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A Constitutional Right to Self-Representation - Faretta v. California

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A CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION—*FARETTA V. CALIFORNIA*

In *Faretta v. California*,[1] the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to conduct his own defense without assistance of counsel when he voluntarily and intelligently elects to do so. The issue arose when petitioner Faretta was forced by the trial judge to accept representation by a public defender despite repeated requests that he be permitted to represent himself.[2] The trial judge, in assigning outside counsel, grounded his decision upon two rationales: defendant had not made a knowing and intelligent waiver of assistance of counsel; and, assuming he had, the waiver did not guarantee defendant the right to self-representation since such a right is not protected by the United States Constitution.[3] After an unsuccessful attempt to have his conviction for grand theft overturned in the California state court system,[4] Faretta obtained relief in the United States Supreme Court. The Court held that the sixth amendment guaranteed Faretta the right to act as his own counsel in spite of the amend-

1. 422 U.S. 806 (1975).

2. The lower courts' proceedings are not published. The facts are contained, however, in the Supreme Court decision.

Prior to trial, Faretta requested that he be permitted to represent himself. Upon questioning by the judge, it was determined that the petitioner had a high school education, that he once had defended himself in a criminal prosecution, and that he believed the public defender had too heavy a caseload to defend him properly. In a preliminary ruling, the judge accepted the petitioner's waiver of the assistance of counsel, but indicated that he might reverse this ruling if it later appeared that the petitioner was unable to properly represent himself. Subsequently, in order to test the defendant's legal knowledge, the judge held a pre-trial hearing in which he questioned the petitioner about the hearsay rule and a state law governing the challenge of jurors, and was dissatisfied with the petitioner's answers. Consequently, a public defender was appointed to represent the defendant. The defendant's repeated requests for permission to act as co-counsel were also rejected by the trial judge. *Id.* at 807-11 & n.3.

3. In ruling that Faretta had no constitutional right to conduct his own defense, the judge relied on People v. Sharp, 7 Cal.3d 448, 499 P.2d 489, 103 Cal.Rptr. 233 (1972). In *Sharp*, the defendant had been indicted for grand theft and, prior to trial, requested that he be allowed to defend himself. His motion was denied and he was subsequently found guilty. In affirming the conviction, the California Supreme Court stated that "neither the federal nor the California constitution makes specific provision for self-representation as a constitutionally protected right in criminal trials." *Id.* at 459, 499 P.2d at 496, 103 Cal. Rptr. at 240. *See* notes 6-10 and accompanying text *infra*.

4. The California Court of Appeals affirmed the petitioner's conviction, and the California Supreme Court denied review. 422 U.S. at 811 (reviewing the history of Faretta's case at the state level).

ment's conspicuous silence regarding the area of self-representation.[5]

In support of the holding, the Court relied upon *Adams v. United States* ex rel. *McCann*,[6] in which the defendant was convicted in a bench trial of mail fraud. Adams had waived his right to trial by jury without first consulting an attorney. He appealed his conviction on the grounds that an individual cannot competently waive his right to trial by jury without advice of counsel. The Court rejected Adams' contention, stating:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law.[7]

Relying upon this dicta, the *Faretta* Court concluded that it had "more than once" indicated that the right of a defendant to represent himself in a criminal case arises from the Constitution of the United States.[8]

This assertion is not entirely accurate. The majority in *Adams* was careful to point out that a defendant's "correlative right to dispense with a lawyer's help" meant only that "[he] may waive his constitutional right to assistance of counsel."[9] However, this right to waive assistance of counsel is not necessarily equivalent to a right to represent oneself. As the Supreme Court has noted previously, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right."[10]

Another weakness in the Court's reliance on *Adams* arises from the fact that the defendant in *Adams* was indicted for a federal offense. Under the Judiciary Act, parties may conduct their own case personally

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5. U.S. CONST. amend. VI, states:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

6. 317 U.S. 269 (1942).

7. *Id.* at 279. In concluding that a defendant could waive the right to a jury trial without the advice of an attorney, the Court stated:

> [A]n accused, in the exercise of free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his constitutional right to assistance of counsel.

Id. at 275.

8. 422 U.S. at 814.

9. 317 U.S. at 279.

