No. 98-7809

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR MARTINEZ,
Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,
FOURTH APELLATE DISTRICT,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

Filed September 8, 1999

QUESTION PRESENTED

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

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COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, *Respondent*.

OPINION OR JUDGMENT BELOW

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Three, is reproduced at J.A. 1. The unpublished order of the Supreme Court of California denying Petitioner's petition for writ of mandate is reproduced at J.A. 2.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28 United States Code section 1257(a) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three, which was entered on September 3, 1998. (J.A. 1.) The California Supreme Court denied a petition for writ of mandate on October 16, 1998. (J.A. 2.) The Petition for Writ of Certiorari was filed within the required ninety-day period following the final entry of judgment. The judgment of the California Court of Appeal became final for the

purposes of this Court with the denial of the petition for writ of mandate by the California Supreme Court.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment, section 1, states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

Title 28 United States Code section 1654 states:

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

California Rule of Court 76.5 states:

> (a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.
>
> (b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).
>
> (c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

California Penal Code section 1240.1(b) states:

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document,

paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

STATEMENT OF THE CASE

In May 1998, Petitioner, a thrice convicted felon, was working in the offices of defense attorney Lawrence Merryman in Santa Ana, California, as an office assistant. The victim telephoned Petitioner about getting her boyfriend out of jail. Petitioner told the victim he would need $6,000 to accomplish the task. Petitioner had the victim bring him the money. Petitioner stole the funds and kept them for himself. (J.A. 10-14.)

SUMMARY OF ARGUMENT

This Court's decision in Faretta v. California, 422 U.S. 806 (1975), contains significant flaws which should not be magnified by extending the right of self-representation to direct appeals in state courts.

The founding fathers did not believe that the right of self-representation was of constitutional magnitude. Instead, they simply viewed it as a procedure that warranted protection by federal statute. Moreover, the states were left free to create their own appellate court systems.

Each state-created appellate court system must comply with the dictates of the Due Process and Equal Protection Clauses. Where a state has adopted a system designed to ensure the reliability of the process and to minimize the risk of an erroneous decision, neither clause prevents the state from requiring all criminal appellants to be represented by counsel on direct appeals. The Federal Constitution does not dictate that the states must have one, and only one, rule for the appellate representation of convicted defendants on direct appeal. The burdens to the administration of the criminal justice system from any other rule would be too onerous.

ARGUMENT

I.

FARETTA CONTAINS SIGNIFICANT FLAWS WHICH SHOULD NOT BE MAGNIFIED BY EXPANDING THE RIGHT OF SELF-REPRESENTATION TO DIRECT APPEALS FROM STATE COURT JUDGMENTS

The major premise of Petitioner's argument is that the decision in Faretta v. California, 422 U.S. 806 (1975), has continuing validity and must be expanded to apply to every state appellate court system since there is no real difference between trials and first direct appeals. Petitioner is wrong on all counts. This Court's decision in Faretta was critically flawed and should no longer be followed. Even if this Court declines to reexamine Faretta at this time, there is no legal basis for extending it to direct criminal appeals in state courts given the applicable law and the significant differences between a trial and a first appeal.

When this Court decided Faretta, the majority posited that although the Sixth Amendment does not expressly grant the right to self-representation, that right is necessarily implied by the amendment's structure. Id. at 820. This Court also reasoned that thrusting trial counsel on an unwilling defendant would violate the principles of the Sixth Amendment because it would change the role of counsel from assistant to master, and thus, "the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." Id. Finally, this Court reviewed certain historical material and concluded that self-representation at the trial court was commonplace in both England and the American colonies. Id. at 831-32.

The Faretta opinion is flawed in three respects: it incorrectly assumes the language of the Sixth Amendment implies a right to self-representation; it commits a major historical error concerning the enactment of the Sixth Amendment; and it fails to consider the consequences of requiring self-representation on demand in the trial courts.

First, the language of the amendment does not support the Faretta majority's conclusion. As the three dissenting justices (including now Chief Justice Rehnquist) accurately noted, nothing in the language or the history of the Sixth Amendment implies any right to self-representation. Instead, as then Chief Justice Burger aptly noted, the amendment speaks "in uniformly mandatory terms" and the right to counsel is a central element of the right to a defense at trial. Faretta, 422 U.S. at 838. Justice Burger also noted that merely because a defendant has a constitutional right which he or she can waive, no inherent right to the opposite position exists. Id. at 841.

Justice Burger was absolutely correct. While a defendant has the right to a public trial, and can waive that right, he has no right to compel a private trial. While a defendant has the right to be tried in the state and district where the crime was committed, and can waive that right, he has no right to compel transfer of the case to another district. While a defendant has the right to confront the witnesses against him, and can waive that right, he cannot force the government to make its case by stipulations without witnesses. Thus, this aspect of the majority opinion is flawed.

The second major flaw comes in this Court's treatment of the timing of enactment of the Judiciary Act of 1789 (the "Act") and the drafting of the Sixth Amendment. The Act gave a statutory right to self-representation in federal criminal trials. (Now codified in 28 U.S.C § 1654.) The Act was first drafted in April 1789, and signed on September 24, 1789. 1789 House Journal

36; Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789 16-17, 21 (1990). The Faretta majority stated that the day after the signing of the Act (September 25, 1789), the text of the Sixth Amendment was proposed in Congress and this timing implied that there was a congressional intent to include the right of self-representation into the Sixth Amendment. Faretta, 422 U.S. at 831.

