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Defense Pro Se

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DEFENSE PRO SE

MAURICE M. GARCIA*

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I. INTRODUCTION

In recent years both our federal and state courts have placed increased importance upon the right of an individual in a criminal action to be represented by counsel. Decisions such as *Gideon v. Wainwright*,¹ however, should not result in an overlooking of the fact that attendant to the privilege of having counsel is the correlative right to appear *in propria persona*—to proceed pro se.² In fact, our Federal Constitution and the constitutions of 37 states confer upon an individual the right to be heard by counsel or by himself, or both;³ or the right to appear and defend in person or by counsel, or both;⁴ or the right to have the assistance of counsel.⁵

The question of why people wish to represent themselves is not easily resolved. Some have suggested that innocent individuals accused of a crime have such blind faith in their own innocence and the infallibility of justice that they entertain the belief that they will be acquitted no mat-

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1. 372 U.S. 335 (1963). The Court held that the sixth amendment to the Federal Constitution providing for the right of an accused to be represented by counsel was binding upon the states through the fourteenth amendment, and that an indigent defendant in a criminal prosecution is entitled to have counsel appointed for him.

2. See note 18 *infra*. For purposes of this Comment the terms "pro se" and "*in propria persona*" will be used interchangeably.

3. ALA. CONST. art. I, § 6; ARK. CONST. art. II, § 10; CONN. CONST. art. I, § 9; DEL. CONST. art. I, § 7; FLA. CONST. DECL. OF RIGHTS § 11; IND. CONST. art. I, § 13; KY. BILL OF RIGHTS § 11; MASS. CONST. pt. I, art. XII; ME. CONST. art. 1, § 6; MISS. CONST. art. III, § 26; N.H. BILL OF RIGHTS art. XV; OKLA. CONST. art. II, § 20; ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.C. CONST. art. I, § 18; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; WIS. CONST. art. I, § 7.

4. ARIZ. CONST. art. II, § 24; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 16; IDAHO CONST. art. I, § 13; ILL. CONST. art. II, § 9; KAN. BILL OF RIGHTS § 10; MO. CONST. art. II, § 22; MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 18; N.D. CONST. art. I, § 13; N.M. CONST. art. II, § 14; N.Y. BILL OF RIGHTS art. I, § 6; OHIO CONST. art. I, § 10; S.D. CONST. art. VI, § 7; UTAH CONST. art. I, § 12; WASH. CONST. art. I, § 22; WYO. CONST. art. I, § 10.

5. IOWA CONST. art. I, § 10; LA. CONST. art. I, § 9; MICH. CONST. art. I, § 9; MINN. CONST. art. I, § 6; N.J. CONST. art. I, § 10; R.I. CONST. art. I, § 10; W. VA. CONST. art. III, § 14.

ter what.⁶ Many individuals, in addition, apparently feel that a self-inflicted burden of defending themselves will invoke the sympathy of the court or jury.⁷ Moreover, there are those who have become so involved with television's criminal defense series syndrome that they in fact feel capable of handling their own defense.

To many of those who are skilled in the law it appears obvious that a defense pro se is equivalent to having one conduct his own surgery. And, strangely enough, in many cases those persons desiring to represent themselves are both legally and generally ignorant. Yet such individuals, so long as they are sui juris, mentally competent,⁸ and aware of the dangers involved⁹ are legally entitled to venture into the realm of criminal

6. Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964).

7. *Commonwealth v. Helwig*, 184 Pa. Super. 370, 378, 134 A.2d 694, 698 (1957). Here the defendant attempted to accomplish the same end through the use of alternative means:

[w]hile pretending to seek sympathy from the court because of his self-inflicted burden of defending himself, the knowledge he disclosed of the law with regard to the introduction of distinct crimes suggests that he shrewdly hoped to use this protection of the accused as a means of obtaining a reversal in the event the verdict went against him.

8. *Price v. Johnston*, 334 U.S. 266 (1948) where the court speaks of an individual's recognized privilege of conducting his own defense at trial; *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959); *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958); *United States v. Private Brands, Inc.*, 250 F.2d 554 (2d Cir. 1957); *United States v. Cantor*, 217 F.2d 536 (2d Cir. 1954); *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950); *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1949); *Mayes v. United States*, 177 F.2d 505 (8th Cir. 1949); *Mackreth v. Wilson*, 31 Ala. App. 191, 15 So.2d 112 (1943); *State v. Van Bogart*, 85 Ariz. 63, 331 P.2d 597 (1958); *State v. Aldrich*, 75 Ariz. 53, 251 P.2d 653 (1952); *Phillips v. State*, 162 Ark. 541, 258 S.W. 403 (1924); *People v. Zucker*, 177 Cal. App. 2d 172, 2 Cal. Rptr. 112 (1960); *People v. Duncan*, 175 Cal. App. 2d 372, 346 P.2d 521 (1959); *People v. Williams*, 174 Cal. App. 2d 364, 345 P.2d 47 (1959); *People v. O'Ward*, 168 Cal. App. 2d 127, 335 P.2d 762 (1959); *People v. Pearson*, 150 Cal. App. 2d 811, 311 P.2d 142 (1957); *People v. Lamb*, 133 Cal. App. 2d 179, 283 P.2d 727 (1955); *People v. Wilson*, 46 Cal. App. 2d 218, 115 P.2d 598 (1941); *Capetta v. State*, 204 So.2d 913 (Fla. 1967); *Cash v. Culver*, 120 So.2d 590 (Fla. 1960); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Duncan v. State*, 71 Ga. App. 841, 32 S.E.2d 435 (1944); *People v. Richardson*, 17 Ill. 2d 253, 161 N.E.2d 268 (1959); *People v. Burson*, 11 Ill. 2d 360, 143 N.E.2d 329 (1957); *People v. De Simone*, 9 Ill. 2d 522, 138 N.E.2d 556 (1956); *Blanton v. State*, 229 Ind. 701, 98 N.E.2d 186 (1951); *Ex Parte Smith*, 145 Me. 174, 74 A.2d 225 (1950); *Allen v. Commonwealth*, 324 Mass. 558, 87 N.E.2d 192 (1949); *People v. Haddad*, 306 Mich. 556, 11 N.W.2d 240 (1943); *State ex rel Butler v. Swenson*, 243 Minn. 24, 66 N.W.2d 1 (1954); *State v. Velanti*, 331 S.W.2d 542 (Mo. 1960); *State v. Warren*, 321 S.W.2d 705 (Mo. 1959); *Zasada v. State*, 19 N.J. Super. 589, 89 A.2d 45 (1952); *People v. Cunningham*, 2 Misc. 2d 162, 134 N.Y.S.2d 212 (1954); *People v. Murphy*, 202 Misc. 332, 117 N.Y.S.2d 893 (1951); *People v. Shapiro*, 188 Misc. 363, 67 N.Y.S.2d 774 (1947); *State v. Pritchard*, 227 N.C. 168, 41 S.E.2d 287 (1947); *Lee v. Kindelan*, 80 R.I. 212, 95 A.2d 51 (1953); *State v. Holloman*, 232 S.C. 489, 102 S.E.2d 873 (1958); *State v. Owens*, 124 S.C. 220, 117 S.E. 536 (1923); *State v. Thomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960); *State v. Penderville*, 2 Utah 281, 272 P.2d 195 (1954).

