No. 98-7809

In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF FOR THE PETITIONER

RONALD D. MAINES
Counsel of Record
MAINES & LOEB, PLLC
1827 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 223-2817

August 6, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Order of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, denying Petitioner's motion to represent himself on appeal, is unreported. It is reproduced at J.A. 1. The Order of the Supreme Court of California denying Petitioner's application for writ of mandate, also unreported, is reproduced at J.A. 2.

JURISDICTION

The judgment of the Supreme Court of California was entered November 18, 1998. The petition for writ of *certiorari* was filed on December 28, 1998, and was granted on April 19, 1999. This Court set for July 1, then extended to August 6, 1999, the deadline for submission of Petitioner's brief on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

2. The Fourteenth Amendment, Section 1, provides: " * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. *Trial; Notice of Appeal.* Salvador Martinez was convicted in California state court of the fraudulent appropriation of the property of another in violation of the California Penal Code. Throughout the trial, Mr. Martinez represented himself. He filed a timely notice of appeal on September 3, 1998. On October 16, his request to proceed *pro se* on appeal was denied by the California Court of Appeal in a one sentence Order, the court citing *In re Walker*, 56 Cal. App. 3d 225 (1976) as the authority for its ruling. J.A. 1.

2. *California's System for Appointment of Appellate Counsel.* Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants convicted at trial of their appellate rights, including the right of an indigent defendant to have counsel appointed by the reviewing court. In the case of an indigent defendant, the trial attorney has a statutory duty to file a timely notice of appeal when the attorney believes that meritorious grounds exist for a reversal or modification of the trial court's judgment.

In the Fourth Appellate District, the appointment of counsel on appeal is administered through Appellate Defenders, Inc. (ADI), an independent agency which performs administrative functions in connection with the appointment of appellate counsel. Pursuant to Rule 76.5(d) of the California Rules of Court, the appellate

court is relieved of the duty of assuring the quality of appointed counsel under the guidelines of the Standards of Judicial Administration, because the qualified attorneys in ADI are required to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief.

3. *The Rationale of Walker.* The California appellate court did not articulate a rationale for denying Mr. Martinez' motion to continue to represent himself on appeal, as he had at trial. The court instead rested its ruling on the vitality of *In re Walker, supra*, a 1976 case holding that a defendant does not have a constitutional right to this effect. *Walker* is a succinct decision whose argument has the following structure: *(1)* An appeal from a state court judgment of conviction is not itself "a matter of absolute right" – *i.e.*, is not constitutionally based – but exists only by dint of state "provisions allowing such appeal," *id.* at 227; *(2)* for this reason, the "scope and authority [of the statutory right to appeal] is only as specifically delineated" by the State, provided this does not violate due process or equal protection, *id.* at 227-28; *(3)* neither of these factors is implicated with respect to a purported right to self-representation on appeal; *(4) therefore*, the State is free to dictate that no such right exists, and may appoint counsel over a defendant's objections.

California's appellate court recently affirmed *Walker* in *People v. Scott*, 64 Cal. App. 4th 550 (1998). Although *Scott* is the more detailed analysis, its essential logic is identical to that of *Walker*. *Scott* did, however, explicitly urge two key propositions that are only implicit in *Walker*: *(1)* Because the right to counsel historically has been closely linked to fairness, "[t]he due process right to

a fair appeal would be hindered by establishing a right to self-representation on appeal." *Id.* at 561. Thus, a State court's "duty to ensure that appellants receive a fair appeal" effectively *requires* the imposition of counsel; *(2)* "the administrative burden of allowing self-representation" overrides a defendant's putative interests on this score. *Ibid.*[1] These features of the *Walker/Scott* approach to self-representation – which any argument of like structure is logically committed to – has implications that are wholly untenable in light of this Court's right to counsel jurisprudence.

