In the

Supreme Court of the United States

Anthony Pasquall Faretta,

Petitioner,

v.

State of California,

Respondent.

No. 73-5772

Washington, D. C.
November 19, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY PASQUALL FARETTA, Petitioner,	:	
v.	:	No. 73-5772
STATE OF CALIFORNIA, Respondent.	:	

Washington, D. C.,

Tuesday, November 19, 1974.

The above-entitled matter came on for argument at 1:50 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JEROME B. FALK, JR., ESQ., Howard, Prim, Rice, Nemerovski, Vanady & Pollak, 650 California Street, Suite 2900, San Francisco, California 94108; on behalf of the Petitioner.

HOWARD J. SCHWAB, ESQ., Deputy Attorney General of California, 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-5772, Faretta against California.

Mr. Falk, you may proceed whenever you're ready.

ORAL ARGUMENT OF JEROME B.FALK, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. FALK: Thank you, Mr. Chief Justice. And may it please the Court:

The issue which this case presents is whether an indigent defendant who, under controlling State law, is not free to select the counsel of his choice and who must permit the lawyer appointed for him to control the presentation of his defense, but if such a defendant is entitled to forego counsel and represent himself; although no holding of this Court squarely controls decision, this Court has, on several occasions, spoken of a right of self representations in circumstances which fairly can be described as considered dicta.

The California Supreme Court, in People vs. Sharp, two years ago, decided that there was no constitutional right under State or Federal law as to representation, and this case was decided pursuant to that controlling decision.

This petitioner was originally allowed by the trial court to represent himself, having been quizzed at some length by the trial judge and found to have voluntarily and

knowledgeably waived his right to counsel.

Then the Sharp case intervened, and some six days later the trial court called petitioner before it, asked him a series of questions not concerning -- not addressed to his waiver but addressed to his ability to represent himself as a defendant without a lawyer.

He answered those questions, I would -- he answered them rather well in most instances, but at the conclusion of the colloquy the trial court found him to be inadequately prepared to represent himself, and terminated his right to represent himself and appointed the public defender.

The Court of Appeals affirmed on the authority of Sharp, and the California Supreme Court denied a hearing.

This case has to be seen in the light of the California law and three aspects of California law which bear on a defendant and his representation by counsel.

In the first place, it is clear that under California law a defendant who is indigent, who seeks the appointment of counsel, takes the lawyer assigned to him by the court, be it Public Defender or a private attorney. The defendant has no right under any circumstances, which I know of under the cases, to select the lawyer of his choice. He may, therefore, get a lawyer who he does not choose and whom he may have no confidence in.

QUESTION: There is nothing unusual about that.

MR. FALK: No, Your Honor, there is not. And, in fact, in none of the three respects I'm about to speak to is California law unusual, and I ought to say further that in none of those three respects do we quarrel with it, as applied to a voluntary attorney-client relationship.

QUESTION: Do you think there was anything unusual about people of modest means not always getting the lawyer they would like to have to --

MR. FALK: No, Your Honor, and I perceive no constitutional right to pick one's own counsel. I have no quarrel with California law in this respect. I merely describe it because it does bear on the consequences when the defendant is unhappy.

The second feature of California law is that once a lawyer is in the case, that lawyer runs the show -- and again, I don't quarrel with this, in the normal voluntary relationship. But the lawyer under California law has broadest powers with respect to decisions in the course of the trial. There are only three exceptions that I know of: one is the decision to plead guilty; second is the decision whether or not to have a jury; and the third is the decision whether or not to testify.

Save for those three exceptions, the lawyer makes all decisions.

Yes, Mr. Justice?

QUESTION: What's the third one?

MR. FALK: Whether or not to testify, Mr. Justice Blackmun. Counsel cannot keep his client off the stand against the client's desire to testify.

QUESTION: Those standards are consistent with the standards established by the American Bar and Criminal Justice Project, are they not?

MR. FALK: They are identical with the ABA standards, Mr. Chief Justice, and I again don't quarrel with them. I think a lawyer has to run the show, and the consequence, however, is that when the lawyer runs the show he makes decisions for his client which directly affect constitutional rights: whom to cross-examine; whether or not to call a particular witness; whether to make a motion to suppress allegedly illegally obtained evidence; whether to seek a continuance, and so forth.

Again, where the relationship is voluntary, we see no difficulty with it.

Finally, the third aspect of California law, again one which is not unusual, is that there is extremely limited appellate review of the performance by a lawyer. The standard is set forth in our brief, it essentially boils down to egregious cases, reducing the trial to a farce or a sham.

Now, when the defendant and his lawyer are coerced in their relationship with one another, then these three

concepts become manacles on the defendant's presentation of his defense. This is so even if, as an objective matter, the lawyer is a very competent lawyer -- and I'm prepared to believe that most are in California and elsewhere.