The majority's position is historically inaccurate. While Congress passed an agreed resolution about the Sixth Amendment on September 25, 1789, the original draft of the Sixth Amendment was proposed by James Madison on June 8, 1789. Congressional Register, June 8, 1789, vol. 1, pp. 427-29 [quoted in Neil H. Cogan, The Complete Bill of Rights 385 (1997)]. The amendment was debated and revised over the next three months. The final text was made an enrolled resolution on September 29, 1789. Cogan, supra, at 400. Thus, at the very time that Congress was debating the Act it was simultaneously debating the text of the Sixth Amendment.

By choosing to place the right of self-representation into the Act and not into the text of the Sixth Amendment, Congress clearly made the decision that the right was not of constitutional magnitude but was simply a process which would be followed in the federal courts by legislative dictate. If Congress had considered the right of self-representation to be a fundamental constitutional right, then surely it would have specifically said so in the language of the Sixth Amendment. Instead, it enacted the matter as merely a federal statutory right in the Act. This action is convincing proof that the first Congress did not read any right of self-representation into the constitutional fabric of our nation. Thus, any suggestion by the Faretta majority that there was a solid historical underpinning for its analysis is simply wrong.

Finally, the third major flaw in the majority's opinion stems from the total absence of any discussion

concerning the potential effects on the criminal justice system caused by the recognition of this new right to self-representation at trial. This Court has recognized the consequences of constitutional interpretation to be a critical factor in other areas and should have considered the consequences then. Fay v. Noia, 372 U.S. 391, 399 (1963); Stovall v. Denno, 388 U.S. 293, 297 (1967) [impact on judicial system a critical factor in determinations of retroactivity]. Justice Blackmun warned of the dangers that would "haunt the trial of every defendant who elects to exercise his right to self-representation." Faretta, 422 U.S. at 852.

Justice Blackmun's dissent proved prescient. A recent exhaustive review of the cases decided in the state and federal courts since Faretta demonstrates that:

> [F]or the past twenty years the criminal justice system has struggled to mend the procedural holes left by the Faretta decision. The exercise of this right continues to hinder the efficiency of the criminal justice system and undermines the guarantee of justice afforded criminal defendants. Consequently what remains is an unrecognizable patchwork quilt, whose creator has lost sight of the original pattern.

John Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta, 6 Seaton Hall Const. L.J. 483, 498 (1996).

Thus, the goal of improving the criminal justice system, and better guaranteeing a defendant equal justice under law, has not been achieved by the holding in Faretta.

Indeed, while this Court may have intended Faretta as an overall benefit to the criminal justice system,

it has had a far different fate. Scores of cases have been reversed over hyper-technical applications of this rule. For example, in Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir. 1997), cert. denied, Calderon v. Moore, 521 U.S. 1111 (1997), the Ninth Circuit reversed a death penalty judgment because it disagreed with the Supreme Court of California about the timeliness of a request for self-representation. Similarly, in State v. Christensen, 40 Wash. App. 290, 698 P.2d 1069 (1985), the trial judge advised the defendant of his right to an attorney and admonished the defendant on the nature of the charges against him and the possible penalties. The defendant elected to proceed pro se and was subsequently convicted of all charges. The Court of Appeals of Washington reversed the conviction, holding that the defendant's waiver of counsel was defective. Although the trial judge inquired into the defendant's educational background, experience, literacy, and actual awareness of his right to counsel, as well as informed him of his right to counsel, the court of appeals held that the failure to advise the defendant of the technical aspects of his defense undermined the knowing and intelligent waiver of counsel and reversed the conviction. Id., 698 P.2d at 1070-72.

While Faretta's conclusion may have seemed like a reasonable proposition in the abstract, its application has proved a tremendous burden on the criminal justice system. As the Faretta decision is seriously flawed in three major respects, it should not be extended to apply to direct state appeals after a criminal trial. Indeed, this Court may wish to examine the continuing validity of Faretta itself.

II.

JUDICIAL SCRUTINY OF STATE APPELLATE PROCEDURES IS GOVERNED BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AND NOT THE SIXTH AMENDMENT

Petitioner admits no specific language in the Constitution supports his claim that self-representation is constitutionally mandated. Petitioner also admits no historical evidence supports his claim. Instead, he relies upon dictum from this Court's decisions in an attempt to equate criminal trials with first appeals. He then extrapolates that all fundamental trial rights, including the right to self-representation, must apply to appeals. His analysis directly conflicts with this Court's pronouncements as to how constitutional rights are determined.

In determining whether a right is "fundamental," this Court has admonished courts not to take an "expansive view" of the "authority to discover new fundamental rights imbedded in the Due Process Clause," and has further admonished that there should be "great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

This Court looks to the text of the Constitution, not the purported "importance" of the asserted right, when deciding whether an asserted right is "fundamental." San Antonio School District v. Rodriguez, 411 U.S. 1, 33-35 (1973); see also, Vacco v. Quill, 521 U.S. 793, 799 (1997).

There is simply nothing in the Constitution concerning post conviction criminal appeals, let alone the right of self-representation in such matters. Since there is no constitutional mandate nor historical precedent for self-

representation on appeal, this Court should not read into the Constitution such a right.

"[T]he Due Process Clause does not demand uniformity of procedure . . . [e]ach State is free to devise its own way of securing essential justice in these situations." Hysler v. State of Florida, 315 U.S. 411, 416-17 (1942). Thus, states are "free to devise their own systems of review in criminal cases," the "[p]rocedural details for securing fairness" are left to the states, and the manner in which a state chooses to adjudicate claims is afforded wide discretion, "so long as they observe those ultimate dignities of man which the United States Constitution assures." Carter v. People of State of Illinois, 329 U.S. 173, 175 (1946).

