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Notes

The Jailed Pro Se Defendant and the
Right to Prepare a Defense

"Laymen," observed Justice Douglas in a statement echoed by Chief
Justice Burger, "foolishly trying to defend themselves, may un-
derstandably create awkward and embarrassing scenes."¹ A pro se
defendant's awkwardness in trying to defend himself against criminal
charges is far more distressing than some scene of simple social em-
arrassment: his distress challenges cherished illusions about our sys-
tem of justice. Procedural and evidentiary objections directed against
a pro se force us to realize that in order to relate a simple occurrence
to 12 peers, an ordinary man must have studied long and deeply a
hypertechnical science. Each pro se defendant crystallizes the reali-
zation that the justice applied to even the most commonplace of
crimes is not simple, and a just and ordinary man, standing alone
before a court, cannot necessarily expect to receive a just verdict.

An ordinary man needs a lawyer in order to assure himself a fair
trial. This empirical proposition, transformed into a legal maxim,
forms the basis for many seminal Supreme Court decisions.² In Fa-
retta v. California³ the Supreme Court, cutting against the grain of
those decisions,⁴ held that a defendant has a constitutional right to

¹. Mayberry v. Pennsylvania, 400 U.S. 455, 462 (1971) (Douglas, J.); accord, id. at
468 (Burger, C.J., concurring).

344 (1963); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45,
68-69 (1932).

³. 422 U.S. 806 (1975). The decision has stimulated considerable discussion. E.g.,
Robbins & Herman, Pro Se Litigation—Litigating Without Counsel: Faretta or for Worse,
42 BROOKLYN L. REV. 629 (1976); Note, The Right to Defend Pro Se: Faretta v. California
and Beyond, 40 ALB. L. REV. 423 (1976); Comment, Faretta v. California: An Examina-
tion of Its Procedural Deficiencies, 7 COLOM. HUMAN RIGHTS L. REV. 553 (1976); Note, A
Fool for a Client: The Supreme Court Rules on the Pro Se Right, 37 U. PITTS. L. REV. 403
(1975). The most extensive pre-Faretta analyses of the constitutional right to self-repre-
sentation reached inconsistent conclusions. Compare Garcia, Defuse Pro Se, 23
U. MIAMI L. REV. 551 (1969) (recognizing right) with Grano, The Right to Counsel:
Collateral Issues Affecting Due Process, 54 MINN. L. REV. 1175 (1970) (denying right's
existence). A detailed empirical study of pro se defendants can be found in Comment,
The Right to Appear Pro Se: The Constitution and the Courts, 61 J. CRIM. L. & CRIM-
INOLOGY 240 (1973) [hereinafter cited as Illinois Survey].

⁴. As Justice Stewart, author of the majority opinion, recognizes. 422 U.S. at 832.
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conduct his defense without the assistance of counsel when he voluntarily and intelligently elects to do so. Thus, Faretta presents the possibility of a pro se representation shockingly inferior to what may be expected of the prosecution.

This Note examines circumstances in which this possibility becomes near certainty: the situation in which a defendant who chooses to represent himself is jailed before trial. A jailed pro se defendant will almost certainly present an inadequate defense because pretrial incarceration has prevented him from preparing any defense. Few jails provide pretrial detainees either access to legal research materials or the means to investigate factual aspects of a case. Although most courts that have considered the problem have implied to the contrary, this Note argues that there exists a due process right to an adequate opportunity to prepare. When a defendant exercises his right of self-representation, he does not waive this right to prepare, and thus, if the state restricts a pro se defendant's preparation by jailing him before trial, it must provide alternative means of preparing a defense. A practical alternative means of preparing a defense, a means both benefiting the defendant and increasing the efficiency of the judicial process, is the appointment of standby counsel to aid the detainee in his trial preparation.

I. Due Process and Adequate Preparation

The decision to waive counsel is a serious one, and in all but a few cases a foolish one. The right to counsel has been defined in

5. Though the Supreme Court made no note of the fact in its decision, Faretta himself was a pretrial detainee. Appendix to Briefs at 36-38, Faretta v. California, 422 U.S. 806 (1975) [hereinafter cited as Appendix]. Incarcerated in the Los Angeles County Jail, Faretta expected to be given the opportunity to research his case in the jail library. Id. at 38. That library was later found to be inadequate. Brown v. Pitchess, 13 Cal. 3d 518, 520, 531 P.2d 772, 773-74, 119 Cal. Rptr. 204, 205-06 (1975). In order to conduct the investigations and interviews that would have been necessary in order to present a defense, Faretta planned to employ a "legal runner," though it is unclear whether he expected the state to pay for the legal runner's services. Appendix at 38. Despite the fact that the facilities provided pro se defendants in the Los Angeles County Jail are far more extensive than in most of the nation's jails, see pp. 304-05 infra, Faretta's incarceration would have presented a difficult obstacle to the preparation of a defense. The trial judge's awareness of the difficulties of conducting a defense from a jail cell certainly influenced his decision to deny Faretta's motion to proceed pro se. Appendix at 35-38.