But where the lawyer is less than competent or where the defendant perceives him not to be competent, the relationship becomes a terribly difficult one. And I have certainly no desire in this case to put the legal profession on trial. But some realism has to allow consideration for the fact that not all lawyers are able, that there are some lawyers practicing criminal law in California and elsewhere who are far less than able, and --

QUESTION: That's true even of retained counsel.

MR. FALK: That is true, even of retained counsel. And, as I'll mention in a moment, one of the interesting things is that the California court's solicitude with respect to a defendant's presentation of his defense that was asserted here does not carry over into the area of retained counsel.

In fact, the California Supreme Court has gone so far as to hold, in a case called Smith vs. Superior Court, that an appointed lawyer who is found by the trial court to be incompetent cannot be replaced over the objections of the defendant.

The California Supreme Court decided that case in

1968; it's still good law.

Of course if the performance proves to be incompetent, there may be a reversal, but the trial judge must leave that relationship undisturbed even if the trial judge comes to the conclusion that the trial counsel is incompetent.

QUESTION: Do the California judges ever, in that situation, appoint yet another lawyer to act as friend of the court and assist?

MR. FALK: I have never heard of them doing that where there is a lawyer in the case. They can and do appoint standby counsel in cases where defendants seek to represent themselves, or at least they did before the Sharp case. There have not been many instances of self representation since the Sharp case, to my knowledge.

QUESTION: Of course, in mid-trial it would be kind of hard to either replace the man who was assigned, and it would be kind of difficult to get a new man in, on the third day of a trial, who could do much good; wouldn't it?

MR. FALK: The Smith case actually was a case that had not yet commenced trial. It had been a case in which the lawyer -- really, it was quite an extreme case. The lawyer had been appointed previously, he represented the man in a previous trial that had been reversed, sent back; in the meantime the lawyer had been found incompetent by a federal judge in another case, and the judge, in the Smith case, was

sufficiently concerned that he inquired and replaced the trial counsel before trial started.

The California Supreme Court issued a writ in that case and ordered the trial court to replace the original lawyer, even though the trial court had found him to be incompetent.

And so the California courts -- the lesson from this is that the California Supreme Court and the California courts intervene very little in the presentation of a defense, leaving that to the defendant and his counsel, except in one instance, and that is this instance where the defendant seeks not to have a lawyer.

QUESTION: How many days had this trial gone on?

MR. FALK: The case I've described?

QUESTION: This case.

MR. FALK: This case? This case had not begun when this --

QUESTION: No part of the case had --

MR. FALK: No, it was at a pretrial -- totally pre-trial stage.

I recognize that the issue is quite different when the trial has begun, and that presents a very different problem that is not presented on this, on this record.

I mention all of these aspects of California law because they make clear that compelling a client relationship

does more than the California Supreme Court recognized in the Sharp case. That is, it does more than give the defendant, layered onto what he had before, give him more than a benefit, even though he may not want it. It takes something away from him. It takes away from him his rights, which we deem to be granted him by the Sixth Amendment, to present the defense as he sees fit.

It's that mistake in conceiving of the way the issues arise in this case which led, not only the California Supreme Court, in our opinion, but also quite recently the Third Circuit, to reject the right of self-representation.

The Attorney General has sent to the Court a slip opinion of the Third Circuit which follows, although without citing it, follows the Sharp precedent.

It reasons, as did the California Supreme Court, that all that is at stake here is the right to reject that which the right-to-counsel clause of the Sixth Amendment grants. And thus it was able to see the case as largely controlled by the Singer case, in which this Court rejected the assertion that a defendant unilaterally may waive the right to a jury trial.

There are two --

QUESTION: We don't read the Sixth Amendment language as mandatory --

MR. FALK: I beg your pardon, Mr. Chief Justice?

QUESTION: We don't read the "shall" in the first line of the Sixth Amendment as being, by clear implication, part of the last phrase: "And shall have the right to ... assistance of counsel for his defense."

MR. FALK: No, I read it together with the confrontation and cross-examination clauses of the same Amendment, which, in our view, create a right of the defendant to present his own defense as he sees fit.

Now, that --

QUESTION: Then you read "shall have" out of the Sixth Amendment.

MR. FALK: Well, only in the sense that the defendant may elect not to have that which the -- that part of the Sixth Amendment allows him to have if he wishes.

QUESTION: Well, it would be easier to follow if the Sixth Amendment read "may have the assistance of counsel", would it not?

MR. FALK: Well, if it said that, Mr. Chief Justice, then I take it the trial courts would have some discretion, and of course trial courts don't have discretion to deny counsel to a defendant who wants it.

I think that drafting it in that way would have left that kind of discretion in the trial courts, and the Framers surely didn't intend that.

I really need to elaborate, I think, on the point

I left hanging a moment ago, which is: how we see the right of a defendant to present his defense in the confrontation and cross-examination clauses.