9. It is generally agreed that the defendant must be aware of the problems associated with a choice to proceed pro se. Though the expression of that position varies, it can be safely said that the general rules of waiver govern. Consequently, a defendant may waive his constitutional right if he knows what he is doing and his choice is made with eyes open. See *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964) (defendant must know what he is doing); *People v. Kemp*, 55 Cal. 2d 458, 359 P.2d 913, 11 Cal. Rptr. 361 (1961). See also *Kamisar, The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1146 (1965), where the author discusses the

trial work without demonstrating an ability to handle the problems attendant to that endeavor.¹⁰

Obviously, the right to proceed pro se, like other areas of constitutional and statutory inquiry, is plagued by a myriad of problems. Rather than present a broad general survey of the right to proceed pro se, an approach adopted by others,¹¹ it will be the purpose of this Comment to present a brief analysis of the background of this right and then to suggest restrictions on the exercise of this right and the development and use of advisory counsel, two areas in which our courts have by and large failed to adopt a meaningful and effective judicial attitude.

II. COMMENTS ON THE NATURE OF THE RIGHT

The right of an accused in a criminal action to conduct his own defense is a constitutionally conferred right¹² additionally supported by both federal statute¹³ and state constitutions.¹⁴ Our Federal Constitution, however, unlike the constitutions of many states, does not *expressly* provide for the right to defend pro se. In the leading case of *United States v. Plattner*¹⁵ the court stated that the right to appear *in propria persona* was one *arising out of* the constitution—in fact, one *implicit* in both the fifth and sixth amendments.¹⁶

The *Plattner* decision operated to define more precisely the nature of the right.¹⁷ It has not, however, been free from attack. Professor

problem of an intelligent waiver by a defendant incapable of conducting his own defense; note 28 *infra* and accompanying text.

10. See note 33 *infra*. In this regard it should be noted that we are involved with a two-step inquiry. First, is the defendant aware of what his waiver entails? If so, can he adequately conduct his own defense? See, e.g., *State v. Kolocotronis*, 436 P.2d 774, 781 (Wash. 1968).

11. See Kamisar, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965); Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964).

12. This article will cover both state and federal jurisdiction. Problems surrounding the *quality* of the right are only raised when the issue is couched in terms of a federally granted constitutional right. See notes 15-17 *infra*.

13. FED. R. CRIM. P. 44(a) which provided:

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Though the rule has been rephrased and amended Moore is still of the opinion that under the new rule the defendant may still proceed without counsel. See 8 J. MOORE, FEDERAL PRACTICE ¶ 44.02 (2d. ed. 1953); See also the JUDICIAL CODE, 28 U.S.C. § 1654 (1964 ed.).

14. See cases cited note 8 *supra*.

15. 330 F.2d 271 (2d Cir. 1964).

16. [W]e hold the right to act pro se . . . is a right arising out of the Federal Constitution and not the mere product of legislature or judicial decision

Under the Fifth Amendment, no person may be deprived of liberty without due process of law. Minimum requirements of due process in federal criminal trials are set forth in the Sixth Amendment Implicit in both amendments is the right of the accused personally to manage and conduct his own defense in a criminal case.

Id. at 273-74.

17. In *Price v. Johnston*, 334 U.S. 266 (1948), the Court spoke only of the defendant's *recognized privilege* of conducting his own defense. Unlike *Plattner* the *Johnston* Court did not attempt to place a label upon the right.

Kamisar has suggested that a right correlative to a constitutional right—as the implied constitutional right to proceed *pro se* is related to the sixth amendment right to counsel—need not, as *Plattner* suggests, be a constitutional right.¹⁸ Nonetheless, though the right may lack foundation in the constitution, it is still the choice of a citizen in a free society.¹⁹ The question, perhaps, should be considered moot since the right to proceed *pro se* is one long recognized in our system of jurisprudence.²⁰ Yet, it is obvious that the individual desiring to represent himself would best be able to defend his choice when relying upon a constitutional right as opposed to a right described as merely “long recognized.” Therein lies the value of the *Plattner* decision.

The origin of the right to defend *pro se* relates back to the Judiciary Act of 1789. Section 35 of the original act, signed into law one day prior to the proposal of the sixth amendment, provided that in all courts of the United States the parties may plead and manage their own causes personally.²¹ Significantly, belief that individuals might not be able to adequately conduct their own defenses produced the subsequent constitutional guarantee of the right to counsel. That right, expressed in the sixth amendment, was intended to supplement the primary right of an individual, indigent or otherwise, to defend his own case.²²

Obviously, any discussion of the right to proceed *pro se* must necessarily involve mention of the right to counsel, the two being so closely related. Both are more than legal formalisms as “[t]hey rest upon considerations that go to the substance of an accused’s position before the law.”²³ The relationship between the two was described in *Plattner*:

The right to counsel and the right to defend *pro se* in criminal cases form a single, inseparable bundle of rights, two faces of

18. Kamisar, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1136 (1965) where the author stated:

Although it is quite plain that the federal statute and many state constitutions confer the right to proceed alone, it is far from clear that the federal constitution extends such a right. It certainly does not do so explicitly. Reliance upon . . . reference . . . to [a] “correlative right” . . . may be unwarranted, for clearly a right correlative to a constitutional right need not itself be constitutional.