A. Providing For Direct Appeals In Criminal Cases Is Not Constitutionally Compelled

Over a century ago, this Court held that the Constitution does not require states to grant appeals as of right to criminal defendants seeking to review alleged trial court errors, and that the right of review in an appellate court is purely a matter of state concern. Kohl v. Lehlback, 160 U.S. 293, 299 (1895); McKane v. Durston, 153 U.S. 684, 687-88 (1894). "Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed." Abney v. United States, 431 U.S. 651, 656 (1977). The statutory right to appeal a criminal conviction in federal courts did not arise until 1889 for death penalty cases and until 1911 in all other criminal cases. Id. at 655. It was not an original part of the judicial structure of the United States. This is hardly surprising since criminal appeals were virtually unknown in England. "Normally . . . there were no criminal appeals." Colin Rhys Lovell, English

Constitutional and Legal History, Oxford University Press 214 (1962).

In the over 100 years since the decision in McKane, this Court has never retreated from its holding that a criminal defendant has no constitutional right to an appeal, and that it is wholly within the discretion of the states whether to allow such a review. Johnson v. Fankell, 520 U.S. 911, 932 n.13 (1997); M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996); Goeke v. Branch, 514 U.S. 115, 120 (1995); Jones v. Barnes, 463 U.S. 745, 751 (1983); Abney, 431 U.S. at 656; United States v. MacCollom, 426 U.S. 317, 323 (1976); Estelle v. Dorrough, 420 U.S. 534, 536-38 (1975) (per curiam); Griffin v. Illinois, 351 U.S. 12, 18 (1956).

The claim by amicus curiae, the National Association of Criminal Defense Lawyers, that somehow the statutory right to appeal has, with the mere passage of time, been transformed into a constitutional right is without foundation. The mere passage of time cannot change the language and nature of this nation's Constitution nor change the underpinnings of the statutory right to appeal. Indeed, in numerous situations a citizen's relationship to the state government has existed for years but has not metamorphosized into a constitutional right. For example, even though the states have provided their residents with welfare benefits for decades, no one has been so bold as to suggest the practice has become a constitutional right to welfare. In fact, this Court has repeatedly rejected any such notion. Dandridge v. Williams, 397 U.S. 471, 478-79 (1970); Rodriguez, 411 U.S. at 33. The same is true as to a free public education. Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458 (1988). Amicus, the National Association of Criminal Defense Lawyers, has not pointed to any instance where this Court has undertaken to transform a statutory right into one of constitutional magnitude. Having avoided such unnatural mental

gymnastics in the past, this Court should avoid them in this case as well.

B. Because The Constitution Does Not Compel States To Provide A Direct Appeal In Criminal Cases, The States Must Simply Comply With Due Process And Equal Protection Requirements In Providing An Appeal

The fact that state appellate courts are creations of statutes and not mandated by the Federal Constitution merely leads to the determination of the proper law to be used in evaluating Petitioner's central claim. It is not the lynch pin Petitioner claims. If a state has provided for appellate review as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," its appellate procedures must comport with the demands of the Due Process and Equal Protection Clauses to "protect persons . . . from invidious discriminations." Griffin, 351 U.S. at 18. To pass muster, the state's procedures must afford "adequate and effective appellate review." Id. at 20.

This Court's repeated pronouncements in this area have consistently demonstrated that the proper analysis for issues relating to direct appeals is within the Due Process and Equal Protection Clauses, not the Sixth Amendment. For example, in Griffin, this Court held that a transcript of the trial court proceedings must be provided to an indigent criminal appellant if that was the only way to ensure an "adequate and effective" appeal. Id. at 13-14. In doing so, this Court recognized that while a state had no constitutional obligation to provide appellate review, if the state chose to create such a right, the Due Process and Equal Protection Clauses protected indigent criminals from "invidious discriminations." Id. at 18.

Again, in 1963, this Court in Douglas v. California, 372 U.S. 353, 356-58 (1963), held that when a state in its discretion created a right to an appeal, it must provide counsel. This Court based such a right not on the Sixth Amendment, but on the Fourteenth Amendment, which required the state to make the appeal more than a "meaningless ritual" by supplying an indigent appellant with counsel. Id. at 358.

By contrast, on the same day, this Court held that the right of an indigent defendant to counsel at trial flowed from the explicit grant of that specific right in the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

In Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), this Court summarized the Griffin line of decisions and held, without reference to the Sixth Amendment, that while the Court had never held that the states are required to establish avenues of appellate review, these avenues once established, "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Requiring counsel on direct appeal does not impede this open and equal access. Indeed, it enhances it.

Subsequently, this Court held on Fourteenth Amendment grounds that an appointed appellate attorney must be available to assist in preparing and submitting a brief to the appellate court, Swenson v. Bosler, 386 U.S. 258, 259 (1967), and must play the role of an active advocate, rather than a mere friend of the court, assisting in a detached evaluation of the appellant's claim. Entsminger v. Iowa, 386 U.S. 748, 750-51 (1967); Anders v. California, 386 U.S. 738, 743-45 (1967).

In Ross v. Moffitt, 417 U.S. 600, 608-09 (1974), this Court held that under the Fourteenth Amendment the States were left to decide whether to provide counsel to indigent state defendants in their discretionary appeals. In

doing so, this Court acknowledged that the rationale for the Griffin and Douglas line of cases had "never been explicitly [established]" and that "some support" was found in both the Due Process and Equal Protection Clauses. Ross, 417 U.S. at 608-09. This Court in Ross recognized the critical differences between the trial and appellate stages. Id. at 610-11.