The Attorney General's position with respect to that is that the right to present a defense, the right to confront, the right to cross-examine, is a right that can be exercised for a defendant by an agent, by a lawyer.

If that were so, then the right to be present, which this Court held -- has held on many occasions -- to be a part of due process and part of the Sixth Amendment, would not derive from the Sixth Amendment, because a defendant could confront his accusers and cross-examine through a lawyer. But the Court held, in Illinois vs. Allen, following a long line of cases, the Sixth Amendment gives the defendant the right to be present.

And in, I think, probably --

QUESTION: Well, with some qualification. With some qualification.

MR. FALK: It's a right that can be lost by misconduct.

QUESTION: Yes.

MR.FALK: And we -- I should say, so I'm clear on that point -- we quite agree that a defendant who waives his right to -- a defendant may waive his right to represent himself in the same way, by misconduct; may be taken from him

just as it was in Illinois vs. Allen.

I should also say that this defendant was entirely respectful on the record, there was not any instance of that in this case, nor in any of the 76 other reported appellate cases involving the right of self-representation in California, which we've collected in an appendix to our brief. That kind of outrageous conduct that the courts on Illinois vs. Allen and in Mayberry vs. Pennsylvania is a rarity.

But in the right-to-be-present case, the Court has seen the right of self-representation as involved. In Snyder vs. Massachusetts, the Court ex plained the right to be present as deriving from the defendant's right, and I quote, "to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself."

So that is part of why we see the Singer case as not controlling, because Singer involved simply the right to reject a protection of the Constitution, and this involves another part of the Constitution, the right to present a defense.

But there's another reason, too, why Singer doesn't control here. The Singer case was a case where the Court properly recognized that the government, as a litigant -- it used those exact words -- the government, as a litigant, has an interest in seeing a particular kind of fact-finder, a jury.

Here the government as a litigant is neutral. It has no interest in seeing who the -- how the defendant presents his defense or who represents him. And the government in turn, the prosecutor in this case, made no objection when the defendant sought to represent himself; it took no position. He saw himself as neutral on that, on that issue.

QUESTION: Do you think the courts should give controlling or even very much weight to what a prosecutor thinks about that subject?

MR. FALK: Well, I think not, and -- but in a different kind of case, which I'm trying to distinguish, they should. That is, where they --

QUESTION: The prosecutor might be overjoyed at having a defendant waive counsel, might he not?

MR. FALK: I have heard prosecutors speak on both sides of that. I think that the --

QUESTION: I said "might", because it would depend on the circumstances.

MR. FALK: The proper answer is, I think, the one implied in your question; it's not the prosecutor's affair. And that's precisely the point I'm trying to make; which is, that, unlike Singer, where the prosecutor had a legitimate interest as a litigant in a particular kind of fact-finder, the prosecutor was neutral here.

It is also not true that --

QUESTION: Mr. Falk, don't you think the State or the government really has an interest to see that justice is done and that it is done in a way so convincing that it wins popular approval?

MR. FALK: I do think so, Mr. Justice Blackmun. But I would respectfully suggest that chaining a defendant to a lawyer he doesn't want is not the way to accomplish that.

Now, I know that --

QUESTION: Well, he doesn't want any lawyer, he just wants himself, in the context of this case --

MR. FALK: Well, in this case he would have -- I don't believe it's shown by the record, there was a private lawyer he would have accepted, but it wasn't within his ability to have that lawyer.

QUESTION: No, they always want the notorious or celebrated ones.

MR. FALK: This one happened not to be the case, this one happened to be a relatively obscure and perfectly competent lawyer who couldn't work for free, and that's just how it happens, it's quite true that that sometimes is the case.

But what --

QUESTION: Doesn't the State also have an interest in securing criminal judgments against later collateral attack based on a contention as to whether the waiver of

counsel was voluntary or not?

MR. FALK: Yes, Mr. Justice Rehnquist, it does. And the -- the position that we take here on that point is that -- is that the defendant is bound by what happens at his trial. His waiver comes at the point in which he elects knowledgeably to forego an opportunity he had to have counsel. And to --

QUESTION: Would you say a defendant who is in the position of your client, but -- at that stage, who says, "I elect to represent myself", would you say that the defendant in that position could never later raise the question of the voluntariness of his waiver of the right to counsel?

MR. FALK: Oh, no, he may certainly --

QUESTION: Well, so the State is solving that problem, potential vulnerability to collateral attack, by appointing counsel for him; right?

MR. FALK: Well, that is, in my view, a pretty weak basis on which to deny somebody -- if that were the only interest at stake -- his opportunity to present his own defense.

It certainly has the right, the court certainly has the right, and I think the duty, to question the defendant very carefully as to the state of his knowledge and understanding at the time he makes his decision. We set out in the appendix a very excellent model colloquy prepared by Judge

Ely in an opinion in the Hodge case.