SUMMARY OF ARGUMENT

In my school days, when I had lost one shaft
I shot his fellow of the self-same flight
The self-same way, with more advised watch
To find the other forth, and by adventuring both
I oft found both. I urge this proof.
– *The Merchant of Venice*
Act I, Scene i

Like the technique employed by Shakespeare's Bassanio in *The Merchant of Venice* – who reckoned the location of one "lost shaft" by tracing its flight with a second shot "the self-same way" – the constitutional stature of the right to elect self-representation on direct

[1] The analysis in *Walker* is typical of the rationale relied upon by other courts, state and federal, which have reached the same conclusion. See, e.g., *Callahan v. State*, 354 A. 2d 191 (Md. App. 1976); *Hill v. State*, 656 So. 2d 1271 (Fla. 1995); *United States v. Gillis*, 773 F. 2d 549 (4th Cir. 1985); *Lumbert v. Finley*, 735 F. 2d 239 (7th Cir. 1984).

appeal can be found among the array of related rights the Court already has delineated in its numerous assistance of counsel cases. The legitimacy of a right to self-representation is established in two ways. *First*, its existence is conceptually necessary when we consider the overall framework of the Court's pattern of decisions. These cases establish beyond cavil that the stage at which the instant case presents itself – direct appeal of right – falls within a carefully delimited set of decisions specifying the procedural stages at which the Court has determined that a right to counsel is required by due process because a defendant's liberty interest is sufficiently substantive. Opposing arguments that would discount the value of that interest on the grounds that "there is no constitutional right to appeal" or "the stages of trial and appeal are dispositively different" rest on a mistaken interpretation of the analytical principles by which the Court's precedents hang together coherently. Once the precise bounds marked by that set of decisions are in view, the right to self-representation follows correlatively, as do many constitutional rights whose origin and scope are determined by resort to structural analysis. *Moreover*, the right to elect self-representation on first appeal cannot be denied except by doing violence to the logical integrity of the framework of the Court's decisions.

ARGUMENT

THE RIGHT TO ELECT SELF-REPRESENTATION ON DIRECT APPEAL OF A CRIMINAL CONVICTION IS OF CONSTITUTIONAL STATURE.

I. Introduction; Analytical Parameters.

As with most cases involving the derivation and scope of constitutional rights, the right at issue in this case cannot be specified *a prior*, in a vacuum of conceptual space. When the Court identifies a constitutional right applicable to the States through the Fourteenth Amendment, that Amendment's due process predicate – being open-textured – calls for careful specification of the right within the constellation of the Court's relevant precedents; the coherent fixing of the right in the context of related rights comprising the Court's evolving jurisprudence in the area.

Because "[t]he precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise," *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975), a principled approach to precedent extends logically the rationales that motivate prior holdings. In Justice Cardozo's words, this achieves "the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice, to make out a better right." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 31-32 (1966).

Thus, although the Court ordinarily does not identify a previously unarticulated constitutional right merely by inferring it from an already established right – *see, e.g.*, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) ("The

inference of rights is not . . . a mechanical exercise") – the overall logic or structure of the existing array of related rights, together with the rationalizing principles by which they cohere, are often key for assessing whether the right in question is of constitutional dimension. The Court by this legitimate method is able "to identify [a] source of constitutional value . . . in the logical implications of a system that recognizes both individual liberty and democratic order." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (1986) (White, J., joined by Rehnquist, J., dissenting). Of course, this reliance on analytical consistency is all the more important when controversy over the right in question may not easily be enlightened by other familiar approaches – for example, recurrence to English or Colonial legal history – because concern over the right is principally an outgrowth of modern-era case law. The "attempt to use history to take [us] where legal analysis cannot" may thus "create[ ] more questions than it answers." *Faretta v. California*, 422 U.S. 806, 843-44 (1975) (Rehnquist, J., dissenting). The logical implications of extant constitutional rights therefore have a "primacy" (CARDOZO, *supra*) that must be countenanced in the disposition of future cases.

Two further pre-cautions help ensure the validity of constitutional adjudication of this type. *First*, contradictions or inconsistencies in the pattern of the Court's precedents – tears in the fabric of otherwise coherent principles – appear when the analytical extension has gone awry because it has gone too far. "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the . . . analysis may not be pressed without doing

violence to principles recognized in other decisions of this Court." *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974) (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). *Second*, anomalies can result when the original context of an invoked principle is neglected or forgotten. "[T]he same constitutional principle may operate very differently in different contexts . . . [S]hoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part, concurring in the judgment). If a competing line of reasoning exhibits either of these features – incongruence or the dislodging of a principle from its factual mooring – the argument's viability is doubtful.

