁶⁷ Although not stated, it would seem that the case could also have been analyzed in terms of court discretion to deal with disruptive pro se defendants by terminating self-representation and reappointing counsel.²⁶⁸

VI. CONCLUSION

In his closing remarks to his dissent in *Faretta*, Justice Blackmun observed: "I assume that many of these questions will be answered with finality in due course. Many of them, however, such as the standards of waiver and the treatment of the *pro se* defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation."²⁶⁹ Although thus far the Supreme Court has not granted *certiorari* on any post-*Faretta* pro se cases, the federal and state courts are beginning to delineate the scope

re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176 (D.C. 1975), vacated for procedural reasons, 531 F.2d 600 (D.C. Cir. 1976). In that decision, one attorney represented 100 union members, and the court approved a government motion (later ruled in part premature by the court of appeals) for an order requiring certain member witnesses to obtain separate counsel. The court reasoned that the *Faretta* interest in individual choice concerning the client/attorney interest had to be balanced against the governmental interest in law enforcement, and more particularly the proper functioning of a grand jury investigation. *Id.* at 1180.

263. 158 N.J. Super. Ct. 27, 385 A.2d 318 (1978).

264. *Id.* at 29-30, 385 A.2d at 319.

265. *Id.* at 31-32, 385 A.2d at 320.

266. *Id.*

267. *Id.* at 34-35, 385 A.2d at 321.

268. See notes 61-70 & accompanying text *supra*.

269. 422 U.S. at 852 (Blackmun, J., dissenting).

and consequences of this new constitutional right with a fair degree of consistency. The basic right is being protected, but the courts remain on guard against its potential abuse as a manipulative device. Some of the splits and gaps may eventually be resolved by the Supreme Court, while others may reflect issues which must inevitably be resolved by the facts of the particular case, rather than by rules of law articulated by a higher court. In such cases, guarding against abuses of discretion by trial courts will remain the only means of protecting the constitutional right of self-representation established by *Faretta*.

Donald D. Schneider '80