If that is done and the defendant adheres to the position that he wants to represent himself, he's bound by that decision. The court can protect itself by an adequate colloquy -- indeed, the one in this case, by the trial judge on the first instance, I think, would have survived any kind of scrutiny, it was a very careful, good job of seeing that the defendant knew what he was doing, and the judge said to him --

QUESTION: What if the judge asks him all the questions that you suggest he asks him and a lot more, too, and becomes convinced that he really is quite incompetent to conduct his own defense, and then concludes that his waiver cannot possibly be intelligent, might be quite voluntary but it isn't intelligent.

MR. FALK: Well, I --

QUESTION: And I suppose you would suggest that the waiver must be intelligent as well as voluntary?
Is that right or not?

MR. FALK: Well, I -- only in the sense that he has to understand that the trial judge thinks he's making a terrible mistake. He does not have to understand in order to make an intelligent waiver --

QUESTION: So you say, your answer is, No, it doesn't have to be intelligent, it only has to be voluntary?

MR. FALK: I'm having difficulties with the words, but I think that is the proper conclusion. I -- well, let me put it, if I may, a slightly different way: He does not have to show that he will do a good job, is a competent self-representer, if you will. If that test gets applied, then, as most of the courts that have considered the matter recognize, there will be very, very few instances in which defendants will satisfy a skeptical trial judge that he's going to do as good a job as a lawyer.

QUESTION: Let's take an extreme example, obviously extreme: The defendant is a highly intelligent deaf-mute, in writing he communicates or through other methods with the judge, sufficiently to show that it is a voluntary waiver of counsel. Do you think the Constitution requires the court to go ahead and have this deaf-mute undertake to defend himself? Just because he is a -- he's satisfied it is voluntary, and that the man is a very intelligent person.

MR. FALK: I think that the question is one that has, there are other ways of dealing with it, as I presume there are ways of bridging the communications problem with the defendant. He's going to have the same problem with a lawyer, I suppose.

The problem, if I may turn the facts around, the real problem comes frequently where the defendant is just not as good as the judge would like him to be, in terms of understanding

legal issues.

QUESTION: Well, going to the waivers of some of these constitutional provisions, in many of the States as in the Federal statutes, when a defendant seeks to waive trial by jury, he is not permitted to do so unless the prosecutor concents and unless the judge consents, all three participants must consent or it can't be done.

Does that policy suggest something about this case?

MR. FALK: I think not, because of the difference between the prosecutor's interest in having a jury trial and the prosecutor's lack of interest in seeing that the defendant has a particular type of defense.

QUESTION: Does it not go to what Mr. Justice Blackmun was intimating, that the State has such a strong interest in a proper trial that it sets up these additional safeguards over and above the Constitution?

MR. FALK: A whole series of questions I think all touch on the very problem of the inadequate defendant. He's made an intelligent waiver, in the sense that he understood what he did; but he's not intelligent about being a lawyer. And it seems to me the answer to that has to be presented at two levels: philosophical and practical.

At the philosophical level, I think we have to conclude that constitutional rights are not dependent for their existence on the ability of the person who owns them,

has them, and to exercise them intelligently or well. The right of free speech can be exercised by an utter fool, as cases like Coan vs. California, and many others demonstrate.

QUESTION: Would you help me on this? I just don't understand how you -- what questions can be answered to show that you intelligently waive your right to counsel? Are you going to do a little Wigmore with him, or -- how are you going to do it?

MR. FALK: You ask him a series of questions. Does he understand that he has a right to a lawyer? He answers yes.

Does he understand that the court thinks he's got a very complicated case here, the court thinks he's very ill-advised, that a lawyer can do a better job for him; the court has seen many such cases; does he understand that?

The court wants him to have a lawyer. Does he understand that?

He answers questions of that kind all the way through. Does he understand what the --

QUESTION: And he said, Can you handle your own defense?

MR. FALK: That I think is not a question. The court may ask it -- and it probably ought to ask questions like that, to see --

QUESTION: But if he says yes, that wouldn't mean a

thing to me, because he doesn't know a defense from a hole in the ground.

MR. FALK: Mr. Justice Marshall, I agree with you, and I think we have to --

QUESTION: Well, do you quarrel with -- at that stage, the judge saying, Go ahead and conduct your defense, but I'm going to leave that lawyer there in case you need him.

MR. FALK: Absolutely not. I quite agree that that's what the trial judge should do, that's what the ABA standards committee thought the judge ought to do.

QUESTION: Well, you wouldn't object to that?

MR. FALK: Would not object to that. But the difference is -- the difference is that that lawyer is there to provide such assistance as the defendant wants. He'll answer questions, he may even volunteer a little advice, but he doesn't present evidence, he doesn't prevent the defendant from presenting evidence. That's the key, you see, that the lawyer in California --

QUESTION: You don't have to tell me what the key to trying a case is.