6. See notes 14 & 15 infra.

7. Whence the maxim that he who is his own lawyer has a fool for a client, quoted approvingly by Justice Blackmun in his Faretta dissent. 422 U.S. at 852. There are, however, many reasons for a defendant's decision to proceed pro se: concern about the public defender's heavy caseload, see id. at 807; a perception that the public defender lacks independence from the prosecutor, see People v. Brown, 51 Cal. App. 3d
various terms; the fullest expression of its various components is Judge Bazelon's opinion in United States v. DeCoster, which incorporates detailed guidelines from the American Bar Association Project on Standards for Criminal Justice as standards for measuring the "reasonably competent assistance" of counsel. Though few other courts have been so specific in their delineations of the right to assistance of counsel, the right certainly encompasses representation by an attorney who has made adequate preparation through both legal research and factual investigation.

When an accused waives the right to assistance of counsel, he must also, of course, relinquish many of the collateral benefits traditionally associated with representation. He cannot expect, for example, that his own performance will be judged on appeal by the same standards used to determine the effectiveness of an attorney's representation.

Adv. Sh. 284, 297, 124 Cal. Rptr. 130, 137 (1975); a judgment that the defendant himself has greater experience than appointed counsel, see MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) ("counsel reasonably likely to render and rendering reasonably effective assistance" (emphasis in original)); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975) ("legal assistance which meets a minimum standard of professional representation"); Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970) (attorney's "exercise of customary skill and knowledge which normally prevails at the time and place").


12. See p. 301 infra.
Some courts have held that if a defendant decides to manage his own defense, he must accept whatever disadvantages result from that decision. The most startling of these disadvantages is that a pro se defendant jailed before trial may be prevented from making preparation for trial. The opportunity to perform the pretrial legal and factual research necessary for the presentation of a defense is seen as a concomitant of the right to counsel which does not survive the waiver of that right. Such decisions amount to a rule that a pro se defendant has no right to an adequate opportunity to prepare his defense.

It is understandable that the right to an adequate opportunity to prepare should have become bound up in the Sixth Amendment's guarantee of a right to counsel, if only because so many adjudications have involved attorneys who, through inadequate preparation, have deprived their clients of the right to the effective assistance of counsel. Yet a waiver of the right to adequate preparation by counsel is not a waiver of the right to an adequate opportunity to prepare.


15. Walle v. Sigler, 329 F. Supp. 1278, 1282 (D. Neb. 1971), aff'd, 456 F.2d 1153 (8th Cir. 1972). Note, however, that in its affirmance the Eighth Circuit refused to affirm the district court's broad holding that a waiver of counsel amounts to a waiver of collateral aids, such as a law library, necessary to preparing a defense. 456 F.2d at 1156. Rather, the affirmance was based on the more limited holding of the Supreme Court of Nebraska in the same case, 182 Neb. 642, 156 N.W.2d 510, cert. denied, 393 U.S. 880 (1968), that since standby counsel had been directed by the trial court to provide the materials requested by the defendant, no denial of access to legal materials had occurred.


17. Appellate courts have suggested colloquies that trial courts should conduct with defendants in order to determine whether a waiver of counsel is voluntarily and intelligently made. Two of the most extensive of these suggestions were fashioned in cases involving pro se defendants who were jailed. Yet neither of these suggested colloquies contains any warning to the pro se defendant that his waiver of counsel may
Rather, an adequate opportunity to prepare is a fundamental component of due process, guaranteed by the Fifth and Fourteenth Amendments. Put another way, the state cannot prevent a jailed pro se defendant from preparing his defense merely because he has chosen to exercise his constitutional right of self-representation.

This distinct due process right to an adequate opportunity to prepare may be seen, paradoxically, in cases claiming that ineffectiveness of counsel has deprived defendants of due process. The classical standard for testing constitutional claims alleging ineffectiveness of counsel—that the representation was so woefully inadequate as to shock the conscience of the court and render the proceedings a farce and a mockery of justice—springs not from the Sixth Amendment’s guarantee of assistance of counsel, but rather from the guarantee of due process. The standard was devised by the District of Columbia Circuit in a case holding that the Sixth Amendment requires no more than result in a sharply curtailed opportunity to prepare his defense. See Hodge v. United States, 414 F.2d 1049, 1048 n.4 (9th Cir. 1969) (Ely, J., dissenting); United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

18. Although this Note concentrates on a due process right to an adequate opportunity to prepare, it might also be argued that the Sixth Amendment rights to be informed of the nature and cause of the accusation, to be confronted with witnesses, and to have compulsory process for obtaining witnesses by implication include the right to the preparation necessary to exercise these rights. People v. Mersino, 237 Cal. App. 2d 263, 268-69, 46 Cal. Rptr. 821, 824 (1965) (wrongful interference with defendant’s interviewing of potential witnesses violates right to compulsory process as well as due process and equal protection); cf. State v. Lerner, 112 R.I. 62, 76, 308 A.2d 324, 335 (1973) (state constitution’s compulsory process clause secures to defendant opportunity to prepare by interviewing potential witnesses). The Faretta decision said of Sixth Amendment rights other than the right to counsel:

The right to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.

422 U.S. at 818. Yet if a defendant’s calling and interrogating favorable witnesses, cross-examination of adverse witnesses, and introduction of evidence is to be more than mere charade, he must have the opportunity to prepare for trial.