19. *Id.* at 1152-1153 where the author states:

Although the “right” to proceed without counsel is subject to recognized qualifications and may lack foundation in the federal constitution, the free choice of a competent individual is entitled to great deference in our society.

See also *Adams v. United States ex rel McCann*, 317 U.S. 269, 280 (1942) (court speaks of the defendant making a free choice as a self-determining individual).

20. See *Price v. Johnston*, 334 U.S. 266 (1948) (court speaks only of a recognized right).

21. Act of 1789, 1 Stat. 73; see also the JUDICIAL CODE, 28 U.S.C. § 1654 (1964 ed.), which parallels FED. R. CRIM. P. 44(a).

22. In *Plattner v. United States*, 330 F.2d 271, 274 (2d Cir. 1964) the court stated that the right to counsel, a constitutional safeguard, was “surely not intended to limit in any way the absolute and primary right to conduct one’s own defense in *propria persona*.” In addition the court observed that the denial of *Plattner*’s right to proceed *pro se* stemmed from the automatic assignment of counsel to his case.

23. *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1942). In addition, the Court stated that “essential fairness is lacking if an accused cannot put his case effectively in court. But the constitution does not force a lawyer upon a defendant.” *Id.*

the same coin. . . . [T]he choice between the two [is] sometimes discussed in terms of a waiver of the right to counsel, and sometimes in terms of an election to have a lawyer or defend *pro se*.²⁴

Moreover, it has been suggested that the right of an individual to conduct his own defense is one of the most elementary prerequisites of a fair trial.²⁵

Proper procedure in this area now dictates that the court must instruct the defendant that a choice is to be made between representation by counsel and a defense *pro se*, placing the court in the unique position of being forced to navigate between the "Scylla of denying a defendant the right to determine his own fate and the Charybdis of violating his right to counsel by acceptance of an ineffectual waiver"²⁶ If a defendant indicates a desire to proceed *pro se* it then becomes incumbent upon the court to make inquiries necessary to assure that the individual is capable of making an intelligent choice.²⁷ A waiver of counsel and a subsequent election to proceed *pro se* can be accepted only upon a conclusive finding that the defendant "understands the nature of the charge,

24. Plattner v. United States, 330 F.2d 271, 276 (2d Cir. 1964).

25. United States *ex rel* Maldonado v. Denno, 239 F. Supp. 851, 854 (S.D.N.Y. 1965); Capetta v. State, 204 So.2d 913, 916 (Fla. 4th Dist. 1967); see Adams v. United States *ex rel* McCann, 317 U.S. 269 (1942).

26. People v. Carter, 66 Cal. 2d 666, 668, 427 P.2d 214, 216, 58 Cal. Rptr. 614, 616 (1967); Plattner v. United States, 330 F.2d 271 (2d Cir. 1964) (court must inform defendant that a choice is to be made between representation by counsel and defense *pro se* and that it is advisable to have an attorney).

27. In Plattner v. U.S., 330 F.2d 271, 276 (2d Cir. 1964) the court set forth rules governing the proper procedure for trial courts confronted with defendants asserting the right to proceed *pro se*. The court stated:

If the result is a waiver of the right to counsel and an election to defend *pro se*, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. In other words, there must be a record sufficient to establish our satisfaction that the defendant knows what he is doing and his choice is made with eyes open.

Consider the following colloquy among the court, the defendant, and the district attorney as reported in People v. Carter, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967):

District Attorney: Mr. Carter, what is your age, sir?

Answer: Thirty.

District Attorney: And what schooling have you had?

Answer: High school graduate.

District Attorney: . . . Have you had any college courses of any kind?

Answer: No.

District Attorney: Do you feel that you are capable of representing yourself?

Answer: Yes, I do if I am granted the use of the law library.

District Attorney: What crimes are you charged with?

Answer: Robbery and Kidnapping, Grand Theft.

District Attorney: You understand what the crime of Robbery is? You understand what the crime of kidnapping is; is that correct?

Answer: Yes, I do.

District Attorney: I have no other questions. If the court feels he is capable—

Court: Very well: *He is capable of defending himself.* (emphasis added).

It is suggested that the court above failed to conduct any real inquiry into the defendant's capacity to represent himself. Moreover, it is suggested that even if the defendant had been permitted to use the facilities of a law library, the denial of which formed the base

the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted."²⁸

The questions propounded by the court will be quite useful as well as necessary. Primarily they will serve to determine whether the defendant is capable of conducting his own defense and whether the waiver of counsel was a knowing, competent and intelligent one.²⁹ In addition, the court will place the defendant on notice that the action contemplated contains pitfalls and constitutes a journey into an area where even skilled counsel often fear to tread.

In this regard it is interesting to note that the trial court is not obligated to impart a legal education to the defendant seeking to defend in person.³⁰ Though the court is under an obligation to explain to a defendant the difficulties which he may encounter, it is not obligated to demand that he demonstrate or possess either the learning or acumen of an attorney.³¹ However, it is recognized that more than a superficial inquiry into a defendant's competence to represent himself is required.³² In a recent decision, *People v. Addison*,³³ one court suggested that

upon which reversal was predicated, his competence to conduct his own defense would have still remained questionable and might itself have constituted grounds for reversal.

It should be remembered that the guarantee of the right to counsel is considered fundamental to the concepts of a fair trial and due process of the law. Clearly, the acceptance of an ineffectual waiver constitutes a denial of due process. However, the real question to be considered is whether or not a defendant can *in fact* safeguard his own interests so as to preclude the possibility of an unfair trial and the consequent denial of due process.

28. *Ex parte James*, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952), *see also* *In re Fresquez*, 67 Cal. 2d 626, 432 P.2d 959, 63 Cal. Rptr. 271 (1967); *People v. Carter*, 66 Cal. 2d 666, 668, 427 P.2d 214, 216, 58 Cal. Rptr. 614, 616 (1967) (the defendant must have an intelligent conception of the consequences of his act); *People v. Kemp*, 55 Cal. 2d 458, 359 P.2d 913, 11 Cal. Rptr. 361 (1961) (court refused to relieve counsel for the defense notwithstanding the fact that the defendant understood the nature of the charges against him); *People v. Williams*, 174 Cal. App. 2d 364, 345 P.2d 47 (1959) (court, on appeal, concluded that the defendant had in fact waived his right to counsel and was competent to conduct his own defense, given that throughout the trial, he objected to proffered testimony, cross-examined prosecution witnesses with marked intelligence, and succeeded in eliciting valuable testimony at various points in the trial); *People v. Chesser*, 29 Cal. 2d 815, 178 P.2d 761 (1947) (court required that the defendant understand what he was doing).