MR. FALK: No, I'm sorry, the key to --

QUESTION: I've tried a few.

MR. FALK: Well, I understand that, Mr. Justice. I meant by that the key to the problem in California. The prcblem in --

QUESTION: I've tried a few in California.

MR. FALK: I understand.

In California, the defendant is precluded by the trial judge -- by the trial counsel from presenting evidence, if he has -- if the trial counsel doesn't want him to. He's precluded from cross-examining if the trial counsel doesn't want him to, and that's the problem to which I address myself, and the difference between the appointment of counsel and the standby counsel, which the ABA thinks is the way to solve the problem is that the standby counsel doesn't interfere in those kinds of decisions.

QUESTION: But you wouldn't require the appointment of standby counsel, would you?

MR. FALK: I think that the --

QUESTION: If you waive it, you waive it.

MR. FALK: No, I do not think that the right to counsel and the right to present one's own defense are necessarily mutually exclusive. This is --

QUESTION: So you say it might not be enough -- it might not be the final answer, if he just says: "I waive. I understand, Judge, I'm doing myself a terrible disservice."

What you're really suggesting, then, is that he should say to the judge: "I want to run this trial. You must appoint me a counsel to help me, but I am running the show."

MR. FALK: No, this defendant --

QUESTION: Is that the limit of his constitutional --

MR. FALK: My client's position is simply that he wanted to do it alone, he didn't care to have a standby counsel.

If a defendant wanted a standby counsel, I am not sure that he isn't constitutionally entitled to it. I recognize the issue isn't presented here.

But the reason that I say that is that the Sixth Amendment clauses that are a part of this case can be -- are not mutually exclusive --

QUESTION: Yes, but, Mr. Falk, by rule of court, for example, statute -- assuming your position prevailed, that he's entitled to run his own show, may the court say, But we're going to appoint a standby counsel? If he objects?

MR. FALK: Yes, it may.

QUESTION: "May"?

MR. FALK: May. I see no right not to have --

QUESTION: So that that would have a limitation, then, on the Sixth Amendment right?

MR. FALK: I don't think it interferes with the Sixth Amendment right, it's someone sitting at his side and can --

QUESTION: I see.

MR. FALK: -- and doesn't interfere with him, and I see --

QUESTION: But the standby counsel is being foisted on him.

MR. FALK: Well, but not in the sense -- not in the way that a lawyer is being foisted upon defendants such as Faretta. And I see no objection --

QUESTION: Because standby counsel doesn't have the authority to run the show.

MR. FALK: Exactly, Mr. Justice Brennan.

QUESTION: As I understood your brief -- is there constitutionally only to the extent that the man, the defendant himself, wants to consult him and use him.

MR. FALK: He's there, but he provides no assistance unless --

QUESTION: Right. And as I further understood your brief, you do not say that the Constitution requires any such standby counsel.

MR. FALK: We -- we have not gone that far. I think --

QUESTION: That's what I thought.

MR. FALK: -- that's an open question.

I think that that standby counsel alternative, plus the power of the trial judge to run his courtroom provides a very adequate answer to the problem that Mr. Justice Blackmun

raised early on, which is the problem of the inadequate defendant and the need of the courts to see that everybody gets a fair trial. That bridges the gap.

QUESTION: Well, your answer to Mr. Justice Stewart means, counsel, the court says: "All right, go ahead, defend yourself."

He says,"Well, I'd like to have counsel sit behind me to help me if I need him."

"No, you want to run your own show, you run it; I'm not going to appoint anyone."

MR. FALK: I have to say candidly that I think an argument can be made that a defendant who chooses to -- has his Sixth Amendment right to present a defense is also entitled to the assistance of counsel of a standby nature. And you can read those clauses texturally --

QUESTION: Well, then you're departing from -- you're now departing from your brief, very explicitly.

MR. FALK: I'm answering a question candidly that I didn't -- couldn't raise in --

QUESTION: Well, that question must have occurred to you in writing your brief.

MR. FALK: Well, I didn't reach it in the brief.

QUESTION: You covered it; you dealt with it, explicitly, and --

MR. FALK: No --

QUESTION: -- you said you're not claiming that.

MR. FALK: I'm not claiming it on behalf of this petitioner, because I don't have to. The problem isn't raised by his case, he didn't ask for that.

I did not -- I'm quite sure, Mr. Justice, I did not disclaim that position because it was in my mind that the two can be read consistently in that way.

QUESTION: I take it you'd be willing to concede that we must consider that aspect, whether you press it on us or not.

MR. FALK: I think so, Mr. Chief Justice, and that's why I've answered the questions I have.

QUESTION: I take it you're aware that in most cases, when a judge appoints standby counsel, that standby counsel is instructed to do everything that he would do if he were retained counsel, whether the defendant likes it or whether the defendant does not like it.