19. At one time or other, all the federal circuits have utilized the farce and mockery standard. See, e.g., Stone, Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences, 7 Colum. Human Rts. L. Rev. 427, 428-29 & n.15 (1975) (collecting cases); United States v. Stern, 519 F.2d 521, 524 (9th Cir.), cert. denied, 423 U.S. 1033 (1975); Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965); Snead v. Smyth, 275 F.2d 838, 842 (4th Cir. 1959); United States ex rel. Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.), cert. denied, 346 U.S. 865 (1953). Most of the circuits, however, have deserted that standard, substituting specifically Sixth Amendment standards which are more stringent in application. See Stone, supra at 431-35. This substitution of more stringent Sixth Amendment standards to measure defense counsel’s performance will result, one may hope, in raising the level of that performance, thus providing a powerful incentive for defendants to accept representation by counsel rather than to insist on self-representation. Though the farce and mockery test is being abandoned as a Sixth Amendment standard, it retains its original validity as a measure for violations of the due process right to a fair trial.
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the formal appointment of counsel. In order to secure habeas corpus relief on the grounds of ineffectiveness of counsel when counsel had been formally appointed, the court held that a prisoner would have to base his claim upon the due process guarantee of a fair trial. The farce and mockery standard which the court devised was designed to test such due process claims.

The farce and mockery standard places upon the complainant a heavy burden in demonstrating the requisite unfairness, and reviewing courts have been reluctant to allow their consciences to be shocked. Yet it is clear that the standard is breached when inadequate preparation deprives the accused of his defense: in many cases in which counsel failed to undertake investigation and research essential to adequate trial preparation, reviewing courts have held that the proceeding amounted to a farce and mockery of justice.

The dynamics of trial are such that it cannot be said that inadequately prepared counsel invariably will render the trial a farce and mockery of justice: an experienced and well-trained lawyer could, perhaps, mount a respectable defense in a simple criminal trial with very little preparation. However, when a pro se, untrained in law and inexperienced in trial procedure, is forced to defend himself without having had an opportunity to prepare, a trial that is a farce and mockery of justice will almost certainly result. Any procedure so likely to result in a deprivation of due process must itself offend due process. As Justice Powell recently stated: "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."

The due process guarantee of an adequate opportunity to prepare

21. United States v. Kelton, 518 F.2d 531, 534 (8th Cir.), cert. denied, 423 U.S. 1021 (1975); see, e.g., Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), cert. denied, 324 U.S. 869 (1945); Hudspeth v. McDonald, 120 F.2d 962 (10th Cir.), cert. denied, 314 U.S. 617 (1941).
22. E.g., Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (appointed counsel's totally inadequate preparation and presentation of insanity defense and failure to object to defendant's being forced to wear prison uniform in courtroom); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 973 (1963) (allegations that trial counsel failed to investigate and present defenses would, if proven, constitute denial of due process); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957) (defense counsel, member of Ohio bar, unfamiliar with Indiana procedure and given no time to prepare); United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971) (total failure of assigned counsel to investigate and prepare materials for defense); Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968) (defense attorney did not talk to potential witnesses before trial and did not obtain copies of hospital records, police records, or defendant's written confession); People v. Ibarra, 60 Cal. 2d 460, 356 P.2d 487, 34 Cal. Rptr. 563 (1965) (defense counsel's failure to research applicable law deprived defendant of defense).
is also apparent in the line of cases requiring prison officials to make meaningful the convicted prisoner's right of access to the courts. A convicted prisoner, like an unconvicted pro se defendant, is not protected by the Sixth Amendment's guarantee of the assistance of counsel. Nevertheless, it has long been recognized that, as a fundamental corollary of Fourteenth Amendment due process, prisoners do have a right of access to the courts.

This due process right of access to the courts was once thought to require only that the state refrain from placing obstacles between petitioner inmates and the courts. In *Gilmore v. Lynch*, however, a three-judge court held, with Supreme Court affirmance, that the right of access to the courts is not limited simply to invalidating state-imposed obstacles to court access. Rather it "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." When indigent prisoners seek habeas corpus relief, prison officials are required "to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts." The *Gilmore* court refused to set forth any minimum quantum of aid that must be provided, referring the problem back to prison authorities for a solution. In the flood of litigation that has followed *Gilmore*, however, the courts

24. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. See *Johnson v. Avery*, 393 U.S. 483, 488 (1969).


28. The Supreme Court's affirmance, 404 U.S. 15 (1971), is simply a cryptic citation to *Johnson v. Avery*, 393 U.S. 483 (1969). The affirmance contains a touch of irony, since *Johnson* began as a "motion for law books and typewriter." 252 F. Supp. 783, 784 (M.D. Tenn. 1966). The district court, while invalidating regulations restraining inmates from mutual assistance at writ-writing, rejected the contention that the state was obliged to furnish legal research materials, *id.* at 787, and the question was not considered either on appeal, 382 F.2d 353 (6th Cir. 1967), or in the Supreme Court's opinion, 393 U.S. 483 (1969). The case that forms the basis for unrepresented prisoners' claims for access to legal materials, then, was affirmed on the basis of a case that actually denied such access. No court, however, has suggested that the Supreme Court's affirmance of *Gilmore* was qualified by these circumstances.

29. 319 F. Supp. at 110.