10. Singer v. United States, 380 U.S. 24, 34-35 (1965). Although *Faretta* recognized the validity of *Singer*, 422 U.S. at 819-20 n.15, and purported not to contravene it, this is very nearly what the Court did in placing so much reliance on the dicta in *Adams*.

or by counsel.[11] Thus, any right the defendant in *Adams* had to dispense with assistance of counsel and proceed pro se may have arisen *not* from the United States Constitution, but from a federal statute. Indeed, one federal court[12] has cautioned against citing *Adams* as authority that a constitutional basis for self-representation exists: "*Adams'* 'correlative right' language was not an essential ingredient of its holding, which was simply that a defendant who has intelligently waived his right to counsel may also waive his right to a jury trial."[13] The same circuit court, in an earlier case,[14] similarly asserted that the *Adams* opinion "does not say the defendant's right to defend himself is constitutional."[15]

The *Faretta* Court also cited *Snyder v. Massachusetts*[16] for support. *Snyder* held that the "confrontation clause" of the sixth amendment confers upon an accused in a criminal trial the right to be present at all stages of the proceedings where his absence might deny him fundamental fairness.[17] Central to the Court's concern with the defendant's presence at all significant stages of the litigation was its assumption that the accused has the power to disregard the advice of counsel and conduct the trial himself.[18]

However, as in *Adams*, the holding in *Snyder* did not deal directly with the right to self-representation; any reference to such a right was

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11. Ch. 20, 1 Stat. 73 (1789); currently 28 U.S.C. §1654 (1970). The Judiciary Act states:

> [I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein.

Id. See also FED. R. CRIM. P. 44(a):

> Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

12. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

13. *Id.* at 1121.

14. Brown v. United States, 264 F.2d 263 (D.C. Cir. 1959).

15. *Id.* at 365 n.2. In addressing the issue of a defendant's right to counsel, the court stated that "the right [to self-representation] is statutory in character, and does not rise to the dignity of one conferred and guaranteed by the Constitution." *Id.* at 365.

16. 291 U.S. 97 (1934).

17. *Id.* at 105-06.

18. The Court reasoned that the defendant's right to "presence" was premised on the belief that:

> [D]efense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supercede his lawyers altogether and conduct the trial himself.

Id. at 106.

dicta. More importantly, the *Snyder* Court, in conceding a defendant's right to "conduct the trial himself," was referring only to federal prosecutions.[19]

The case cited by the *Faretta* Court which best supports its holding is *United States v. Plattner*.[20] In that case, the defendant was denied a request to represent himself at the *coram nobis* proceeding on the grounds that he was not schooled in the law.[21] On appeal, the Second Circuit Court of Appeals reversed, holding that in a criminal case the defendant has a constitutionally protected right to conduct his own defense pro se, and such right is "not the mere product of legislation or judicial decision."[22] The court reasoned that this right to self-representation arose out of the sixth amendment and was intended to safeguard the defendant's right to due process of law.[23]

However, the *Plattner* decision has its shortcomings. The court relied upon the Judiciary Act of 1789, which embodied the right to self-representation in federal courts, to illustrate the intent of the framers of the sixth amendment regarding such a right. Since the Judiciary Act was passed at approximately the same time as the sixth amendment, one day before the amendment was proposed, and by virtually the same men, the *Plattner* court concluded that the Act vis-á-vis the sixth amendment gave "more elaborate expression to the meaning of the terse language of the Bill of Rights."[24]

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19. The *Snyder* Court cited Lewis v. United States, 146 U.S. 370 (1892), as authority for the proposition that a defendant may supercede his attorney and conduct the trial himself. In doing so, the Court expressly indicated that *Lewis* was limited *only* to prosecutions in the federal courts.

Furthermore, even if one accepts the proposition that *Snyder* recognizes a constitutional right to supercede one's lawyer in state trials, one cannot necessarily conclude that a defendant may handle his own defense from the outset. The majority in *Snyder* may have believed that no right to defend oneself exists until one has received at least some benefit of counsel. In this way, the defendant would be able to represent himself more competently since he and his lawyer would have had an opportunity to discuss the legal aspects of his case.

20. 330 F.2d 271 (2d Cir. 1964).

21. *Id.* at 273.

22. *Id.*

23. *Id.* at 274.

24. *Id.* This view is supported by the commonly-held notion that the Judiciary Act and the sixth amendment were both intended to express the individual's rights against the federal government; therefore, they could be read together. *See* Baron v. Mayor and City Council, 32 U.S. 243, 247 (1833), in which the Court stated, "the Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States."

One may argue further that the Supreme Court's "piecemeal" approach of incorporating the Bill of Rights into the fourteenth amendment is recognition of the view that the

The court's conclusion is less than convincing. First, it is difficult to see how the Judiciary Act could elaborate upon an amendment that had not even been proposed when the Act became law. Second, the omission in the sixth amendment of a right to self-representation was most likely deliberate. The framers may have believed that self-representation was not a fundamental right, but nevertheless an important one that could be modified or revoked by Congress without incurring the difficulties involved in amending the Constitution. Such an interpretation is supported by traditional rules of statutory construction, which caution courts not to supply omissions to statutes.[25] In fact, the *Faretta* dissent concluded likewise that the omission was deliberate, particularly in view of the deliberate inclusion of a right to self-representation in the Judiciary Act at the same approximate time.[26]

Another shortcoming of the *Plattner* decision is that the court relied explicitly upon the dicta in *Adams* to support its holding that the sixth amendment contains a right to self-representation.[27] From the aforementioned discussion of *Adams* and its "correlative right" dicta,[28] this weakness should be immediately apparent.