Given that the majority position, a wise position, is expressed in *James*, it does not necessarily follow that the defendant who understands the nature of the charge, the elements of the offense, and the pleas and defenses which may be available is capable of conducting his own defense. Moreover, it should be remembered that the defendant is a partisan, not an advocate, and consequently he may be unable to approach his own defense objectively.

29. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (a valid waiver indicates an intentional relinquishment of a right).

30. *People v. Terry*, 224 Cal. App. 2d 415, 36 Cal. Rptr. 722 (1964).

31. *Id.* at 724; *People v. Carter*, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967) (a defendant need not possess the knowledge and understanding of an attorney); *People v. Linden*, 52 Cal. 2d 1, 338 P.2d 397 (1959).

32. *People v. Carter*, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614, 620 (1967);

[I]t is the very discrepancy between the legal skills of the laymen and those of the licensed practitioner which fosters our deep concern to protect the right to the assistance of counsel against hasty and improvident waiver. . . . [I]n reviewing a trial judge's determination of a defendant's competence to represent himself, we will not accept a mere superficial inquiry.

33. 256 Cal. App. 2d 32, 63 Cal. Rptr. 626, 629 (1967). "If the defendant wants to

ignorance of the law could not be used as a basis for claiming an ineffectual waiver so long as the defendant was aware of the *problems* associated with his choice.

Criticism of the right to proceed *pro se* stems, at least out of one camp, from the belief that the individual who is not an attorney cannot be an adequate advocate. Consequently, to allow a layman to assert such a choice is to imprison him through the exercise of a constitutional right.³⁴ For example, in *People v. Terry*,³⁵ following a defense *pro se*, the jury returned a verdict of guilty after only fourteen minutes of deliberation. Obviously, the fact that the defendant does not win his case is not ground for reversal.³⁶

It is disturbing to note that defendants are entitled to assume the responsibilities of an advocate, in partisan's clothing, without having to demonstrate a professional ability to handle their own causes. In these situations the right would appear hollow indeed. On the other hand, it must be conceded that the aforementioned procedure, representing the great weight of authority in this area, is consistent with both the meaning and spirit of the right involved. It is suggested that if the right to proceed

venture into the unknown, he must be allowed to do so, if he is aware of the dangers that lurk therein. *He need not demonstrate that he can meet them.*" (emphasis added). Here the lower court denied defendant's request to appear *in propria persona* on the grounds that the defendant was not legally trained. On appeal the court stated at 629-630:

An intelligent conception of the consequences of proceeding without counsel is not negated by a lack of knowledge of particular rules of law or procedure. . . .

[L]ack of knowledge of the law cannot be used as the sole basis for saying that an attempted waiver of counsel is ineffective (emphasis added).

See also *People v. Mason*, 259 Cal. App. 2d 24, 66 Cal. Rptr. 601 (1968) (court failed to conduct any inquiry at all concerning defendant's ability to defend himself). *People v. Mattson*, 51 Cal. 2d 777, 336 P.2d 937 (1959) (where defendant insisted upon representing himself, appellate court concluded that his waiver was competent in view of the fact that defendant was "mentally competent and alert and had some knowledge of the law" notwithstanding the fact that he either did not recognize or merely refused to follow the rules of procedure).

It appears to this writer, however, that the denial of defendant's request to proceed *pro se* on the grounds of insufficient legal knowledge would not be a denial of the individual's right to proceed *pro se*. To allow such a defendant to proceed alone would constitute a denial of due process, a fair trial. See *People v. Lee*, 249 Cal. App. 2d 234, 57 Cal. Rptr. 281 (1967) (defendant knew nothing about the law or court procedure); *People v. Shields*, 232 Cal. App. 2d 716, 43 Cal. Rptr. 188 (1965) (defendant who admitted that he did not understand how to pick a jury and did not know about a challenge for cause was not entitled to proceed alone).

Here it should be obvious that our courts are forced to tread a thin line. Specifically they are faced with the problem of determining at what point a defendant can in all fairness to himself conduct his own defense. On the one hand is the position adopted by the *Mattson* court wherein the defendant had some knowledge of the law. On the other hand is the position adopted by the *Lee* court where the defendant knew nothing about the law. Can a defendant proceeding alone receive a fair trial if he cannot challenge a prospective juror, object to the introduction of evidence, cross-examine witnesses and the like?

34. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942): Allowing a defendant the right to proceed *pro se* and the right to dispense with constitutional safeguards even though "he reasonably deems himself the best advisor for his own needs is to imprison a man in his privileges and call it the Constitution."

35. 224 Cal. App. 2d 415, 36 Cal. Rptr. 722 (1964).

36. *People v. Looney*, 9 Cal. App. 2d 335, 49 P.2d 889 (1935).

pro se is to remain at all meaningful, our courts must safeguard its effective use. This could be accomplished through the automatic assignment of advisory counsel, a topic to be discussed below.

III. QUALIFICATIONS OF THE RIGHT

A. *Time of the Election*

The right of an individual in a criminal action to conduct his own defense is subject to certain restrictions. In addition to the general, common sense requirements that the defendant be sui juris, mentally competent, and aware of the problems involved,³⁷ a most controversial restriction concerns the timing of a defendant's request to proceed alone.

The majority position, expressed by the leading case of *United States v. Bentvena*,³⁸ is that the right to proceed pro se is unqualified if invoked prior to the start of the trial. In this Second Circuit decision the defendant, midway through the trial, attempted to discharge his attorney and proceed alone. The court held that the right claimed by the defendant was *qualified* and not the *absolute* right it would have been had it been asserted prior to the start of trial.³⁹ Moreover, the court was of the opinion that the defendant was adequately represented by competent counsel and consequently his case would not be prejudiced by the denial of his request.