MR. FALK: Well, there are --

QUESTION: That's what the standards of the American Bar reflect.

MR. FALK: They indicate, though, Mr. Chief Justice, that the standby counsel is not to ask questions, and not to introduce evidence, and not -- and has no power to preclude the defendant from doing so. So in those respects he is not able to interfere with the defendant's Sixth Amendment rights

to present his defense.

QUESTION: Are there many lawyers who are willing to act as standby counsel on that capacity?

MR. FALK: I would think that there are as many lawyers who are willing to do that as who are willing to endure the awful relationship of having -- with a client who doesn't want them.

QUESTION: Well, but you've still got the relationship. At least when you're representing the guy, your judgment, your professional judgment is given some weight. But it seems to me the standby counsel is the worst of both worlds.

MR. FALK: Well, I -- this is a personal answer, I have no statistics for you. My personal reaction is quite the opposite, I would prefer --

QUESTION: No problem.

MR. FALK: -- I would prefer to serve as a standby counsel, and those lawyers who I've had an opportunity to question on it share the same view.

QUESTION: Mr. Falk, let me get this thing straightened out about this standby counsel. I want to -- when I was talking to you, did I understand you and I to be talking about standby counsel who only gave advice and did whatever the man told him?

MR. FALK: That's correct.

QUESTION: That was what we were talking about.

MR. FALK: That's what I was talking about, Mr. Justice --

QUESTION: And that's the standby counsel you're talking about?

MR. FALK: That's right, that's in the --

QUESTION: Not the one that actually takes over?

MR. FALK: That's correct.

QUESTION: Mr. Falk, we've showered you with questions here, but I want to be sure -- do I correctly understand your position to be that if Mr. Faretta were permitted to represent himself he would thereby no longer have a claim later for incompetency of counsel?

MR. FALK: Yes, that is clearly my position.

QUESTION: You concede this?

MR. FALK: I concede it.

And I concede further that he would not have the right to any advantage over the position that a defendant would be who had a lawyer. Any claim that should have been raised at trial wasn't included, in the same way.

QUESTION: Do you think a court, the trial court, the presiding judge, or an appeallate court is going to consider itself bound by that kind of proposition?

MR. FALK: I think it -- I think it will, because it is the logical consequence of everything that has been said

on the right of self-representation. Anything else makes the right --

QUESTION: Well, if we concede your premise, it is the logical consequence; but you don't really think that an appellate court would refuse to examine a claimed faulty waiver by a defendant?

MR. FALK: No, not a faulty waiver. I think it has to be able to look at that in the same way that it can look at a guilty plea. But beyond that it -- I believe it will not allow a defendant to profit from his decision to represent himself, and ought not to.

Thank you.

QUESTION: In this case -- before you sit down, Mr. Falk -- the trial court purported to find that your client, your present client, the defendant, did not make an intelligent and knowing waiver of his constitutional right to be represented by an attorney.

Now, that's the posture, I mean that's the fulcrum on which he -- the court decided.

MR. FALK: That is a finding I must respectfully say, which is supported by no evidence in the record, because the colloquy upon which that finding was based did not examine the question of the defendant's knowledge with respect to the waiver, did not go over the same ground that the original judge had covered. He asked only questions about

the ability of the defendant to conduct the trial. That's all that that judge inquired of. It was a different judge who handled -- who took the waiver in the first place.

QUESTION: Unh-hunh. But that was the finding, wasn't it?

MR. FALK: Well, that's a question of constitutional fact, which I think this Court must make a judgment on.

QUESTION: And what did the appellate court do with that? Did it --

MR. FALK: Under the California rule of the Sharp case, and earlier cases, that is a sort of substantial-evidence rule, and the court yielded to what it called the discretion of the trial court in that regard.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Falk.

Mr. Schwab.

ORAL ARGUMENT OF HOWARD J. SCHWAB, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SCHWAB: Thank Your Honor.

Mr. Chief Justice, and may it please this Court:

The issue of whether or not the defendant has a constitutional right to represent himself without counsel and whether this exists in criminal trials has been described, in the words of the Second Circuit, as whether or not a defendant has a constitutional right to go to jail under his own banner.

I submit, Your Honors, that the defendant has no such

right. Rather, he has a right under the Constitution to a fair trial. A good working definition of a fair trial was set forth in the California case of People vs. Sharp, in 7 Cal. 3d, defining it as follows, quote:

"Proceedings which will accord him the fullest opportunity to preserve all trial rights and successfully defend against the charges." Unquote.

A fair trial is the definition of due process, and to mandate that a defendant has a constitutional right to defend himself without counsel could have the opposite effect. A good example is this case, and I must differ with petitioner in his interpretation of the taking away of the appropriate privileges in this case. The defendant was confused as to the hearsay rule, and equated it to the best-evidence rule.