Federal cases which have subsequently relied upon the *Plattner* decision were also cited in *Faretta* to support the Court's holding.[29] Apparently, the Court believed that if enough federal courts declared that a right to self-representation exists, then indeed it must exist. "[T]he fact that the path is a beaten one," the Supreme Court reasoned, "is a persuasive reason for following it."[30] However, this representation is not

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framers may not have intended the Bill of Rights to apply to the states. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 489-90 (9th ed. 1975). This view is not universally accepted. One modern commentator believes that the rights conferred in the Bill of Rights *were* intended to restrict the states as well as the federal government. *See* W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1050 (1953).

25. *See* C. ODGERS, THE CONSTRUCTION OF DEEDS AND STATUTES 202 (3d ed. 1952), in which it is stated that it is the function of the legislature, not the courts, to supply omissions to statutes. There is also a presumption that the legislature does not make mistakes. *Id.* at 283. Therefore, it would appear that the stronger argument is that the drafters of the sixth amendment did not intend to make self-representation a constitutionally protected right. *See* Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479, 1487 (1971).

26. 422 U.S. at 844.

27. 330 F.2d at 275.

28. *See* text accompanying notes 6-16 *supra*.

29. *See, e.g.*, Halsam v. United States, 431 F.2d 362 (9th Cir. 1970); Lowe v. United States, 418 F.2d 100, 103 (7th Cir. 1969); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 13 (2d Cir. 1965).

30. 422 U.S. at 816, *citing* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 CAL. L. REV. 1, 26 (1945).

entirely convincing since, in fact, not all federal courts have adopted the *Plattner* view regarding self-representation. Judicial endorsement of a right to self-representation constitutes an untraveled path, at best. Some courts have held that the right to self-representation does not assume constitutional dimensions. For example, in *United States v. Davis*,[31] a district court stated:

> The validity of the deduction that the right to defend oneself without the assistance of counsel is a constitutional right is questionable. All that has really been said by the Supreme Court is that the sixth amendment does not prohibit the right of self-representation.[32]

In further support of its holding, the *Faretta* Court also presented historical evidence. It undertook a comprehensive study of English and colonial jurisprudence to establish that an independent right to self-representation is by clear implication contained in the sixth amendment.[33] Unfortunately, this historical survey is as open to criticism as is the Court's reliance on case law.

Relying upon the work of historians Pollack and Maitland,[34] the Court stated that self-representation, not representation by counsel, was the practice in sixteenth and seventeenth century England in prosecutions for serious crimes.[35] It noted that with the passage of the Treason Act of 1695, England slowly began to allow assistance of counsel for an accused traitor, but pointed out that counsel was never forced on an unwilling defendant.[36] The evolutionary process has continued, and now a person charged with a criminal offense can choose between representing himself or having counsel handle his defense.[37]

The Court also noted that the colonists had "an appreciation of the virtues of self-reliance and a traditional distrust of lawyers,"[38] whom

31. 260 F. Supp. 1009, 1010 (E.D. Tenn. 1966); *accord*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Brown v. United States, 264 F.2d 363, 365 (D.C. Cir. 1959); People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal.Rptr. 233 (1972). *See also* Van Nattan v. United States, 357 F.2d 161, 163-64 (10th Cir. 1966); *cf.* Butler v. United States, 317 F.2d 249, 258 (8th Cir. 1963).

32. 260 F. Supp. at 1019.

33. The Court's historical study purported to establish an independent right to self-representation arising from "the structure and history of the constitutional text." 422 U.S. at 819 n.15.

34. 1 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 211 (2d ed. 1898).

35. 422 U.S. at 823.

36. *Id.* at 825. It may be argued that this view has received some recognition in the United States, since a similar view was expressed in dicta in Carter v. Illinois, 329 U.S. 173, 174 (1946). There the Court stated that "[the Constitution] does not require that under all circumstances counsel be forced upon a defendant."

37. 422 U.S. at 825-26.

38. *Id.* at 828 n.30, *citing* C. WARREN, A HISTORY OF THE AMERICAN BAR 7 (1911).

they associated with the "cringing Attorneys General and Solicitors General of the Crown."[39] This view was expressed in the many colonial charters which provided for self-representation in criminal cases.[40] The Court concluded that the concept of self-representation was so ingrained in the colonial experience that it was unnecessary for the right to be stated in the sixth amendment.