The *Bentvena* position was recently followed in a Washington decision, *State v. Bullock*,⁴⁰ in which the court stated that:

The right to defend one's self and the necessity of the defendant to have trust and confidence in his counsel are propositions which defendant can insist upon before trial is convened. However, when they are asserted during trial they are necessarily limited in extent by the necessity of having an orderly proceeding.⁴¹

The defendant who fails to initially invoke his rights will, in the majority of jurisdictions, thereafter find his request subject to the discretion of the trial court, with reversal predicated only upon a showing of prejudice. On the other hand, it is recognized that the trial court which initially refuses to present the defendant with the choice between representation by counsel and a defense pro se will have committed error per se.⁴²

37. See cases cited note 8 *supra*.

38. 319 F.2d 916 (2d Cir. 1963).

39. *Id.* at 938; *Ormento v. United States*, 375 U.S. 940 (1963); *Butler v. United States*, 317 F.2d 249 (8th Cir. 1963); *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

40. 431 P.2d 195 (Wash. 1967).

41. *Id.* at 199.

42. *United States v. Plattner*, 330 F.2d 271, 273 (2d Cir. 64); The right to proceed pro se is a right arising out of the Constitution. Consequently, the court "would be required to remand the case, even if no prejudice to Plattner were shown to have resulted from the

The qualifying features of many cases in this area are related, in one way or another, to *Bullock* and *Bentvena*. Implicit in many of these decisions is the belief that an in-trial election is necessarily disruptive of courtroom procedure. Consequently the request should be denied, notwithstanding the defendant's assertion of his right to proceed pro se coupled with, or even without, allegations of lost trust and confidence in his attorney.

It would seem that the sole disruption worth mentioning would be the time it would take to determine defendant's competence to continue his case.⁴³ This determination could be made in a matter of minutes and would consist of inquiries similar to those which would have been made had the request been asserted prior to the start of trial.

Opposing this view is that expressed in *United States v. Mitchell*:⁴⁴

[I]t would be unfair to say that no further choice is possible after the case is opened. . . . [I]f an accused during the trial decides that he wishes to proceed alone and without delaying the trial, and makes his decision with full knowledge of the risks he is taking . . . that course should be open to him in view of the fact that he must have complete confidence in his counsel⁴⁵

It is the opinion of this writer that the foregoing expresses the better view. A defendant in a criminal action is and must be entitled to have complete faith in his representation. As the arbiter of his own fate—for it is he alone who stands to suffer the most from an improvident choice⁴⁶—

refusal to permit him to act pro se." See *Powell v. Alabama*, 287 U.S. 45 (1932); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); *Capetta v. State*, 204 So.2d 913 (Fla. 4th Dist. 1967).

43. In addition to any loss of time that might occur, there are obviously other non-disruptive disadvantages which would accompany an in-trial request to proceed pro se. One, for example, would be confusion in the minds of the jurors if the defendant elected to switch the emphasis of his defense presentation. Moreover, courts are occasionally faced by defendants who request delay in the proceedings in order that they might use the facilities of a law library. See *People v. Loving*, 258 Cal. App. 2d 112, 65 Cal. Rptr. 425 (1968); *People v. Carter*, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967) where the defendant's waiver of counsel was conditioned upon his being able to use the facilities of a law library. In *Carter* the defendant, a high school graduate, was allowed to proceed pro se having told the court that he understood the crimes of robbery and kidnapping and that he felt capable of conducting his own defense. In a *Carter*-like situation one can only wonder whether such a defendant can in fact defend himself and whether he is capable to use, to any advantage, a law library. See also *People v. Nunn*, 223 Cal. App. 2d 658, 35 Cal. Rptr. 884 (1963); *People v. Byrd*, 221 Cal. App. 2d 551, 34 Cal. Rptr. 562 (1963); *People v. Ortiz*, 195 Cal. App. 2d 112, 15 Cal. Rptr. 398 (1961). Defendants who insist upon representing themselves are not entitled to special privileges and advantages.

44. 137 F.2d 1006, 1010-1011 (2d Cir. 1943). In *Mitchell* the court appointed an attorney for the indigent defendant who, after the trial had begun, asked the court to discharge appointed counsel and requested to proceed pro se. The importance of *Mitchell* lies in the fact that the decision assumes that an accused can assert an in-trial request to proceed above without producing a delay in the proceedings.

45. *Id.* at 1010-11.

46. See *Kamisar, The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1136 (1965); *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964).

asserting a recognized right, either for its own sake⁴⁷ or as an expression of lack of confidence in counsel, he should be entitled to his choice at any point in the proceedings.

Some opposition to giving the defendant his choice is generated from fear that the individual who has received in-trial permission to conduct his own defense may thereafter find himself incapable of handling that task. In such a situation the court must either declare a mistrial, appointing new defense counsel for the new trial, or reappoint original counsel to conclude the case.⁴⁸ The former situation necessarily results in a disruption of the proceedings and an obvious loss of time. The latter situation is obviously distasteful to the defendant as he is forced to place his case in the hands of one whose services he may not desire or in whom he may have lost trust and confidence.

It is this writer's belief that the retention of dismissed counsel in an advisory capacity would lessen the aforementioned problems and operate to the benefit of all involved. The court would not be faced with the possibility of a mistrial if counsel could "step in" and pick up what would by then be a faltering defense effort. The approach would receive the favor of defendants who, in such situations, would still have the right to assist in their own defense subject, of course, to the discretion of the court and the advisory counselor.⁴⁹ Moreover, the employment of advisory counsel would enable the court to more efficiently safeguard the interests of defendants asserting the right to proceed pro se.

B. *An Orderly and Efficient System of Justice*

In addition to the above qualifications it is also recognized that the right to defend in person may not be used to subvert the orderly and efficient administration of justice.⁵⁰ Thus, it may not be used as a tool

47. *United States ex rel. Maldonado v. Denno*, 239 F. Supp. 851, 856 (S.D.N.Y. 1965) (the purpose or motive behind the assertion of a constitutional right cannot be a subject upon which to deny it).

48. In such a situation the act of appointing new counsel to finish the case would necessarily result in a delay in the proceedings as counsel would be forced to review the record and converse with the defendant.