In Evitts v. Lucey, 469 U.S. 387 (1985), this Court held a state would violate due process if it penalized a criminal defendant by dismissing his first appeal as of right when appointed counsel failed to follow mandatory appellate rules, and that the right to appellate counsel meant the right to "effective assistance." Id. at 396.

Finally, in 1997, the Court in Johnson once again repeated that prior decisions "made it quite clear that it is a matter for each State to decide how to structure its judicial system," and that respect for the fundamental principles of federalism is at its apex when the Court is confronted with a claim "that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." Johnson, 520 U.S. at 922 and n.13.

These decisions show that this Court has consistently turned to the Due Process and Equal Protection Clauses for decisions involving direct state appeals. This Court has not relied upon the Sixth Amendment as a tool in its analysis. It can be seen, then, that the rights of a criminal defendant to an appeal and to adequate counsel in that appeal, stem from the Due Process and Equal Protection Clauses through the Fourteenth Amendment, not from the Sixth Amendment, the foundation upon which Faretta rests.

III.

NEITHER THE DUE PROCESS CLAUSE NOR THE EQUAL PROTECTION CLAUSE REQUIRES THE STATE APPELLATE COURTS TO ALLOW SELF-REPRESENTATION ON APPEAL

The inquiry for this Court is whether denial of self-representation on direct appeal contravenes due process or equal protection guarantees. The Sixth Amendment does not play a role in the analysis. While due process and equal protection require the state to provide an indigent criminal appellant with appointed counsel on the initial appeal as of right, it does not follow that the denial of self-representation violates due process or equal protection. As the Seventh Circuit has aptly noted, "We find it conceptually difficult to imply in the 'equal protection right' to counsel on direct appeal a correlative right of self-representation on direct appeal." Lumbert v. Finley, 735 F.2d 239, 246 (7th Cir. 1984). Similarly, the court noted that due process principles requiring that an indigent be provided with counsel on appeal do not imply a correlative right to self-representation on appeal. Id.

A. Due Process Is A Flexible Concept That Varies With The Process At Issue

The Due Process Clause of the Fourteenth Amendment "incorporates many of the specific protections defined in the Bill of Rights." Zinermon v. Burch, 494 U.S. 113, 125 (1990). Additionally, the Due Process Clause "encompasses . . . a guarantee of fair procedure." Id.

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citations.] "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . . ." [Citation.]

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

The Due Process Clause, unlike the strict commands of the Sixth Amendment, generally focuses on the reliability or fairness of the process. Id.; Gilbert v. Homar, 520 U.S. 924, 932 (1997). In this regard, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also, Gilbert, at 929; Zinermon, 494 U.S. at 128.

Thus, the due process guarantee, unlike the Sixth Amendment's guarantee of the right to counsel and self-representation at trial, is meant to "minimize the risk of erroneous decisions," and "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13 (1979). The flexibility of due process is "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey, 408 U.S. at 481.

The Due Process Clause protects only those "fundamental rights and liberties" which are "'deeply rooted in this Nation's history and tradition,'" and "'implicit in the concept of ordered liberty,'" such that "'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997), citing Moore v. City of East Cleveland, Ohio,

431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). As noted, supra at pages 9, 14, and 15, criminal appeals are not deeply rooted in this nation's history or tradition or in our English common law background.

B. Requiring A Defendant To Have Legal Counsel On Appeal Improves The Reliability Of The Process And Minimizes The Risks Of An Erroneous Decision, Which Thereby Promotes The State's Interest In Ensuring The Correctness Of Its Trial Court Judgments

Denial of self-representation on appeal does not impair the fundamental fairness of the proceeding. Instead, it increases the reliability of the process and minimizes the risks of an erroneous decision by ensuring that the defendant's appeal will be presented by a qualified, strong advocate. Therefore, self-representation is not a requirement of due process. Disallowing self-representation on first appeal by criminal defendants promotes the state's interest and the individual's own interests in ensuring every convicted person is accorded full, fair, and effective appellate review.

The state has a compelling "interest in [e]nsuring an adequate appellate review of judgments which deprive individuals of their liberty." Blandino v. State, 112 Nev. 352, 914 P.2d 624, 627 (1996), cert. denied, Blandino v. Nevada, 519 U.S. 881 (1996); accord, U.S. v. Turnbull, 888 F.2d 636, 639-40, (9th Cir. 1989), cert. denied, Turnbull v. U.S., 498 U.S. 825 (1990).

Because a prisoner is not entitled to present oral argument, representation through counsel helps ensure adequate appellate review. In Price v. Johnston, 334 U.S. 266, 285 (1948), this Court held:

> [A] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. [Citation.] The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution [citation], and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.

Faretta itself acknowledged this distinction. While Faretta recognized a criminal defendant has a right to self-representation at trial under the Sixth Amendment, this Court specifically distinguished the right to conduct one's own defense at trial from other stages of the judicial process. The majority opinion in Faretta observed:

> [I]n [Price], the Court, in holding that a convicted person had no absolute right to argue his own appeal, said this holding was in "sharp contrast" to his "recognized privilege of conducting his own defense at the trial." [Citation.]

Faretta, 422 U.S. at 816.

Thus, Faretta did not limit Price but cited it with approval. Consequently, even after Faretta there is no right of a convicted incarcerated defendant to present oral argument on appeal.