* * *

This dynamic – the reasoned extension and limitation of doctrinal principles – has been especially visible in the Court's decisions involving the right to counsel *vel non*, including the right to self-representation. The "right to representation" decisions are a bundle of interrelated precedents which today mark the limits of several associated constitutional rights, among them the right to counsel at trial and on direct appeal, waiver of the right to counsel, and the right to self-representation at trial. The Court's holdings in these cases are unified by the principle that a defendant's due process interests are of a fundamental nature (and thus constitutionally protectable) through a progression of procedural stages of which direct appeal is the last. Beyond that key juncture the discretion of the State in implementing its criminal processes is ordinarily

accommodated, as long as it is rational. But for cases that fall into the well-defined set of circumstances where the Court finds due process protections in play, such as direct appeal of right, the interests of the State are secondary to those of the defendant, and neither the State's own view of the requirements of "fairness" nor its invocation of utilitarian goals can defeat a defendant's constitutional claim.

We show below that the right to elect self-representation on direct appeal is necessarily implicit within this framework of related rights; and that, conversely, if we were to assume *ex hypothesi* that the right to self-representation does *not* exist and that a State may, in the name of due process or social utility, force counsel on a defendant at the direct appeal stage, fatal incongruencies weaken that framework.

II. Background Cases: The Fabric of the Court's Jurisprudence in Right to Counsel Cases.

The analysis of the issue in the instant case cannot be conducted apart from the harmonizing principles that emerge from and control prior decisions of the Court construing the nature and scope of the right to counsel *vel non*. A review of the *ratio* of the cases shows that the variety of "right to representation" issues are fundamentally interrelated. Within the procedural boundaries staked out by the Court's precedents – boundaries which indisputably extend from arraignment to trial to direct appeal of right – we find a characteristic logic employed, a genuine consistency of analysis. Moreover, underlying the pattern of holdings within that fixed domain are

consistent assumptions about the nature of such rights: They inhere in the individual; they have a core element of personal choice; they can be intelligently waived; they cannot be overridden by interests of social utility.

1. *Powell v. Alabama*, 287 U.S. 45 (1932), was the first occasion in which the Court held that the Due Process Clause required the appointment of counsel by state courts for indigent defendants in those cases in which lack of representation by counsel would result in an unfair trial. The Court did not rule in *Powell*, however, that the assistance of counsel clause of the Sixth Amendment was applicable to the States. Rather, the Court held only that the Fourteenth Amendment's Due Process Clause required fair trials for state criminal defendants, and that in some cases a fair trial could not be obtained unless the accused were offered the assistance of counsel. After the *Powell* decision, the Court thus followed the rule that the Due Process Clause required state courts to appoint counsel for indigent defendants in capital cases, but that appointed counsel in noncapital state cases was required only if an unfair trial would result.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), however, the Court held that the Fourteenth Amendment's Due Process Clause required the appointment of counsel for indigent defendants facing serious criminal charges in all state cases, capital or noncapital. This brought the rule governing the right to counsel in state courts into conformity with the rule applicable in the federal courts under the Sixth Amendment. The *Gideon* case is regarded as having incorporated the assistance of counsel clause of the Sixth Amendment into the Fourteenth Amendment, making it applicable to the States, an expansion of the

constitutional right to counsel that began with the Court's decision in *Powell*.

Over time, the Court interpreted the Sixth Amendment counsel clause expansively, first by adding a requirement to provide counsel, and second by specifying the stages where the offer of counsel is necessary. The view evolved that a State may not incarcerate a person, whether he is indigent or not, if he has not had (or waived) the assistance of counsel at all stages of the criminal process at which his substantial rights may be affected. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The proper resolution of the present case requires attention to this second element: the extent to which a case's procedural stage – here, direct appeal – affects the nature of the defendant's constitutional interest.

2. *Appeals of Right*. The Court traditionally has held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 (1894). However, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S 12, 18 (1956), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

In *Griffin*, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the

stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. The Court held that the State must provide a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective" appeal. 351 U.S. at 20.[2]

Justice Black's opinion for the *Griffin* plurality is instructive. Rejecting the argument that the post-trial posture of the case *eo ipso* was determinative in favor of the State, he reasoned in two steps: *First*, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Second*, "[t]here is *no meaningful distinction* between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the

---

[2] See also *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 215 (1958) (per curiam) (invalidating state rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction); *Lane v. Brown*, 372 U.S. 477 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); *Draper v. Washington*, 372 U.S. 487 (1963) (invalidating state procedure providing for free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivolous).

poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Ibid.*

The link between the counsel right at the trial stage and the stage of first appeal is a valid one, even though "[i]t is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin*, 351 U.S. at 17-18. From that proposition, it did *not* follow that "a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." *Ibid.*

Subsequently, in *Douglas v. California*, 372 U.S. 353 (1963), the Court held that the right to counsel is one of the safeguards guaranteed by the Fourteenth Amendment where a criminal defendant pursues a first appeal as of right. During this period, other decisions of the Court reiterated the constitutional significance of this initial stage of appeal in criminal proceedings. For example, in *Swenson v. Bosler*, 386 U.S. 258 (1967), the Court held that an indigent criminal appellant was entitled to "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court . . . on the only appeal which the State affords him as a matter of right." *Id.* at 259. In establishing a system of appeal as of right, "the State had implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decision maker, the appellate court, was convinced that the conviction was in accord with law." *Ibid.* Direct appeal was deemed "the final step in the adjudication of guilt or innocence of the individual," *ibid*, and the

very fact that a State had created a right of appeal implied the State's recognition of the significance of the liberty interest at stake.

The prospect of the Court's ultimately identifying the post-trial procedural stage beyond which a defendant's constitutional interests would *not* warrant the offer of counsel arrived in *Ross v. Moffitt*, 417 U.S. 600 (1974), where the Court considered whether the *Douglas* right to appointment of counsel on first appeal should be extended to require counsel for discretionary state appeals and for applications for review in the Supreme Court. *Per* then-Justice Rehnquist, the Court held that appointment of counsel at these stages was not required. The Court began by observing that, broadly speaking, "there are significant differences between the trial and appellate stages of a criminal proceeding," 417 U.S. at 610, but it quickly refined that categorization. In *Ross*, the defendant had received the benefit of counsel in examining the record of his trial and in preparing an appellate brief for the court of appeals. But procedural stages *beyond* direct appeal were of a *different* sort: The Court thus rejected the notion that a defendant on discretionary appeal is denied "meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court." 417 U.S. at 615.

Ross is instructive for two reasons. *First*, it demarcates an upper procedural bound in the Court's right to counsel cases. Beyond first appeal of right, the fundamental guarantees of the Fourteenth Amendment do not require a State to offer counsel to an indigent defendant. By contrast, between the stages of arraignment and direct

appeal, the nature of the defendant's interest is such that the opportunity for counsel's assistance, if sought, is constitutionally required.

Second, the *Ross* decision, while recognizing the procedural realities differentiating the trial from appellate stages generally, grouped "first appeal of right" with the *earlier* stages of a criminal prosecution, and thus marked the chief distinction in play as the one between direct appeal and discretionary appeal. Thus, said the Court, "[t]he suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek *certiorari* to review state judgments of conviction." *Id.* at 617-18. To the contrary, "this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for *certiorari* in this Court. * * * In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so." *Ibid.*

Eleven years after *Ross*, in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Burger Court further elaborated the nature and scope of the individual right at stake in a direct appeal, holding that a State cannot penalize a criminal defendant by dismissing his first appeal as of right when his appointed counsel has failed to follow mandatory appellate rules. The rationale of *Evitts* is notable for its

portrayal of the unavailing arguments of the State of Kentucky, which had pressed two points relevant to the instant case.

First, Kentucky invoked the traditional rule of *McKane v. Durston, supra*, that a State need not, in the first instance, establish *any* system of appeals as of right. This proposition, thought Kentucky, would sustain the weight of a broader claim – in this case, that the State's discretion to administer its appellate system was largely unencumbered, overriding a defendant's interest in effective assistance on direct appeal.

The Court rejected this argument. The right to direct appeal would be "unique among state actions" if it could be conditioned without consideration of applicable due process norms. 469 U.S. at 401-03. By analogy, said the Court, "although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause," *ibid., citing Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Likewise, "a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with" due process. *Ibid., citing Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972). "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the . . . Due Process Clause." *Ibid.* Accordingly, the fact that the right to appeal was a creation of State law, rather than the Federal Constitution, did not by itself carry any logical force. Uncritically relying on that proposition had merely crabbed the State's line of analysis.