49. It is the opinion of this author that the approach would be beneficial. Counsel would naturally desire to have the defendant "on his side" and consequently would be likely to allow him to assist in the defense of his case. This does not mean that counsel and defendant may alternate in the presentation of the case. It does mean that the defendant will be offering advice to counsel and if the court permits, defendant may be allowed to argue his case along with counsel.

50. *United States v. Private Brands, Inc.*, 250 F.2d 554 (2d Cir. 1957); *Overholser v. De Marcos*, 149 F.2d 23 (D.C. Cir. 1945); *United States v. Mitchell*, 138 F.2d 831 (2d Cir. 143); *People v. Powers*, 256 Cal. App. 2d 1015, 64 Cal. Rptr. 450 (1967) (assertion of right to proceed pro se subject to constant duty of court to protect the judicial process from deterioration); *People v. Martin*, 84 Ill. App. 2d 117, 228 N.E.2d 557 (1967) (defendant's phone calls to his mother during a recess would not have resulted in a loss of courtroom decorum); *People v. Allen*, 37 Ill. 2d 167, 226 N.E.2d 1 (1967) (the judicial process must remain orderly to the end that the defendant may receive a fair trial); *People v. Burson*, 11 Ill. 2d 360, 143 N.E.2d 239 (1957) (leading case); *State v. White*, 86 N.J. Super. 410, 207 A.2d 178 (1965) (court adopted *Burson* wording); *State v. Kolocotronis*, 436 P.2d 774 (Wash. 1968).

for dilatory purposes.⁵¹ Though a person accused of a crime has the right to act on his own behalf, the exercise of that right cannot be used to abuse the patience of the courts or to infringe upon the rights of others.⁵²

The situations which constitute a disruption of what is considered the normal judicial settings are many and varied. In *State v. White*⁵³ the court set forth several factors which should be considered in determining whether a request to proceed pro se should be honored: (1) Would granting the request interfere with an orderly trial of the case? (2) Would the procedure receive the cooperation of counsel for the accused? (3) Is the gravity of the offense such that it carries a severe penalty, and in the interest of justice legal representation is necessary?⁵⁴ (4) Are there any other circumstances which would interfere with a fair and orderly presentation of the case?⁵⁵

One typical situation was presented in *United States v. Private Brands*.⁵⁶ In that case the defendant-president of the defendant-corporation requested the right to proceed pro se. The request was denied, as in the court's opinion counsel for the defendant-corporation could adequately guard the identical interests of both parties. Granting the request would have resulted in unnecessary duplication of defense effort and delay in the proceedings.

An additional example of the abuse of the right to proceed pro se is more than adequately illustrated by the case of Harold "Kayo" Konigsberg.⁵⁷ In December of 1966 "Kayo" went on trial facing ten counts of assault, conspiracy and extortion. During the following weeks he attempted to turn his trial into a circus. First, "Kayo" dismissed his attorney, calling him a prosecution spy, and was permitted to conduct his own defense. Thereafter, with the court's patience and indulgence, "Kayo" occasionally referred to the prosecutor as a "persecutor," the detective

51. *People v. Thomas*, 58 Cal. 2d 121, 373 P.2d 97, 23 Cal. Rptr. 161 (1962); *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949); *People v. Powers*, 256 Cal. App. 2d 1015, 64 Cal. Rptr. 450 (1967).

52. See *People v. Lamb*, 133 Cal. App. 2d 179, 283 P.2d 727 (1955) and text accompanying note 57 *infra*.

53. 86 N.J. Super. 410, 207 A.2d 178 (1965).

54. Though a defendant may be entitled by right to conduct his own defense, by definition a risky venture, that risk factor is necessarily increased where the defendant faces loss of life or even life imprisonment. In such a situation it seems only fair that the defendant should have available at least the sources of an advisory counsellor.

55. In addition to a request to use library facilities, one can only wonder how a defendant is expected to examine witnesses, select a jury, and be responsive to the bench. We must therefore, entertain the question of whether a defendant proceeding alone can get a fair trial. Should it matter that it is the defendant himself who stands to suffer the most from an improvident choice to proceed alone? Can a defendant receive a fair trial if he is not permitted to use the facilities of a law library? Can he receive a fair trial conducting his own defense when the preparation of the case is hampered by his incarceration?

56. 250 F.2d 554 (2d Cir. 1957); see also *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948) where the court recognized that the right of the defendant to proceed pro se was necessarily subject to the power of the court to prescribe the manner in which the business of the court should be conducted. However, the exercise of discretion by the court could not be extended to result in a deprivation of the right to proceed alone.

57. *TIME*, April 21, 1967, at 76.

who arrested him as the "sadist," and the presiding judge as an "animal." In addition, he offered to pay the jurors for any inconvenience they might have been caused due to the length of the trial. The proceedings were far from orderly.⁵⁸

In these situations the court is placed in a difficult position. One can thus understand the feelings expressed by Judge Tenney in *United States ex rel Maldonado v. Denno*⁵⁹ where he expressed his sympathy for his brother trial judges who are continuously faced with defendants whose main interest is to create a record sufficient to support a mistrial. Here, in addition to having to weigh the interests involved—the right to proceed pro se and the desire and need to have an orderly proceeding—the court is forced to consider the nature of the individual involved. Does the defendant have a sincere desire to aid his own cause, or is he for various reasons trying to make a mockery of the trial? It is suggested that because a defense pro se is itself a departure from standard procedure, our courts should, and in all fairness can, tolerate additional deviance for those defendants who fall within the first category. Such restraint would be consistent with both the spirit and meaning of the right. On the other hand, common sense dictates that those defendants desiring to disrupt the proceedings should be silenced and counsel appointed to either continue the case if the damage is reparable, or if it is otherwise, to begin it anew.

It is obvious, however, that even in the case of a defendant honestly desiring to aid his own cause, judicial procedure will necessarily be operating at less than its optimum level. This conclusion is drawn from the fact that most defendants are ignorant of the laws of evidence, procedure and the like. Here, as in the other areas previously mentioned, this writer is of the opinion that the automatic assignment of advisory counsel would operate to promote the orderly presentation of a defense pro se. The combination would enable the defendant to receive some "on the job training" with the hope of instilling within him a tolerable quantum of legal knowledge. Moreover, the situation would more closely approximate a natural trial setting with the court free to resume its normal functions.