30. *Id.*
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have become more specific in defining the requisite assistance for prisoners who are not represented by counsel, so that there has emerged a substantial body of federal law governing almost every aspect of prison regulation of inmate access to the courts. Federal courts have determined, *inter alia*, the number and types of volumes that should be contained in prison law libraries; the hours that such libraries should be open, the amount of legal research materials that may be stored in cells; the necessary supply of clerical materials; whether access to legal research materials must be granted to prisoners in segregation and in hospitals, and whether instruction in the use of legal materials must be provided. The holdings, of course, are not uniform, since each decision rests on a number of unarticulated factors, including the conditions within particular prisons and each judge’s idiosyncratic reaction to the bizarre forms that prisoner complaints sometimes take. Yet the clear result of *Gilmore* and its progeny has been to guarantee that the convicted prisoner not represented by counsel, unlike the unconvicted pro se detainee, will


37. The experience of dealing with pro se prisoner petitions has caused judges to describe them as "penniless ragamuffins gabbling surly about a jumble of misfortunes said to have befallen their authors," Doyle, *The Court’s Responsibility to the Inmate Litigant*, 56 JUDICATURE 405, 406 (1973); "disorderly, numerous, repetitious, discursive, and sometimes mad," Becker, *Collateral Post-Conviction Review of State and Federal Criminal Judgments on Habeas Corpus and Section 2255 Motions—View of a District Judge*, 33 F.R.D. 422, 423 (1963); and designed mainly to badger prison officials, defy authority, or gain the respite from prison of a court appearance, Cruz v. Beto, 405 U.S. 319, 326-27 (Rehnquist, J., dissenting). It is certainly true that few plaintiffs other than prisoners would litigate to the federal courts of appeals disputes over shoes, Howard v. Swenson, 314 F. Supp. 885 (W.D. Mo. 1969), *appeal dismissed per curiam*, 426 F.2d 277 (8th Cir.), *cert. denied*, 400 U.S. 948 (1970).
be provided with the collateral aids necessary to prepare adequately for a court appearance.

*Gilmore* attempts to correct for convicted prisoners a deficiency which Justice Sutherland described in the context of the unconvicted:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. 39

If Justice Sutherland’s frequently cited40 description is accurate, a jailed pro se defendant who has no access to legal research materials would seem utterly incapable of preparing a defense. The courts have expressed concern that a convicted prisoner proceeding pro se cannot obtain due process without the opportunity to prepare by doing legal research; surely even greater concern is due the unconvicted (and still presumptively innocent) jailed pro se.

The due process right to an adequate opportunity to prepare for trial has also been articulated when the Government has attempted to interfere with defense interviews of potential witnesses, either by preventing defense contact with jailed witnesses or by warning witnesses at liberty to avoid interviews with defendant or his counsel. In such cases, courts have recognized that due process demands an adequate opportunity to prepare for trial by interviewing possible witnesses. 41 Furthermore, where a jailed defendant is represented by

provide access to the courts by providing for the appointment of counsel and that such materials need not be provided. Cruz v. Hauck, 515 F.2d 322, 331-32 (5th Cir. 1975); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Lee v. Synchcombe, 347 F. Supp. 1076, 1080 (N.D. Ga. 1972); see Tate v. Kassulke, 409 F. Supp. 651, 657-59 (W.D. Ky. 1976). Contra, Martinez Rodriguez v. Jiminez, 409 F. Supp. 582, 594 (D.P.R.), aff'd on other grounds, 537 F.2d 1 (1st Cir. 1976). Miller v. Carson, 401 F. Supp. 835, 840, 885-86 (M.D. Fla. 1975). The “access to the courts” standard for convicted prisoners is inappropriately applied to unconvicted prisoners. The pro se defendant does not seek access to the courts, but rather to exercise his right to self-representation when forced by the Government to appear before the court. Nevertheless, if adequate preparation is necessary for the meaningful exercise of the former, it is a fortiori necessary for the latter.

40. The passage has been set out in full in the Supreme Court’s seminal right-to-counsel cases. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Johnson v. Zerbst, 304 U.S. 458, 463 (1938). It was repeated in *Faretta*—both by the majority, 422 U.S. at 833 n.43, and in the Chief Justice’s dissent, *id.* at 838-39.
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counsel who is unable adequately to prepare a defense because only
the defendant himself is able to identify exculpatory witnesses, it has
been held that the defendant must be freed from pretrial custody, since
otherwise his due process rights would be violated.42

In the due process clauses of the Fifth and Fourteenth Amendments,
then, rests a guarantee that the defendant in a criminal prosecution
will be granted an adequate opportunity to prepare his defense. This
is not to say that a pro se defendant may later complain that he was
denied a fair trial because of his own improvident strategy, bad tactics,
errors of judgment, lack of skill, mistake, carelessness, incompetence,
inexperience, or failure to prepare when the opportunity was avail-
able.43 Nor can he later complain that a different or better result
would have been obtained had he chosen to accept representation by
counsel.44 If, however, the state jails a pro se defendant before trial,
refuses to provide him access to legal research materials, prevents him
from contacting witnesses essential to his defense, and prohibits him
from conducting necessary investigations, the defendant may well
complain that the state's denial of an adequate opportunity to prepare
has compromised his due process right to a fair trial. As Judge Rives
has bluntly and accurately written: "Any experienced trial lawyer
knows that a purported trial without adequate preparation amounts
to no trial at all."45

II. Faretta and the Opportunity to Prepare a Defense

The Faretta decision, it is true, makes scant mention of the diffi-
culties a pro se defendant may expect in presenting his defense, and
no mention at all of his difficulties in preparing one. The decision

F. Supp. 930, 935-36 (S.D.N.Y. 1967); State v. Harr, 194 S.E.2d 652, 656 (W. Va. 1973);
cf. Byrnes v. United States, 327 F.2d 825, 832-33 (9th Cir.), cert. denied, 377 U.S. 970
(1964) (recognizing right without identifying its source). See generally Annot., 14 A.L.R.3d

42. Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970); see United States v. Pomeroy,
485 F.2d 272, 274 (9th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (detainee released with-
out bail at close of Government's case for purpose of contacting witnesses).