QUESTION: Is this peculiar to the defendant, do you think, or don't you think other lawyers may suffer the same confusion?

MR. SCHWAB: I think that, well, perhaps on individual points, but it goes on.

For example, he also was confused as to the number of peremptory challenges.

Now, an attorney may be confused on one or two points of law, but this was a continuous --

QUESTION; He had the number of peremptories,

that you get, it was --

MR. SCHWAB: Well, he said there were twelve peremptories, and under California Penal Code, Section 1070, in a case of this type, he has ten.

QUESTION: Oh, well, the record simply didn't reveal that he was wrong, I guess, in saying --

MR. SCHWAB: Yes, under Penal Code, Section 1070, he only has ten.

We are arguing this case, Your Honor, --

QUESTION: Is that really so serious? The court can straighten him out easily enough.

MR. SCHWAB: That's true, but the problem is, if he was in ignorance and all of a sudden had used up his ten, and thought he had two more, it may be too late for the court to --

QUESTION: Well, we've had records up here with retained counsel, would complain they weren't advised as to how many peremptories they were entitled to in a joint trial, for instance.

MR. SCHWAB: That's true, but the -- as --

QUESTION: But they never represented themselves either, I guess.

MR. SCHWAB: Sorry, Your Honor?

QUESTION: Nothing. Go on.

MR. SCHWAB: But as this Court said in Mayberry vs.

Pennsylvania, that laymen often make awkward scenes; and I think this is true much more of laymen than ever of attorneys.

And what we're arguing -- and what California is arguing is not that the defendant can never represent himself, but rather that he has no constitutional right to do so; and this, in turn, would give a trial court a wide discretion in deciding whether or not to accept a waiver.

I submit, Your Honors, that petitioner has not shown the source of any constitutional right of self-representation. History shows no right, and we have discussed the history in our briefs. But --

QUESTION: Well, the other side has discussed history and has come up with the opposite result.

Let me ask this: Your statement about constitutional right is out of line, apparently, with the policy in 36 States that Mr. Falk has set forth in his brief, which have constitutional rights under the State Constitutions. Do you think this is bad policy? Is this what you're arguing?

MR. SCHWAB: Oh, I think -- well, I don't argue the policy of the States, because this is a statutory scheme; what I do argue here is the constitutional basis, whether or not an individual State would desire to give a defendant the right of self-representation is really not the issue. The question is: does he have the constitutional right? And --

QUESTION: A Federal constitutional right.

MR. SCHWAB: Correct. Under the Federal Constitution.

And under the common law, self-representation was not a right but was a tyrannical practice, enforced by the Crown and the Kings to insure victories, and to insure that dissidence would be kept down.

And this, of course, was the hallmark of the Stuarts.

Now, the Colonies, when they began having their own various States and Colonies, had their own individual types of charters and constitutions. Four States, Pennsylvania, Vermont, Massachusetts, and New Hampshire, made provisions for both counsel and self-representation.

The Judiciary Act of 1789 was debated at around the same time of the Bill of Rights. The Judiciary Act of 1789 gave both a right to counsel and a right to self-representation.

Yet, the Bill of Rights, the Sixth Amendment, gives no such right of self-representation, while giving a right to counsel.

Thus it appears that the Framers purposely did not want to make self-representation a constitutional right. A similar type of inference and a similar type of logic was made in the case of Singer vs. United States by this Court, where the Court had held that a right to waive a jury does

not spring from the right to a jury.

And the Court stated, quote: "Indeed, if there had been recognition of such a right, i.e., the right to waive jury, it would be difficulty to understand why the Sixth Amendment was not drafted in terms which recognized an option." Unquote. 380 U.S. at 31.

Thus, we submit, the history gives no right and in fact the changes in history, cases such as Gideon, and the recent cases of Soto? in the Third Circuit and People vs. Sharp in our own State of California -- my own State of California, seem to show a greater reliance on the necessity of counsel and questions any possible right of self-representation as being a constitutional right.

Due process does not give a right to represent one's self, rather it is a right to a fair trial. A fair trial is fair if there are fair and efficient court procedures.

Times have changed since -- the last hundred years, and defenses are becoming more and more complex. It's no longer the simple "Did you do it?" A man can shoot somebody in front of a thousand witnesses, yet have a perfectly good defense.

In California, for example, we have a very complex defense known as diminished capacity, and this defense is, more or less, that if a defendant cannot attain a certain

state of mind to commit a certain offense by reason of mental deficiency or disease or intoxication, he cannot be guilty of that offense or that degree.

Now, it would be almost impossible for a defendant in propria to raise this in California, because: one, he would have to know the law. The law is very technical. Two, he would have to know how to examine and cross-examine experts.

And three, perhaps most important of all, he would need to have an objective understanding and appreciation of the applicability of the defense of diminished capacity.

Furthermore, defendant should know -- would have to know the complex motions to suppress by reason of search and seizure, and proper forums.