Because a prisoner is effectively precluded from arguing his or her own appeal or even from being present at the proceedings in the appellate court (Price, 334 U.S. at 285), if a criminal appellant were to proceed in pro se,

the reviewing court would lose "the benefits of listening to his contentions, hearing only the arguments of government counsel." Price, 334 U.S. at 280. It is not a satisfactory answer to say that an unrepresented appellant simply may waive oral argument.

> [T]here are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument . . . ."

Id.

The lack of counsel has other ramifications. As many courts have observed, as a practical matter, it requires an attorney to present an appeal in a form suitable for appellate consideration on the merits. This is because in an appeal there are "intricate rules that to a layperson would be hopelessly forbidding." Evitts, 469 U.S. at 396. Documents filed by persons:

> [W]ho are untrained in the law are often incoherent and fail to identify the issues presented on appeal. Poorly drafted pleadings also require additional time to review and add to the already overwhelming workload of this court.

Blandino, 914 P.2d at 626.

Allowing self-representation would aggravate the burdens imposed by Anders, which already requires an appellate court to conduct a review of the entire record whenever

appointed counsel submits a brief which raises no specific issues. Anders, 386 U.S. at 745-46.

For these additional reasons, the due process right to a fair appeal would be hindered by establishing a right to self-representation on appeal.

C. California's Appellate System Ensures That Every Appeal Is Constitutionally Adequate By Requiring The Effective Assistance Of Counsel On Appeal

California has implemented proper safeguards to ensure the fairness of the appellate process through adequate appellate representation. These procedures fully satisfy the Due Process and Equal Protection Clauses. Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants of their appellate rights, including the right of an indigent defendant to have counsel appointed by the reviewing court, and the steps that must be taken to protect those rights. In the case of an indigent defendant, the trial attorney has a statutory duty to:

> [E]xecute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from . . . .

Cal. Penal Code § 1240.1(b).

To implement the right to counsel on appeal, the courts contract with either the California Appellate Project ("CAP") or Appellate Defenders, Inc. ("ADI"), which perform administrative functions in connection with the appointment of appellate counsel. Any appointed

counsel is required to consult with qualified staff attorneys employed by CAP and ADI. These staff attorneys consult and assist appointed counsel concerning the issues on appeal and review drafts of each appellant's opening briefs.

An appellate counsel appointed to represent a criminal defendant is required to act as a competent advocate. As stated in People v. Harris, 19 Cal. App. 4th 709, 713-14, 23 Cal. Rptr. 2d 586 (1993):

> A criminal defendant has a right not only to counsel on appeal [citation], but to competent counsel on appeal. [Citation.]

Some of the specific duties which appointed appellate counsel must fulfill to meet his or her obligations as a competent advocate include: the duty to ensure a proper record is prepared (People v. Acosta, 48 Cal. App. 4th 411, 426, 55 Cal. Rptr. 2d 675 (1996)); the duty to write a brief which discusses all of the material facts (Id. at 427); the duty to prepare a brief containing citations to the appellate record and appropriate authority, and setting forth all arguable issues; and the further duty not to argue the case against a client (People v. Barton, 21 Cal. 3d 513, 519, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978)). Additionally, appellate counsel serves both the court and the client by advocating changes in the law if argument can be made supporting change.

Thus, California has endeavored to secure full and fair appellate review of criminal convictions through competent appellate representation.

D. The Administrative Burden On The Criminal Justice System Of Allowing Pro Se Defendants Would Be Significant And Contrary To The Principles Of Due Process

The administrative burden that self-representation would entail is a relevant consideration in determining whether due process requires pro se criminal defendants on direct appeal. Zinermon, 494 U.S. at 127; Gilbert, 520 U.S. at 931.

In defining the process necessary to ensure "'fundamental fairness,'" this Court has recognized that the Due Process Clause does not require that the procedures used are "'so comprehensive as to preclude any possibility of error,'" and that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985).

As was discussed earlier, supra at pages 10 through 12, the burdens to the criminal justice system of allowing pro se criminal defendants on appeal would be significant. The poorly drafted pleadings, the failure to identify issues on appeal, and the failure to know or understand the intricate appellate rules would all have major negative impacts on the state criminal justice systems.

This Court has repeatedly recognized the heavy toll that habeas corpus cases, the vast majority of which are pursued by in pro se convicts, take upon the judicial system. "Federal habeas litigation also places a heavy burden on scarce judicial resources . . ." Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992); McCleskey v. Zant, 499 U.S. 467, 491-92 (1991). Expanding the right of self-representation to state direct appeals would impose such heavy burdens on each and every state court judicial

system with no concomitant increase in the reliability of the results.

It is often said that when a convicted defendant decides to proceed in pro se, "'he is entitled to the same, but no greater, consideration than other litigants and attorneys.'" Bistawros v. Greenberg, 189 Cal. App. 3d 189, 193, 234 Cal. Rptr. 377 (1987). However, State v. Seifert, 423 N.W.2d 368, 378 (Minn. 1988) (Wahl, J., dissenting) [footnote omitted], pinpoints the dilemma:

> While we can say that it is the inmate's problem that he finds himself without adequate resources to research and write an effective brief, the true result more likely will be that when an appellate judge reads an incomprehensible *pro se* brief, that judge will be forced, out of conscience, to wear two hats--that of judge and that of advocate--in order to assure the integrity of our reviewing function. This will also be true of our law clerks doing research and preparing bench memos, when issues and cases have not been adequately briefed. Do we have the resources to do this and is it appropriate for us to do so?