43. United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); Arnold v. United States,
414 F.2d 1056, 1059-60 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970). Defendants
who elect to represent themselves must be prepared to be treated as having the qualifi-
cations and responsibilities concomitant with the roles they have undertaken. See, e.g.,
United States v. Cantor, 470 F.2d 890, 892 (3d Cir. 1972); People v. Mattson, 51 Cal. 2d
777, 793-94, 336 P.2d 937, 949 (1955); cf. Faretta v. California, 422 U.S. 806, 834 n.46
(1975) ("The right of self-representation is not a license . . . not to comply with rules
of procedural and substantive law.")


45. Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967).
casts much light around the historical base of the right to self-representation, but leaves in darkness the procedural superstructure which the trial courts must erect upon that base. It might be argued that this terseness in describing the procedure to be followed in trials of pro se defendants springs from an assumption that the waiver of counsel is a general waiver of the components of a true adversary criminal trial, including the opportunity to prepare a defense. But neither the Faretta majority nor its dissenters slights the value of the adversary process; indeed, simply to describe the concerns expressed in the opinion and its two forceful dissents illustrates the irreconcilability of Faretta with a proceeding in which a jailed pro se defendant is tried without having had adequate opportunity to prepare his defense.

To a remarkable extent, the same basic concerns about the adversary process are shared by the majority and dissenters in Faretta; the majority and dissenters diverge largely in their perceptions of how the adversary process is affected when a defendant represents himself. The majority and dissenters agree that a defendant should have the opportunity to present his best defense. The majority perceives that in certain instances a pro se defense may, in fact, be more convincing than one presented by counsel; the dissenters fear that in all but an extraordinarily small number of cases, an accused will lose whatever defenses he may have if he attempts to represent himself. Majority and dissenters share a concern that the defendant must perceive the process as a fair one. The majority considers that a defendant would harbor resentment against a process that forces a lawyer upon him against his will; the dissenters believe that the justice of a trial in which an unwanted lawyer provides effective assistance should be an adequate balm for almost any frustrated pro se defendant. Majority and dissenters agree that the government, with its obvious advantages over the accused, must act in a responsible manner so that the public faith in the criminal process is not imperiled. The majority perceives that the foisting of an unwanted lawyer upon a defendant would be viewed by the public as an act of governmental irresponsibility; the dissenters feel that public confidence in the criminal process is

46. 422 U.S. at 834.
47. Id. at 839 (Burger, C.J., dissenting). Few pro se defenses succeed. See Nagel, Effects of Alternative Types of Counsel on Criminal Procedure Treatment, 48 Ind. L.J. 404, 409 (1973); Illinois Survey, supra note 3, at 249.
48. 422 U.S. at 834.
49. Id. at 849 (Blackmun, J., dissenting).
50. Id. at 833-34.
jeopardized when the government secures an easy conviction over an inept pro se defendant.\textsuperscript{51}

The majority and dissenters differ on the emphasis they place on respect for defendant’s freedom of choice: the majority honors such choice out of “respect for the individual which is the lifeblood of the law”;\textsuperscript{52} the dissenters deride such choice as a defendant’s “folly”\textsuperscript{53} and the “‘freedom’ ‘to go to jail under his own banner.’”\textsuperscript{54} The majority and dissenters also differ in their emphasis upon the strains that pro se defendants place upon the adversary process. The majority avoids discussion of such strains; the dissenters worry that the widespread exercise of the right to self-representation will cause “the quality of justice [to] suffer.”\textsuperscript{55}

These, then, are the concerns for the criminal adversary process which animate both the decision and dissents in \textit{Faretta}: that the accused have the opportunity to present his best defense; that the accused perceive the criminal justice process as fair; and that the public have confidence in the fairness of the adversary process. In addition, the majority feels that courts should respect a defendant’s freedom of choice, and the dissenter hope to minimize strains on the adversary process.