Second, Kentucky argued that even if the Due Process Clause applied to the manner in which a State conducts its system of appeals of right, it played no role in regulating a criminal defendant's due process interests on direct appeal because *Griffin* and its progeny had their source in the Equal Protection Clause, not the Due Process Clause, of the Fourteenth Amendment. In support of this contention, Kentucky pointed out that the cases in the *Griffin* line involved claims by indigent defendants that they have the same right to a decision on the merits of their appeal as do wealthier defendants who are able to afford lawyers, transcripts, or the other prerequisites of a fair adjudication on the merits. *Ibid.*

Again, the *Evitts* Court rejected this argument as resting "on a misunderstanding of the diverse sources of our holdings in this area." *Id.* at 403-04. In *Griffin*, for instance, the State had in effect dismissed the defendant's appeal because he could not afford a transcript. That disposition "violated equal protection principles because it distinguished between poor and rich with respect to such a vital right. But it also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved." In *Griffin*, said the Court, "we noted that a court dispensing 'justice' at the trial level by charging the defendant for the privilege of pleading not guilty 'would make the constitutional promise of a fair trial a worthless thing.' * * * Deciding an appeal on the same basis would have the same obvious – and constitutionally fatal – defect." *Ibid.* *See also Douglas, supra*, 372 U.S. at 357 (procedure whereby indigent defendant must demonstrate merit of

case before obtaining counsel on appeal "does not comport with fair procedure").

In short, the State's arguments in *Evitts* failed because the State misapprehended *(1)* the limited significance of the notion that a right to direct appeal has its source in State law; *(2)* the critical role that due process (not merely equal protection) plays in the Court's decisions resolving rights on direct appeal; and *(3)* the analytical similarities between the *trial* and *direct appeal* stages with respect to such rights; similarities that, if not countenanced, would severely undermine the coherence of the Court's *Griffin* line of cases. As the Court reiterated quite recently, in cases affirming a defendant's due process rights on direct appeal, "the Court [has] evaluated the function and significance of a first appeal as of right, in light of prior cases," *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1251 (1998), in order to ensure the consistency of its controlling principles. The upshot of this approach is that there is "no continuum requiring varying levels of process at every conceivable phase of the criminal system," *ibid., citing inter alia, Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (no right to counsel in postconviction proceedings; and *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (no right to counsel for discretionary appeals on direct review). Direct appeal is thus categorically distinguishable from later or ancillary procedural contexts.

Thus, in *Ohio Adult Parole*, where the Court considered the applicability of procedural requirements relating to a State's executive clemency authority, "[a]n examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far

different from the first appeal of right at issue in *Evitts*." *Id.* at 1251-52. Clemency proceedings are not " 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' " *ibid., citing Evitts*, 469 U.S. at 393. *Ibid.* "Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Ibid.*

Likewise instructive for its counterfactual value is *Pennsylvania v. Finley, supra.* In that case, the Court held *inter alia* that an indigent prisoner had no equal protection or due process right to appointed counsel in postconviction proceedings. "Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on . . . procedures which were designed solely to protect that underlying constitutional right." *Id.* at 557. In this procedural area, the Court reasoned, States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. "In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a *fundamentally different position – at trial and on first appeal as of right.*" 481 U.S. at 559 (emphasis added). *Finley* thus presents a case where the logical connection between a State's creation of a right and the limits the State wishes

to impose on that right is a legitimate one. But a "fundamentally different position" distinguishes a defendant's "first appeal of right." *Ibid.*

* * *

From the Court's analyses in the cases examined above, two points are especially noteworthy. *First,* as *Evitts* illustrates well, a State's perfunctory reliance on the true, but non-dispositive, proposition that appeals are a creature of State law – while it may have a certain rhetorical value – has little logical force. *Second,* nowhere in the reasoning of the Court's cases does there lurk the assumption (let alone the express claim) that due process requires or legitimates the imposition of counsel on a defendant who has not sought and does not desire counsel's assistance.

3. *The right to self-representation at trial.* In *Faretta v. California,* 422 U.S. 806 (1975), the Court addressed "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." Put differently, said the Court, "the question is whether a State may constitutionally hale 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." *Id.* at 807. The Court concluded that "a State may not constitutionally do so." *Ibid.*[3]

[3] The defendant requested permission to represent himself at trial because he believed that the public defender's office was overworked. After questioning the defendant, the trial court granted his request, but later reversed its ruling. The defendant was subsequently convicted after being forced to accept representation at trial. 422 U.S. at 807-08.