Respondent submits that the answer is no. Appellate courts have the "inherent power . . . to develop rules of procedure aimed at facilitating the administration of criminal justice." Joe Z. v. Superior Court, 3 Cal. 3d 797, 801-02, 478 P.2d 26, 91 Cal. Rptr. 594 (1970). Allowing self-representation by criminal defendants on appeal who have access to competent appellate counsel would not represent a wise use of scarce judicial resources, which is a perennial concern of the courts. See, In re Sindram, 498 U.S. 177, 179-80 (1991). As this Court concluded in Sindram, pro se litigants can quickly deplete a court's limited resources:

> The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources . . .

Sindram, 498 U.S. at 179-80.

In addition to the general problems mentioned above, there are a myriad of other negative impacts that this Court will immediately face if it accepts Petitioner's argument. If this Court requires states to allow self-representation in direct appeals, then this Court will have to revisit its numerous cases holding that a state is not required to provide access to a law library or access to legal materials to prison inmates. Lewis v. Casey, 518 U.S. 343, 351-52 (1996); Bounds v. Smith, 430 U.S. 817, 828 (1977); see also, Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Conner, J., concurring) ["[b]eyond the requirements of Bounds, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources"].

Petitioner never mentions the impact of the distinct disadvantage that a criminal defendant will be under when alone faced with "intricate rules that to a layperson would be hopelessly forbidding." Evitts, 469 U.S. at 396.

The next major problem immediately facing the lower appellate courts will be the proper way to determine who is competent to waive the right to appeal. This Court has held that a waiver of the right to have trial counsel must be an "'intelligent and competent waiver.'" Godinez v. Moran, 509 U.S. 389, 396, 401 (1993). In a trial court the judge can personally question the defendant and observe his or her demeanor, voice, tone, and facial

expressions as well as the content of the answers to questions in determining that the person is legally capable of making such a determination. Appellate courts, often located hundreds of miles from the penal institutions, can make no such personal observations of competency. Relying on the written word alone offers no assurances that the signer properly understood the document, or that the person who signed the document is actually the appellant in that particular case. What written procedure can take the part of an in-person waiver of rights? Will the appellate court be forced to conduct hearings with the defendant present in order to make a sufficient inquiry? If so, the morass will be staggering.

Moreover, if, as Petitioner claims, critical trial rights apply to direct appeals, what becomes of the right to be present for the proceedings? Often the sole public event in a direct appeal is the oral argument. If a petitioner has the right to proceed in pro se, then this Court will have to totally re-evaluate its holdings in Price and its progeny that prisoners have no right to appear at oral argument in their direct appeals.

Equally difficult problems will occur in the area of death penalty litigation, where the issues confronting the courts are inherently complex and intricate. Even with counsel, the litigation drags on for years. If a death row inmate had the right to proceed in pro se and opted for that right, the litigation would undoubtedly be even more involved and more delayed. In such cases, the state has an indisputable interest in the prompt and proper outcome of the appeal which the appellant should not be allowed to unilaterally thwart.

Petitioner's claim that the right to self-representation is "conceptually necessary" in the framework of this Court's decisions, is not supported by those cases or by logic. Petitioner quotes from several cases involving collateral attacks on convictions and tries to show that this Court has contrasted trials and direct

appeals with collateral attacks on judgments and in doing so has held that the trial rights and the direct appeal rights must be co-extensive. In large measure, Petitioner relies upon dictum in Ross that contrasted trials and first appeals with habeas and other collateral attacks. While there is such language in the Court's decision, it does not make the giant constitutional leap Petitioner contends by finding that the two stages contain the same constitutional rights. Indeed, Petitioner conveniently overlooks the fact that this Court specifically stated that, "The fact than an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." Ross, 417 U.S. at 611. If Petitioner's analysis of this Court's decisions were correct, this principle would not be true. This quote shows that this Court has not considered appeal rights as co-extensive with trial self-representation rights as Petitioner repeatedly claims.

In sum, the numerous administrative burdens presented by self-representation on appeal further support the conclusion the due process right to a fair appeal would be hindered by establishing a right to self-representation on appeal.

E. Requiring An Attorney For Any Direct Criminal Appeal Does Not Violate Due Process

Because due process is a flexible concept that varies with the particular situation, to determine what procedural protections the Constitution requires in a particular case, a court:

> [W]eigh[s] several factors: [¶] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [Citation.]

Zinermon, 494 U.S. at 127; accord, Gilbert, 520 U.S. at 930.

Petitioner's private interest is his desire to represent himself on appeal. The risk of an erroneous deprivation of that interest is minute and tolerable because, as discussed above, California has implemented an elaborate mechanism to ensure competent legal representation of its criminal appellants. People v. Scott, 64 Cal. App. 4th 550, 561, 75 Cal. Rptr. 2d 315 (1998). Any diminution of Petitioner's possible activities is more than offset by the increased reliability of the appellate process in his case.

The probable value of the procedure sought by Petitioner is slight. As discussed above, laypersons generally are ill-equipped to prosecute a criminal appeal. Also, as a prisoner, Petitioner would be precluded from presenting oral argument. Thus, he is seeking a procedure that will simply put him at a disadvantage to the state and lessen his chances of having a full and vigorously argued appeal. The core right recognized in Faretta was a charged defendant's personal dignity interest in being able to stand before a jury of his peers and conduct his own defense. Faretta, 422 U.S. at 835. An appeal is purely a judicial review, based in law and the record, without the human dynamics of a jury trial that Faretta relied upon.