Each of these concerns is flouted when a pro se defendant who has been unable to prepare an adequate defense because of pretrial incarceration confronts the adversary process. An accused who cannot research an indictment cannot present his best defense because he has no way of discovering what possible defenses exist; a defendant who has been restrained from interviewing witnesses and conducting an investigation has little chance to present any defense at all, let alone his best defense. It would be difficult for an incarcerated defendant to perceive the criminal justice process as fair when that process holds out with one hand the right of self-representation, yet with the other prevents him from effectively exercising that right—especially when more fortunate pro se defendants, free on bail, may exercise the “traditional right to freedom before conviction [that] permits the unhampered preparation of defenses.”\textsuperscript{56} Nor can the public have much

\textsuperscript{51} Id. at 839 (Burger, C.J., dissenting).
\textsuperscript{52} Id. at 834 (citing Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).
\textsuperscript{53} 422 U.S. at 849 (Blackmun, J., dissenting).
\textsuperscript{54} Id. at 839 (Burger, C.J., dissenting) (quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1967)); accord, 422 U.S. at 849 (Blackmun, J., dissenting).
\textsuperscript{55} Id. at 845 (Burger, C.J., dissenting).
\textsuperscript{56} Stack v. Boyle, 342 U.S. 1, 4 (1951).
confidence in an adversary process in which an unskilled defendant not only faces a trained government lawyer, but also has been prevented by the government from acquiring the rudimentary knowledge he needs in order to present his case. As for respect for the defendant’s freedom of choice, such respect is mocked when the choice offered is between representation by counsel and the inability to prepare a defense. Finally, the greatest strain on the adversary process may be expected from defendants who are not only unskilled and unlearned but also unable to prepare. In short, the concerns animating *Faretta* seem lifeless when a jailed pro se defendant is denied the opportunity to prepare his defense.

### III. The Dilemma and a Solution

#### A. The Dilemma of the Jails and the Courts

The conflict between the right to an adequate opportunity to prepare and the right of self-representation would be no conflict at all if a jailed pro se defendant were allowed to perform the legal research and conduct the factual investigation necessary to prepare a defense. However, most jails are simply not equipped to provide the services necessary for trial preparation. Jailers are reluctant to allow limited releases for any purpose, and adequate

57. The Law Enforcement Assistance Administration (LEAA) defines a jail as “any individual facility operated by a unit of local government (that is, a municipality or township with a 1960 population of 1,000 or more persons, or a county) for the detention or correction of adults suspected or convicted of a crime.” U.S. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, NATIONAL JAIL CENSUS 1970, at 6-7 (1971) [hereinafter cited as NATIONAL JAIL CENSUS]. This excludes, at one extreme, lock-ups and drunk tanks, and, at the other, the state-operated jail systems of Connecticut, Delaware, and Rhode Island, as well as federal institutions for the confinement of pretrial detainees. On March 15, 1970, there were 4,037 institutions falling into the LEAA definition, holding a total of 160,863 persons, 83,079 (52%) of whom were pretrial detainees or otherwise not convicted. *Id.* at 1.

By contrast, prisons are generally much larger, are under centralized state or federal control, and confine prisoners serving terms longer than a year. A 1966 prison survey found 398 such facilities (exclusive of satellite facilities) operated by the 50 states, Puerto Rico, and the District of Columbia. The average daily population of these institutions was 201,220. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 179-80 (1967).

opportunity to interview prospective witnesses is not generally available. As for legal research materials, few jails provide any at all, much less anything approaching the $5,500 legal research collection recommended by the American Association of Law Libraries as the minimum adequate "for the most basic legal research that might be done by a prisoner." Nor is there thought to be any constitutional duty for the jails to make legal research materials available to their prisoners. As a First Circuit panel tersely stated in Page v. Sharpe: "Under no stretch of the imagination is a county sheriff, or his subordinates, required to supply law books."

59. The National Jail Census reported that of 4,037 jails surveyed, 26% did not even offer separate facilities for visiting. National Jail Census, supra note 57, at 19. Even where separate facilities exist, their usefulness to the jailed pro se defendant is often limited by other factors. See, e.g., State v. Manson, 926 F. Supp. 1375, 1383 (D. Conn. 1971) (warden has discretion to limit visitor privileges to detainee's attorney and members of immediate family); Mattick, supra note 58, at 818 (most jails have no suitable place for visiting; visitors must usually converse within earshot of guards and other inmates); H. Mattick & R. Sweet, supra note 58, at 199 ("Many [Illinois] jails have no visiting facilities, severely restrict the length of individual visits, and set general visiting hours so that few people will have an opportunity to come to the jail.") Of course, even the finest visiting facilities are of no use if potential witnesses are unwilling to visit the pro se defendant in jail. And restrictions may be imposed on telephone usage. E.g., Inmates of Milwaukee County Jail v. Petersen, 333 F. Supp. 1157, 1169 (E.D. Wis. 1973) (jail personnel have discretion to limit number of detainee calls to bondsmen and attorneys, and to disallow calls to others except in emergencies).

60. See ABA Comm. on Correctional Facilities and Services, Jail Inspection and Standard Systems in Illinois and South Carolina 10-21, 112 (1974) (in Illinois, only two sets of Illinois statutes available to county jail inmates; otherwise necessary "to rely on donations or the borrowing of books from library systems etc."); in South Carolina, no provision for legal research material of any kind); Prison Legal Libraries—Ideas Into Reality 18-19 (Apr. 22, 1972) (Proceedings of Conference Sponsored by Social Responsibilities Round Table of the American Library Association and School of Librarianship, University of California, Berkeley) (six basic law libraries established by N.Y. Dep't of Corrections with assistance of LEAA grants and loans "ignore the needs of men in county jails, in smaller institutions"); Note, supra note 58, at 378-81 (of 31 Arizona pretrial holding facilities, only 2 provide legal materials); Note, Pre-Trial Detention in the New York City Jails, 7 COLUM. J.L. & Soc. PROB. 359, 361 (1971) (library resources of New York City's houses of detention inadequate and often unavailable); see also U.S. Bureau of Prisons, The Jail: Its Operation and Management 192-93 (1973) (providing legal research materials to unconvicted prisoners not considered critical).