A. The Court began its analysis by adverting to the rationale of its decision in *Adams v. United States ex rel. McCann,* 317 U.S. 269 (1942). In that case, "the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.' " *Id.* at 814-15, citing *Adams,* 317 U.S. at 275. The *Faretta* Court, noting that the *Adams* decision "[did] not necessarily resolve the issue before us" because it did not decide that a State may constitutionally force a lawyer on a defendant, nevertheless relied upon the following dicta from the *Adams* case in assessing whether there is "an affirmative right of self-representation." *Faretta,* 422 U.S. at 815.

> 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. . . .
>
> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
>
> . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free

> choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Ibid., citing Adams, 317 U.S. at 279-80 (emphasis added in *Faretta*). The *Faretta* Court further noted that '[t]he holding of *Adams* was reaffirmed in a different context in *Carter v. Illinois,* 329 U.S. 173, 174-75 (1946), where the Court again adverted to the right of self-representation." *Faretta,* 422 U.S. at 815 n. 12. The *Carter* Court stated: "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." *Carter,* 329 U.S. at 174-75.

B. The constitutional setting of *Faretta* is the Sixth Amendment as applied to a state criminal trial through the Fourteenth Amendment. Focusing on the text of the constitutional provision, the *Faretta* Court reasoned:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment. . . . The

> right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. . . . The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. * * * This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Id. at 819-20 (citations omitted).

Faretta establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the

function of counsel is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, notwithstanding that counsel may be better able to decide which tactics will be most effective. It is an inescapable implication of *Faretta* that if the Sixth Amendment were viewed as protecting principally the *State's* interest in fairness, the right to self-representation at trial would not exist.

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . *Personal liberties are not rooted in the law of averages.* The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored. . . .

Id. at 384 (emphasis added).[4]

[4] In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court, "mak[ing] explicit . . . what is already implicit in Faretta," id. at 184, held that "[a] defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." Ibid.

Faretta's rationale is significant for the instant case, not because the right to self-representation which the Court located in the Sixth Amendment applies to direct appeals of right *through* that Amendment, but for two other reasons. *First, Faretta* provides compelling guidance as to the core meaning of the "right to counsel" as a juridical concept. That the right to counsel should entail the correlative right to dispense with counsel – to forgo at one's election the offer of counsel that the State is obliged by due process to extend – *is* our conventional, time-honored manner of thinking about rights – and it is this view of rights that undergirds and makes meaningful the Court's decisions on any number of constitutional fronts affecting individual liberty interests.

Second, it follows that a State cannot deny a defendant the right to elect self-representation if the viability of that right arises in a procedural context that the Court's precedents classify, for analytical purposes, with the trial stage in which we meet *Faretta.* As the account in the previous section makes clear, direct appeal of right – precisely the procedural posture of the instant case – is indeed within that class of precedents.

III. The Fallibility of the *Walker* Approach.

A. In denying Salvador Martinez' request to represent himself on direct appeal of his conviction, the appellate court relied on *In re Walker*, 56 Cal. App. 3d 225 (1976), which held that "there is no constitutional right of self-representation on appeal." *Id.* at 227. The *Walker* rationale is as follows:

> (i) – "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. . . . It is wholly within the discretion of the state to allow or not to allow such review." *Ibid.*
>
> (ii) – "It is therefore clear that the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." *Ibid.*
>
> (iii) – "California has made the right to appeal a statutory creature whose scope and authority is only as specifically delineated." *Ibid.*
>
> (iv) – "Once appellate review is established it must be kept free from any procedures which violate due process or equal protection of the law." A State "must provide counsel for the indigent on his first appeal as a matter of right," but this right is not unlimited, and "the states are free to deny an indigent an appointed attorney at other stages of appellate proceedings." *Id.* at 227-28.
>
> (v) – Trials dispositively differ from appeals. "The discretionary nature of the power [of a court to foreclose self-representation] grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Id.* at 228.
>
> (vi) – *Faretta* is inapposite because the Supreme Court in that case "did not have before it any claim of right to self-representation on appeal." *Ibid.*

Therefore: A defendant "has no constitutional right of self-representation on appeal."