Also, a defendant could be under drugs or withdrawal and by reason of this not be able to defend himself properly.

For example, in this particular case, the attorney for Mr. Faretta said that at the time of the commission of the offense that the defendant, Faretta, was involved in dangerous drug activity. This is found on page 64 of the Appendix.

Therefore, because of the defenses and because of the mental problems that may face a defendant, there would be no right to self-representation.

Furthermore, the law is changing rapidly, and because

of these rapid changes, this would mandate the use of counsel.

Recently this Court has come down with the decisions of Illinois vs. Allen, Taylor vs. United States. The former stating that if the defendant becomes disruptive, he could be removed from the courtroom; the latter saying that if the defendant should leave in the midst of his trial, the trial could go on without him.

If a defendant does not have co-nsel, and either of the two aforementioned events take place, the proceedings would unintentionally become an inquisitorial proceeding, where no defense is tendered at all.

Again, we submit, Your Honors, that due process requires a fair trial, and not subjective wins.

To say otherwise might encourage a cynical view that is more important that the accused believe that he is getting justice rather than actually get justice.

Fairness, to be meaningful, --

QUESTION: Is there any other right the defendant has that he can't waive, other than this one?

MR. SCHWAB: You mean under the Constitution as to --

QUESTION: Unh-hunh.

MR. SCHWAB: Well, under California law --

QUESTION: Under the United States Constitution is my question.

QUESTION: Well, the right to trial by jury under the Singer case.

MR. SCHWAB: That he cannot waive, that's correct.

As to -- I know -- well, I know of no right which is not specifically enumerated in the Constitution which can be, to my knowledge, constitutionally waived. There have been no cases as of yet, to my knowledge.

Singer is the perfect example.

Petitioners pointed out that counsel in California make binding decisions, but these decisions which he lists in his brief are very complex indeed, and are in the purview of a technician.

Thus we need technical minds to best direct a defense.

The purpose of our legal profession, the training involved, is to assure that trained individuals can be advocates protecting the client's interest.

Now, petitioners argue that indigents may get a -- may not choose counsel in California and may not get along with them. However, I think that this can be countered because, first of all, a trial is not a popularity contest to be won by smiles and handshakes, but, rather, is serious business necessitating the best technical minds available.

Furthermore, a defendant could possibly associate with the path of the mentally ill and not get along with any

person.

Thirdly, an attorney will have an objective understanding of the case which a defendant might not have because of his personal involvement in the charges.

The purposes of due process are supported by the use of counsel.

The Court has recognized this in such landmark cases as Powell vs. Alabama and Gideon vs. Wainwright.

Again, as Singer has pointed out, there was no right to a jury trial -- there's no right to a jury trial waiver, and this lack of a jury trial waiver did not violate any constitutional right. That the Constitution guaranteed the defendant a right to a jury, which is what the defendant got.

In the same manner, there is no right to appear without counsel.

And since appellant -- since the petitioner received a trial with counsel, he received what the Constitution guaranteed.

QUESTION: In California, may a defendant unilaterally waive trial by jury without the consent of the court and the prosecution?

MR. SCHWAB: No. Under California law, the prosecution also has a right to --

QUESTION: The court, too?

MR. SCHWAB: I believe the court also, I --

QUESTION: The same as the Federal, then?

MR. SCHWAB: I'm not positive as to the court, but I know for sure the prosecution must also waive.

Petitioner argues that since there is a correlative -- that since there's a right to counsel there must be a correlative right to self-representation.

As mentioned before, there's no historical source of such a right.

Secondly, he mentioned such cases as Adams vs. United States ex rel McCann, which has dicta on this point.

However, these cases came down before the cases of Gideon and Singer, which have supported the necessity of counsel.

The Singer doctrine also came down after these opinions, and thus, because a defendant may be able to waive counsel would not mean that he has a right to waive counsel, because, as this Court said in Singer, quote, "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." 380 U.S. at 34-35.

Thus, the correlative argument falls on its face, because the Constitution guarantees a right to a fair trial, and a right to due process.

And it would be absurd to say that there would be a

correlative right to an unfair trial and to a lack of due process.

Thus, Your Honors, in conclusion, I submit there is no right to self-representation under the Federal Constitution or under either an historical Sixth Amendment or due process interpretation.

Rather, what is mandated is a fair trial.

As the trial court cogently said in this case, to Faretta, quote: "I have seen more people represent themselves convict themselves where, if they just sat down and let somebody who knew what they were doing do it, could well have won the lawsuit." Unquote.

Thank Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Your time is up, Mr. Falk. You took this assignment at the request of the Court and by the Court's appointment, and on behalf of the Court I thank you for your assistance to us and, of course, to your client.

The case is submitted.

[Whereupon, at 2:36 o'clock, p.m., the case in the above-entitled matter was submitted.]

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