61. Am. Ass'n of Law Libraries, Recommended Collections for Prison Law Libraries, in Am. Correctional Ass'n, Guidelines for Legal Reference Service in Correctional Institutions 5 (1975). This $5,500 price tag does not include the cost of state law research materials which, of course, all but federal prisoners would need. Nor does it include the cost of annual upkeep for materials that constantly must be supplemented, or the cost of housing and maintaining the collection. Prison libraries, not surprisingly, have major problems in keeping their collections intact. See Haslam v. United States, 431 F.2d 362, 365 (9th Cir. 1970), cert. denied, 402 U.S. 912 (1971). The American Correctional Association envisages grandiose prison libraries with professional librarians especially trained in audiovisual and legal reference services, the microfilming of legal reference materials, and possible access to computer terminals at various points throughout an institution. See Am. Correctional Ass'n, supra at 1-2.

62. The duty imposed by Gilmore extends only to convicted prisoners, not to pretrial detainees. See note 38 supra.

63. 487 F.2d 567, 569 (1st Cir. 1973).
The indigent pretrial detainee who wishes to defend pro se places the courts and jail officials in a perplexing quandary. Under Faretta, a trial court may not prohibit an accused from exercising his right of self-representation simply on the grounds that the accused is jailed; yet, if due process guarantees an adequate opportunity to prepare, a reviewing court may reverse the conviction of a pro se defendant who has been prevented by jail authorities from preparing his defenses. Jail authorities, however, would be seriously burdened with the task of providing adequate facilities for the preparation of pro se defenses. The expense of law libraries in state and federal penitentiaries may be justified by the large number of prisoners housed in such centralized institutions and the constant use that prisoners, with more restricted rights to appointed counsel, are likely to make of such libraries. The cost of providing similar libraries to the decentralized county jails, where the average number of inmates is far smaller and where most inmates have chosen to be defended by counsel, would be extremely burdensome. One alternative, providing supervised law students to aid in conducting necessary legal research, would be possible only at jails conveniently close to a law school. Another alternative, releasing prisoners under guard to conduct research in whatever facilities are available in the community, would be likely to create drains on jail manpower and possible disciplinary problems.

Preparation of trial defenses, unlike preparation of habeas corpus petitions and civil suits attacking prison conditions, requires factual investigation outside the confines of the jail. When witnesses to be interviewed refuse to visit the jailed defendant, provision for telephone interviews could be made. However, when a pro se defendant claims that he cannot locate potential witnesses by telephone, and requests that he be released in order to interview those witnesses, a difficult decision must be made. Jail officials, by training, temperament, and tradition, are ill-equipped to balance the value of a potential witness against the costs of the jail manpower lost by having guards accompanying detainees during interviews outside the jail. To submit such

64. The percentage of defendants in criminal cases who choose to represent themselves is undoubtedly small. See H. Kalven & H. Zeisel, supra note 7, at 360-62 (defendant without counsel only in 2.7% of jury trials in nationwide survey); United States v. Redfield, 197 F. Supp. 559, 566 n.2 (D. Nev.), aff'd, 295 F.2d 249 (9th Cir. 1961), cert. denied, 369 U.S. 803 (1962) (in 1960, of 93 defendants who entered pleas to criminal charges in Las Vegas division of federal district court of Nevada, 10 waived counsel; of 49 defendants sentenced in Las Vegas, 10 waived counsel at time of imposition of sentence). But cf. Illinois Survey, supra note 3, at 248 (widely differing figures in survey of Illinois judges); Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 584 (1962) (in half of districts surveyed, less than 20% of defendants waived counsel; in some districts, more than 80% did).
requests to the courts would be particularly burdensome, requiring exploration of a defendant's potential defenses well before trial in order to determine the importance of specific witnesses to the defense.55 "Legal runners" and investigatory personnel could be provided to aid in the preparation of the factual elements of the defense, but, again, pretrial evaluation of a defendant's case would be required in order to determine the amount of aid that should be provided.

Of course, jailed pro se defendants could be released in order to prepare for their trials, but such a practice would undoubtedly cause a massive expansion in the number of accused who wish to defend pro se, for many pretrial detainees would certainly choose self-representation simply in order to secure a temporary release from custody. Defendants who formerly would have pleaded guilty may elect to defend themselves at trial if a pro se defense may be relied upon to delay their incarceration.66 The primary purpose of jailing defendants before trial would be frustrated if defendants who intended not to appear for trial could gain easy release from jail by feigning a desire to proceed pro se. The provision of facilities for detainee case preparation would place a major strain on jails; the freeing of all pro se defendants in order to prepare their cases, and the increase in the number of pro se defendants which such a procedure might be expected to cause, would place an intolerable burden on the courts.67

B. Standby Counsel as a Solution

1. The Role of Standby Counsel

A solution to this dilemma is suggested in Faretta, both in the majority opinion and in the Chief Justice's dissent: the appointment of

65. Courts on occasion have made pretrial evaluations of a defense in order to determine whether an incarcerated defendant should be freed from custody to aid in trial preparation. See pp. 300-01 supra. Requiring courts to evaluate each jailed pro se defendant's requests for temporary release would place a substantial burden on the courts and might well require a defendant's disclosure to the court of prejudicial information.