IV. ADVISORY COUNSEL

An advisory counselor is a court appointed attorney whose sole function is to assist a defendant who is proceeding alone. In this capacity he

58. Obviously, the court in *Konigsberg* was tolerant of the abuses which did occur. It would appear, in spite of the fact that a defendant does not have to be a lawyer, that he should at least have respect for the court and the system which presented him the opportunity to proceed alone. Consequently, it is the opinion of this author that "Kayo" should have been replaced by counsel at the first sign of his rebellious attitude. In such a situation his rights would not have been denied and courtroom decorum could have been maintained. See cases cited note 50 *supra* and *People v. Washington*, 77 Ill. App. 2d 8, 222 N.E.2d 150 (1966) where the court states that a presiding judge has the power to compel courtroom decorum and is under a duty to see that the proceedings are conducted in such a manner as will inspire respect for law and the administration of justice.

59. 239 F. Supp. 851, 856 (S.D.N.Y. 1965).

is an active participant in the proceedings only upon the request of the defendant and may be utilized at random throughout the course of the trial. From the foregoing sections it is obvious that this writer is of the opinion that great use and benefit can be derived through the effective employment of advisory counsel. Many people believe, and common sense would seem to dictate, that "trials in which the defendant represents himself have no commendable features whatsoever and often may produce an error-filled record and an irrational verdict."⁶⁰ Consequently, the development and continued practice of appointing advisory counsel has received the praise of many who are desirous of preserving and protecting the right to proceed pro se.

The majority position, expressed by the leading case of *Shelton v. United States*,⁶¹ is that the court is not bound to appoint an advisory counselor upon the defendant's request for one. In fact the defendant must choose between a defense pro se or representation by counsel and cannot expect the court to appoint an attorney to have him occupy an inferior position to that of the defendant throughout the course of the trial. The *Shelton* reasoning was adopted by the court in *People v. McFerran*⁶² which in quoting from *People v. Mattson*⁶³ stated that "the court should not appoint counsel . . . and require of him that . . . he should surrender any of the substantial prerogatives traditionally or by statute attached to his office."

In addition to the above objection, lack of wide-spread support for the system apparently stems from the obvious and certain frustrations which necessarily result, both to the court and counsel, where the defendant refuses to enlist the support of the advisory counselor. In such a situation counsel is forced to sit and watch the progress of the trial having spent time and effort to no avail, while the court is forced to play a more extensive role in safeguarding the rights of the defendant.⁶⁴

The attitude adopted by the above mentioned courts is one which enables them to enforce an all or nothing approach regarding the right to proceed pro se. The approach prevents the defendant from obtaining the "best of two worlds" by combining the benefits which would be derived by an exercise of the right with the expertise of an attorney.⁶⁵

60. Note, *The Representation of Indigent Criminal Dependents in the Federal District Courts*, 76 HARV. L. REV. 579, 585 (1963).

61. 205 F.2d 806, 813 (5th Cir. 1953); quoting from the record of the trial court:

You are either going to be represented by counsel or you are going to represent yourself. . . . Well the court is not going to appoint a lawyer and have him occupy an inferior position in the defense of your case.

62. 211 Cal. App. 2d 4, 26 Cal. Rptr. 914 (1962).

63. 51 Cal. 2d 777, 336 P.2d 937, 949 (1959).

64. It is suggested that the court, in all fairness to the defendant proceeding alone, must make allowances which center around the defendant's lack of knowledge of the law. To require that the defendant conform to the rules of procedure and the like would be to emasculate the effectiveness of the right. One the other hand the court is under an obligation to see that presentation of the case is orderly. To this end the court is forced to sit as a guardian in order to insure that the exercise of the right operates to the benefit of the defendant and does not result in a disruption of the court's business.

65. The individual who is not an attorney cannot conduct his own defense well. Thus

Though one can readily understand the majority position, it is suggested that the approach is unsound and is inconsistent with both the meaning and spirit of the right involved. The advantages which flow from the automatic assignment of advisory counsel necessarily outweigh the disadvantages which might occasionally occur.

The most obvious advantage which accompanies the appointment of advisory counsel lies in the fact that an attorney will be available to assist the defendant who suddenly realizes that he does not appreciate the consequences of his previous waiver—the individual incapable of continuing his own defense. Here one is confronted with the recognition that though a defendant may apparently appreciate the consequences of a waiver of counsel and election to proceed pro se, in fact those consequences cannot be fully appreciated until the trial has begun.⁶⁶ At that point those courts which have adopted the “all or nothing” *Shelton* approach will be forced either to declare a mistrial or to allow the defendant to imprison himself through the exercise of his rights. On the other hand, courts which have adopted the procedure of automatically appointing advisory counsel will have avoided the necessity of declaring a mistrial, as the defendant’s actions will have undergone the observation of the court and will have received the advice of an attorney. This approach would enable our courts to give full recognition to the right to proceed pro se without having to fear that its exercise will result in imprisonment.

Illustrative of the above approach is the case of *People v. Evans*.⁶⁷ There the defendant, one day prior to the start of trial, requested the court to discharge his attorney and to allow him time to prepare for a defense pro se.⁶⁸ The motion to proceed pro se was granted while the motion for a stay of trial was denied. However, the court instructed counsel for the defense to remain in an advisory capacity and aid the defense effort, upon defendant’s request, throughout the trial. At the outset the defendant invoked the counsel’s aid in conducting the jury selection. Counsel was then ordered to continue the case until such time as defendant should object. Defendant once objected and was therefore allowed to examine a witness.

Here the court had made the primary determination that the defendant was in fact capable of conducting his own defense. That determination was erroneous. The subsequent assignment of advisory counsel as a

the assertion of the right bestows little, if any, benefit upon the defendant. The assignment of advisory counsel would aid the defendant to the extent that counsel would be able to offer his experience to the defendant throughout the trial.

66. See *Plattner v. United States*, 330 F.2d 271, 274 at n. 4 (2d Cir. 1964), where reference is made to the inability of an individual to reply to an advocate when called upon to present his defense.

67. 211 Cal. App. 2d 534, 27 Cal. Rptr. 304 (1963).