Finally, the administrative burden of self-representation would hinder the efficient functioning

of the appellate court, squander scarce judicial resources, and decrease the chances of a just and proper result.

Thus, Petitioner's interest in self-representation is outweighed by other considerations, including California's interest in ensuring adequate appellate review. The denial of self-representation does not impair the fundamental fairness of the appellate process, it enhances it. Consequently, Petitioner's contention he has a due process right to self-representation should be rejected by this Court.

F. Since All Criminal Appellants In California Are Treated Equally, No Equal Protection Problem Exists

The Equal Protection Clause of the Fourteenth Amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

As a general rule, states "are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. See, e.g., Cleburne v. Cleburne Living Center,

Inc., 473 U.S. 432, 439-41 (1985); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

In dealing with challenges to a state's regulation of the right of appeal in criminal cases, this Court applies the traditional rational-basis test. Dorrough, 420 U.S. at 538; Rinaldi, 384 U.S. at 309. Under the rational basis test:

> If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold [it] so long as it bears a rational relation to some legitimate end."

Vacco, 521 U.S. at 793, 799, citing Romer v. Evans, 517 U.S. 620 (1996).

> [A] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," [Citation] [¶] . . . A statute is presumed constitutional [citation], and "[t]he burden is on the one attacking the legislative arrangement to [negate] every conceivable basis which might support it," [citation], . . . whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320 (1993).

"Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." Vacco, 521 U.S. at 800; New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88 (1979). A classification not involving fundamental rights nor proceeding along suspect lines is accorded a "strong presumption of validity." Heller, 509 U.S. at 319.

California's denial of self-representation on appeal applies evenly to all criminal defendants, In re Walker, 56 Cal. App. 3d 225, 227-28, 128 Cal. Rptr. 291 (1976), and thus the denial unquestionably complies with the Equal Protection Clause.

Even if the classes are viewed differently, as those criminal defendants who are allowed to proceed in pro se at trial versus those criminal defendants on appeal who cannot proceed in pro se, there is still no equal protection problem. It is well-settled that at trial, unlike an appeal, the state's desire is to transform a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. In order to accomplish this purpose, the prosecuting attorney presents evidence and witnesses, cross-examines, contradicts and challenges defense witnesses, challenges and argues rulings of the court, and directs arguments to both the court and jury in order to convince them of the defendant's guilt.

In contrast, it is generally the criminal defendant, rather than the state, who initiates the appellate process, seeking to overturn the guilty verdict, rather than fending off the efforts of the state's prosecutor. The defendant seeks to overturn the presumption of regularity that attaches to the conviction. The criminal defendant under these circumstances needs an appellate attorney not, as he does at trial, to shield him from being "'haled into court'" by the state and stripped of his presumption of innocence, but instead as a "sword" to upset the prior determination of guilt. Ross, 417 U.S. at 611.

> This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

Id.

Petitioner totally ignores these critical differences and simply equates trials with appeals.

But even assuming arguendo that somehow the two groups were similarly situated, there is a rational basis for not extending the right of self-representation to criminal defendants on direct appeal. Under the Sixth Amendment, numerous personal constitutional rights attach to a defendant. It is the:

> [A]ccused, 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."

Faretta, 422 U.S. at 819.

The accused also is entitled "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Id. at 819 n.15. Further, a criminal defendant has a fundamental constitutional right at trial to present testimony on his or her own behalf. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987).

In contrast, while the trial is essentially a factfinding process, wherein the personal actions of the defendant could impact the outcome, an appeal is essentially a legal process in which counsel assembles facts from the existing record, correlates them with the case law and attempts to establish reversible error. The presumption of innocence is gone. Moreover, where a criminal appellant proceeds in pro se, at oral argument the reviewing court loses "the benefits of listening to his contentions, hearing only the arguments of government counsel." Price, 334 U.S. at 280. Therefore, self-representation on appeal would undermine the state's profound interest in ensuring adequate review of criminal convictions. Blandino, 914 P.2d at 627.

Petitioner has failed to show that the lack of personal input of the defendant on appeal will have any impact at all. The potential role of the convicted defendant, and his or her interest, is greatly reduced compared to trial. Thus, there is no equal protection basis on which to require the states to surrender their carefully developed procedures and follow a new constitutional requirement to allow convicted defendants to proceed pro se on appeal.

In sum, there is simply no good reason to alter years of fundamental understanding about the relationship of the state and federal judicial processes by imposing upon the states a constitutional requirement that they afford a convicted criminal defendant the right to elect self-representation on appeal.

IV.

OTHER JURISDICTIONS THAT HAVE CAREFULLY CONSIDERED THIS ISSUE HAVE CONCLUDED THAT THERE IS NO CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION ON APPEAL

A review of the decisions in other jurisdictions, both state and federal, shows that those courts that have carefully considered the issue have declined to extend Faretta into the appellate realm. Those courts that have extended it, have done so with little or no discussion of the issue raised in this case or have done so by contradicting cases from this Court.

The Supreme Court of Nevada examined the issue and concluded that the Sixth Amendment applied only to trials and does not carry over and require self-representation on appeal. Blandino, 914 P.2d at 625-26. The court carefully detailed that it could not complete its task of ensuring the fairness of criminal appeals if it were faced with only a pro se appellant who filed incoherent documents that failed to identify the issues on appeal. Id.

The Court of Criminal Appeals for Tennessee made a similar analysis concluding that the matter was controlled not by the Sixth Amendment but by due process and equal protection grounds. Tennessee v. Gillespie, 898 S.W.2d 738, 741 (1994).