Several weaknesses pervade the Court's historical analysis. The Court assumes self-representation, as practiced in sixteenth and seventeenth century England, was regarded by the framers as fundamental to a fair trial. This assumption is incorrect, inasmuch as the original English practice was "*imposed upon* the accused to oppress him,"[41] thus increasing the likelihood of conviction.[42] Moreover, the Court's historical rationale fails to explain why, if self-representation was so basic and well-established in the colonies, the framers neglected to mention this right in the sixth amendment; other rights, equally fundamental, were included in the sixth amendment and throughout the Bill of Rights.[43]

The most disturbing aspect of the *Faretta* decision is not the Court's unsatisfactory reasoning, but rather the implications of the holding itself. At worst, the decision conflicts with a line of high court cases expanding availability of counsel to indigents;[44] at best, the decision chips away at much of the rationale for those cases. Prior to *Faretta*, the Court had repeatedly held that the right to counsel was a fundamental right.[45] The premise behind those decisions was that most laymen, even

39. *Id.*

40. *Id.* at 828 n.35, *citing* 2 L. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT, 398-99 (1795-1796).

41. Note, *Criminal Defendants At The Bar of Their Own Defense—Faretta v. California*, 13 AM. CRIM. L. REV. 347 (1975), *citing* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1190-91 (1970).

42. The English courts felt that crimes which posed a threat to the state, *i.e.* treasons and felonies, had to be defeated at all costs. Allowing a defendant to be represented by counsel, therefore, was also a threat to the state. *See* D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 50 (1973). This attitude resulted in the paradoxical practice of permitting assistance of counsel to a person accused of a misdemeanor, but not to a person accused of a felony. *Id.* at 49.

43. *See* notes 24-25 and accompanying text *supra*.

44. Since 1932 the Supreme Court has expanded the availability of counsel to indigents. *See* Powell v. Alabama, 287 U.S. 45 (1932) (holding that an indigent defendant in a state prosecution for a capital offense has a fundamental right to appointed counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (expanding the *Powell* holding to all state felony prosecutions); Argersinger v. Hamlin, 407 U.S. 25 (1972) (expanding *Gideon* and *Powell* to all state misdemeanor prosecutions where the defendant, upon conviction, would be imprisoned).

45. *See* note 44 *supra*.

educated ones, are incapable of adequately representing themselves in a criminal proceeding.[46] Even in *Faretta*, the Court recognized that by guaranteeing a right to self-representation, it seemed to "cut against the grain" of those earlier decisions.[47] Specifically, it stated, "the basic thesis of those decisions is that the help of a lawyer is essential to insure the defendant a fair trial."[48]

Nevertheless, the Court attempted to resolve any potential conflict by insisting that the framers of the Bill of Rights "understood the inestimable worth of free choice," and that "although he [the defendant who chooses self-representation] may conduct his own defense ultimately to his own detriment, his choice must be honored . . . ."[49]

In an apparent attempt to insure that its decision would not prove harmful to the uninformed defendant, the Court required that a defendant's choice to represent himself be made "knowingly and intelligently."[50] However, this requirement does little to alleviate the serious impact of the *Faretta* decision. To competently choose self-representation, a defendant need not have any legal knowledge; he must only "be made aware of the dangers and disadvantages of self-representation."[51] The Court intimated, in language referring to Faretta as "literate,"[52] that the ability to read is also essential to an intelligent choice. Such a minimal requirement is absolutely essential since a

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46. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932), wherein the Court 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 the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have [*sic*] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense.

Id. at 69.

47. 422 U.S. at 832. *See generally* E. CHEATHAM, A LAWYER WHEN NEEDED 87-103 (1963) wherein the increasing complexity of modern jurisprudence is emphasized and a request is made for greater specialization among lawyers. This increased complexity only indicates the layman's greater need for assistance of counsel.

48. 422 U.S. at 832-33.

49. *Id.* at 834.

50. *Id.* at 835.

51. *Id.*

52. *Id.*

defendant cannot begin to adequately represent himself if he is unable to read his indictment. However, this added requirement is hardly adequate protection. It is one thing to be able to read an indictment, and quite another to understand and capably respond to it.[53]

CONCLUSION

Through its decision in *Faretta*, the Court created a conflict of constitutional dimensions by juxtaposing its earlier recognition of the great need for professional legal assistance in our criminal justice system with the discovery of a constitutionally guaranteed right to self-representation. The resolution to this conflict offered by the Court, by way of a "knowingly and intelligently" waiver requirement coupled with a testimonial to "freedom of choice," is hardly comforting. The Court's decision may allow defendants to suffer conviction and imprisonment for no reason other than a misplaced confidence in their own legal abilities.

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53. *See* note 46 *supra*.