68. The question of the point at which a defendant must assert his right to proceed pro se is one which must be considered. It appears that in order for the right to be categorized as “absolute,” the defendant should move at the earliest possible point in the proceedings. If he thereafter changes his mind, the court, more likely than not, will grant a stay of trial if counsel requests additional time to prepare the case.

supplement to defendant's waiver of counsel operated to enable the defendant to assert his right, to enable the defendant to benefit from the advice and experience of an attorney, and to promote an orderly proceeding. These benefits could not have been accomplished had the court employed the *Shelton* approach.

In addition, it is suggested that the court should not wait until trial for the appointment of advisory counsel. Rather the court should appoint counsel to confer and consult with an accused prior to considering his proposed waiver and election. This additional step would operate to place the defendant on early notice of the problems associated with a defense pro se. The defendant and the court thus would not have to depend solely upon the in-court conversation in order to determine the defendant's competence to represent himself.

V. THE FLORIDA POSITION

The Florida position regarding the right to proceed pro se is, as one might expect, both conservative and consistent with the majority positions set forth above.

In *Cappetta v. State*,⁶⁹ a recent decision, the court chose to rely for the most part upon leading federal decisions⁷⁰ in reversing a case wherein the defendant before trial asserted but was denied the privilege of exercising his right to defend himself.⁷¹ In Florida the right to proceed pro se is expressed by the Declaration of Rights, "In all criminal prosecutions the accused . . . shall be heard by himself, or Counsel, or both, to demand the nature and cause of the accusation against him . . ." ⁷² It was early recognized that this provision is in "addition to the rights secured by the general organic requirements of due process of law . . . , and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the state."⁷³

In *Capetta* the court gave recognition to the Declaration of Rights, describing it as one of the most elementary prerequisites of a fair trial,⁷⁴

69. 204 So.2d 913 (Fla. 4th Dist. 1967). It should be noted that since the decision of the Fourth District the supreme court, by direct appeal, has reinstated the conviction of the appellee Capetta. Though the court agreed with the District Court's statement of the general rule, they nonetheless felt that reinstatement was proper because the appellee, had waived his rights. See Case No. 37,099, opinion filed July term, supreme court.

70. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963); *United States v. Private Brands, Inc.*, 250 F.2d 554 (2d Cir. 1957).

71. In *Capetta* the record indicated that trial court, prior to the start of trial, refused to honor the defendant's request to proceed alone. In fact the action of the court constituted an infringement of an accused's constitutional right in that counsel was forced upon the defendant. Consequently, the single action by the court constituted multiple error. See *Cook v. State*, 167 So.2d 793 (Fla. 1st Dist. 1964); *Swarthout v. State*, 165 So.2d 773 (Fla. 3d Dist. 1964).

72. FLA. CONST., DECL. OF RIGHTS § 11.

73. *Deeb v. State*, 131 Fla. 362, 179 So. 894 (1937); see also *House v. Mayo*, 63 F. Supp. 169 (S.D. Fla. 1945).

74. *Capetta v. State*, 204 So. 2d 913 (Fla. 4th Dist. 1967).

adopted much of the thought of the *Plattner* decision,⁷⁵ and adopted the view that the right to proceed pro se is unqualified if invoked prior to the start of trial, with subsequent assertions of the right subject to the discretion of the court.⁷⁶ Moreover, the court suggested the procedure to be followed in determining the intelligence and competency of a waiver.⁷⁷

The value of the *Capetta* decision lies with the fact that the case is one of first impression for Florida courts and thus constitutes a positive expression in one decision on the many areas associated with the right to proceed pro se.

The decision, however, is not without its shortcomings. First, though the court squarely confronted the issue and discussed the many and varied aspects surrounding the right, it failed to include any original commentary upon either restrictions surrounding the right or the concept of advisory counsel. This employment of judicial restraint rested, of course, with the court, and one can only wonder why, in the light of the myriad of decisions in all parts of the country, the court refused to offer an original and fresh approach to some of the problems associated with the exercise of the right.

Consequently, it is the opinion of this author that the Florida position, like that of the great majority which it now joins is suffering from a lack of creativeness which is sorely needed. To those who would reply that the court was not obligated to expand the frontiers to problems not presented on appeal, one can only express hope for an enlightened approach on an undertaking certain to follow in the not too distant future.

VI CONCLUSION

The primary observation to make by way of closing remarks is that the right to proceed pro se is a right frequently asserted by defendants in criminal court to no meaningful end. The very assertion of the right, which no longer constitutes a problem, brings into play a series of legal and social consequences collateral to the right itself. Failure of the parties involved—the defendant and the court—to adopt a mature and meaningful attitude toward the solution of those attendant problems will continue to result in the assertion of a hollow right.

The starting point of inquiry necessarily centers around the ability of a defendant to conduct his defense. In this regard, the procedural steps suggested by the *Plattner* court and others, though indeed sound, in no way suggest any method for determining the intelligence of a waiver and the defendant's ability to defend pro se. This is left for determination by the court. Though the liberal attitude adopted by many courts in allowing de-

75. *Id.* at 917.

76. *Id.* at 917.

77. *Id.* at 918. *See also* regarding the Florida position *Jones v. Cochran*, 121 So.2d 657 (Fla. 1960) (defendant incapable of representing himself); *Cash v. Culver*, 120 So.2d 590 (Fla. 1960) (defendant's ability to represent himself); *Sheffield v. State*, 90 So.2d 449 (Fla. 1956); *Fulmore v. State*, 198 So.2d 101 (Fla. 2d Dist. 1967) (waiver).

fendants to proceed alone is consistent with the recognition of the right, it is suggested that such an approach adds more problems to an area sufficiently plagued. Moreover, one should also be aware that problems surrounding the necessity of having an orderly procedure suggest that our courts long have overlooked the possibility of adopting approaches *within their judicial discretion* toward the solution of those problems.

It is the opinion of this author that many of the problems associated with the right to proceed pro se could be solved through the employment of advisory counsel. Cases seem to indicate wide judicial latitude in determining whether an individual is capable of defending his own cause. Many would agree that criminal defendants as a class are not competent, in all fairness to themselves, to assert a favorable defense effort. Those who are intelligent realize the value of counsel and consequently do not elect to defend pro se.

It is hoped that our courts will realize that the right should be asserted only in the spirit intended. To this end advisory counsel will operate to assure the court that the exercise of the right will not operate in instant imprisonment.