The Florida Supreme Court determined that Faretta did not apply to appeals. The court cited with approval the already quoted portion of the decision in Price, holding that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings. Hill v. Florida, 656 So. 2d 1271, 1272 (1995).

The Court of Special Appeals for Maryland also relied upon Price to conclude that there was no right to self-representation on appeal. The court noted that the

rights at trial were in sharp contrast to those on appeal. Callahan v. State, 30 Md. App. 628, 354 A.2d 191 (1976).

In the federal arena, both the Fourth and Seventh Circuits have recognized that there is no constitutional right to proceed in pro se on appeal. The Seventh Circuit in Lumbert rejected the claim that Faretta stands for the proposition that the Sixth Amendment applies to post-conviction appeals and guarantees a right of self-representation. The court noted the "significant differences between the trial and appellate stages of a criminal proceeding." Lumbert, 735 F.2d at 245. It noted that in Douglas this Court stated:

> [W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Id., citing Douglas, 372 U.S. at 357.

In United States v. Gillis, 773 F.2d 549, 559-60 (4th Cir. 1985), the court held that there was no constitutional right to proceed in pro se in a state post conviction appeal. The court recognized that the right to counsel and the right to self-representation stand on different ground. Unlike the right to trial, which is also guaranteed by the Sixth Amendment, there is no constitutional right to an appeal. Since appeals are statutory creations, the Due Process and Equal Protection Clauses apply. The implicit rights found by this Court in the Sixth Amendment concerning self-representation do not carry over to the appeal. Id. at 559-60.

Several state and federal courts have concluded that there is a constitutional right to proceed in pro se on appeal. But all of them do so with little or no analysis. They simply assume that Faretta applies to appeals or they equate appeals with trials and fail to perceive any

meaningful distinction between the right to represent oneself at trial with the right to represent oneself on appeal.

For example, the Indiana Supreme Court and the Michigan Court of Appeals concluded without analysis that there was no meaningful distinction between a trial and appeal that would prevent the application of Faretta. Webb v. State, 274 Ind. 540, 412 N.E.2d 790, 992 (1980); People v. Stephens, 71 Mich. App. 33, 246 N.W.2d 429, 432 (1976). The Pennsylvania and Arkansas Supreme Courts simply assumed that Faretta applied to appeals. Commonwealth v. Rogers, 537 Pa. 581, 645 A.2d 223, 224 (1994); State v. Van Pelt, 305 Ark. 125, 810 S.W.2d 27, 28 (1991).

In the federal area, the Ninth Circuit also assumed without discussion or analysis that Faretta applies to appeals. Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991), mandamus denied, In re Blodgett, 502 U.S. 236 (1992).

In Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), cert. denied, 470 U.S. 1008 (1985), the federal court took a different tact in concluding that Faretta applied to post conviction appeals. The court stated it did not have to reach the defendant's constitutional claims. However, the court did recognize that "it is not settled whether the right to self-representation under Faretta extends to a defendant's appeal from a conviction." The court went on to note that, "This court and other courts have also expressly or implicitly recognized a difference between the right [of self-representation] at trial and on appeal." But the court went on to conclude that the right must apply to appeals because a court cannot force counsel upon a defendant. Id. at 630.

The problem with such an analysis is that it misconstrues the holdings of this Court. The argument stems from a passage in Adams v. United States ex. rel.

McCann, 317 U.S. 269, 279 (1942). In that case, when this Court stated that, "the Constitution does not force a lawyer upon a defendant," it was clear it was discussing the rights of a defendant at trial since the very next sentence states that the defendant can waive his right to counsel and represent himself. "He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." McCann, 317 U.S. at 279. The comments were made in the context of a trial. This selective use of the quote from McCann distorts this Court's holding in that case.

Moreover, no counsel is being forced onto a defendant in an appeal. The trial is initiated by the state and it will be held, normally against the wishes of the defendant. Under those circumstances, appointing defense counsel does force a lawyer onto a criminal defendant because the trial will inevitably occur as a result of the state's action. The lawyer will have to represent the defendant in that circumstance. But the same is not true for appeals. In non-death-penalty situations, the appeal occurs only if the defendant asks for one. Under such circumstances, if he or she seeks such a review, the defendant must accept the requirements that go with such an appeal, such as the time limits, the length of briefs, and the use of a lawyer. No lawyer is appointed except in response to the request for an appeal. Since the entire appeal is initiated by the request of the defendant, instead of by the filing of charges by the state, counsel is not being forced upon an appellant.

Chamberlain is also flawed in that while it acknowledges the conclusion in Price that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court, it reaches the opposite conclusion. Chamberlain, 744 F.2d at 630. As such, the decision in Chamberlain is faulty and of no precedential value in deciding the matter at issue in this case.

Therefore, all of the cases that have carefully examined this issue have concluded that there is no constitutional right to self-representation. The cases that do not reach this conclusion do so by faulty logic or no analysis at all. As such, they are not persuasive and should not be followed.

This Court should recognize that each state has the right to devise its own appellate court system. So long as a state's system meets due process and equal protection requirements, it should not be intruded upon by the federal courts. The Federal Constitution was designed to allow each of the states flexibility to devise their own systems of jurisprudence. The founding fathers did not envision a system where the states would be required to follow a narrow federal blueprint for their appellate systems. This Court should not force each of the states to follow one particular mold designed by the federal government.

CONCLUSION

Accordingly, Respondent respectfully asks that the ruling of the California Supreme Court be affirmed.

Dated: September 8, 1999.

Respectfully submitted,

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