B. Examined in light of the framework of the Court's precedents, the *Walker*-type argument cannot be sustained. Its substantive premises either are erroneous or do not carry logical force. Indeed, *Walker*'s rationale is reminiscent of the reasoning discredited by the Court in *Evitts*. *First*, the proposition that appeal of right is a creation of State law, while true, will not advance a State's argument that there is no constitutional right to self-representation. For cases within the set as to which the Court has deemed due process interests fundamental – that is, through first appeal of right – it simply does not matter that the right to an appeal is not a constitutional right. Over the years, the Court repeatedly has taken for granted the validity of that proposition, on the one hand, while nonetheless concluding in such landmark cases as *Griffin*, *Douglas*, and *Evitts* that direct appeal is a critical stage in the procedural life of a defendant's efforts to establish his innocence or expose trial court error, implicating constitutional guarantees for that reason. The defendant's right to counsel on direct appeal is no less a "constitutional right" because the opportunity for appeal in the first instance derives from state statutory authority, rather than from the Constitution.

Second, the fact that trial-level proceedings and proceedings at the level of direct appeal are procedurally (indeed, by definition) distinct, does not carry substantive force. As we have noted, the Court's decisions in right to representation cases mark procedural bounds, those stages at which the right to counsel is implicated because substantive rights of the defendant are at risk. At the upper end of this range is appeal of right. Discretionary appeals are of a *different*, distinguishable ilk. Thus, the cases teach that the pivotal procedural distinction for these purposes lies not at the line between trial and appeal, but between first appeal of right and subsequent discretionary appeals. The Court's recognition of direct appeal as a critical stage warranting a defendant's option to have counsel appointed, of course, means that the right is no less fundamental at that juncture than at previous stages of the prosecution.

Third, in the present context, due process and fairness implicate the individual rights of a defendant, not rights of the State. Thus, the premise of *Walker* and *Scott* that a State appellate court's "duty to ensure that appellants receive a fair appeal," *Scott, supra*, 64 Cal. App. 4th at 550, effectively requires the imposition of counsel, is erroneous. The constitutional right to representation, whether it flows from specific provisions of the Bill of Rights or is more directly derived from the concept of due process, is a right inhering in the person. By its nature, such a right implies a choice, a palpable degree of discretion in the individual. This essential quality is evident in the Court's well established doctrine that constitutional rights can be waived. *See, e.g., Del Vecchio v. Illinois*, 474 U.S. 883, 885 (1985) (A constitutional right, like any other right of an

accused, may be waived); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (Defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine witnesses could not be waived by his counsel without defendant's consent); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (A waiver of the right to counsel is valid if it is voluntarily and understandingly made).

Wholly consonant with this orientation, the Fourteenth Amendment Due Process Clause provides that "[n]o State shall . . . deprive *any person* of life, liberty, or property, without due process of law" (emphasis added). The Clause is thus "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security," and to "protect the people from the State." *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 195-96 (1989). *See also Harris v. McRae*, 448 U.S. 297, 317-318 (1980) ("The liberty protected by the Due Process Clause affords protection against unwanted government interference").

The anomaly in a *Walker*-type construction of the right to counsel can also be illustrated in a different way. If we do not offer to appoint counsel on direct appeal when a defendant wishes to have counsel appointed, but cannot afford a lawyer, this violates due process. The converse of that proposition – that due process is satisfied if we offer to appoint counsel – is a logically valid step. But it is not valid to say that due process is satisfied if we *force* appointed counsel on a defendant, because that state of affairs is *not* the negation of offering a defendant the assistance of counsel. Looked at in this more formal fashion, the State's error lies in an unwitting misuse of the logical form known as ***modus tollens***.

Fourth, a right against the government is meaningful when considerations of general social utility alone are inadequate to authorize the State to override it. In other words, the essential characteristic of a right is that the State may not abridge it on the basis of the State's own view of fairness or on purely utilitarian considerations of what will be beneficial for society. Under *Walker*, a defendant does not have a right to due process, so much as a government benefit that he must accept. Under that interpretation, the State is truly making the defendant an offer he cannot refuse. Unfortunately, the State thereby violates a defendant's legitimate due process expectations.

CONCLUSION

The lower court's decision should be reversed.

Respectfully submitted,

RONALD D. MAINES
Counsel of Record
MAINES & LOEB, PLLC
1827 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 223-2817

Dated: August 6, 1999