66. There is evidence that jailed defendants plead guilty more often than bailed defendants. Note, A Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693, 726 (1958). This tendency may be explained by a defendant's hope that a guilty plea will result in a suspended sentence and release from custody and his certainty that, at worst, a guilty plea will result in his transfer to prison, where conditions are generally less cramped and uncomfortable than in the jails. See Note, Pre-Trial Detention in the New York City Jails, supra note 60, at 353.

67. This burden would be the result not only of an increase in the number of contested criminal cases, see note 66 supra, but also of the delay, disorder, and confusion that pro se defendants, even those with the best of intentions, cause within the judicial process. See Laub, The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court, 2 Duquesne L. Rev. 245, 249-55 (1964).
"standby counsel" to aid the indigent defendant if a jail is unable to offer the facilities or programs necessary for the preparation of a pro se defense. The appointment of standby counsel would safeguard the accused's constitutional right to prepare: standby counsel would be available to advise the pro se on matters of law, to conduct legal research, to provide the pro se with legal materials that can be reasonably procured, to arrange for the interview of witnesses, to interview witnesses himself if they cannot be interviewed by the defendant, and to conduct factual investigations. In brief, standby counsel's duty would be to make all preparations necessary for a defense that the defendant, because of his incarceration, is prevented from making.

The actual scope of standby counsel's pretrial role would depend upon the wishes and needs of the pro se defendant. In some cases the defendant may choose not to rely on standby counsel at all, in which case he may be considered to have foregone the opportunity to prepare his defense. In other cases the defendant may request that standby counsel transmit to the court requests for investigative, expert, and other services, that he take part in the plea-bargaining process, or that he participate in pretrial hearings. In some cases demands made by defendants upon standby counsel may be unreasonable, involving requests for investigations unlikely to unearth evidence or for pointless legal research. Unreasonable demands for services may be submitted to the court for resolution. After good-faith research, standby counsel may advise a pro se defendant that a claim lacks any


69. See pp. 313-15 infra.
70. See pp. 315-16 infra.
71. See pp. 310-11 infra.
72. Similar issues are already resolved by the trial courts. See, e.g., pp. 300-01 supra (release for interviewing witnesses); pp. 313-15 & note 97 infra (investigatory services under Criminal Justice Act).
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discoverable legal basis but that, as a pro se defendant, he may, of course, submit a claim to the court in spite of its frivolity.

Standby counsel's duty before trial is defined by the defendant's right to an adequate opportunity to prepare; during trial, however, the defendant has no constitutional right to the assistance of standby counsel; if both the court and the defendant choose to allow his presence, standby counsel's role should be defined by considerations of judicial order and decorum. Ordinarily the trial court should honor such requests, since the participation of standby counsel undoubtedly will enhance judicial decorum rather than detract from it. There may, however, be certain cases in which the defendant's waiver of counsel is mere charade, and the defendant expects standby counsel to conduct the defense, while the defendant manipulates his right to self-representation in order to engage in carefully calculated disruptive conduct. Such cases are similar to cases of hybrid representation, in which a defendant, accepting all the benefits of representation by counsel, attempts to appear as cocounsel. Courts have been reluctant to allow such hybrid representation, fearing that a defendant may

73. Lee v. Alabama, 406 F.2d 466, 469 (5th Cir. 1968), cert. denied, 395 U.S. 927 (1969); Duke v. United States, 255 F.2d 721, 725 (9th Cir.), cert. denied, 357 U.S. 920 (1958); Shelton v. United States, 205 F.2d 806, 812-13 (5th Cir.), cert. dismissed, 346 U.S. 892 (1953). There is, however, some authority for the proposition that the Sixth Amendment, in guaranteeing the assistance of counsel, envisages counsel who is truly an assistant and whose services may be accepted or rejected to the extent desired by the defendant. Such an interpretation guarantees to a defendant, even if he has insisted upon exercising the right to self-representation, the services of standby counsel if he so desires. Wake v. Barker, 514 S.W.2d 692, 693 (Ky. 1974); see Note, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 CALIF. L. REV. 1479, 1507-12 (1971); Note, The Pro Se Defendant's Right to Counsel, 41 U. CHI. L. REV. 927, 929-30 (1972); cf. Faretta v. California, 422 U.S. at 820 (Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant").


75. See United States v. Harbolt, 491 F.2d 78, 80 n.2 (5th Cir. 1974), cert. denied, 419 U.S. 848 (1975) (after court dismissed counsel at defendant's request so that defendant could proceed pro se, counsel allowed to continue representation when intermittently called upon by defendant and court); Walle v. Sigler, 329 F. Supp. 1278, 1281 (D. Neb. 1971), aff'd, 456 F.2d 1153 (8th Cir. 1972) (standby counsel allowed to participate actively in trial on several occasions).


limit his participation to occasions on which he may engage in offensive tactics, such as examining a witness he knows he can bully, or making statements to the jury without fear of cross-examination, or launching attacks on other defendants, government witnesses, and public officials. If it appears that a pro se defendant intends to engage in similar disruptive activity while at the same time depending on standby counsel to conduct the brunt of the defense, a trial court may well be justified in warning a defendant that it may impose limitations on the trial participation of standby counsel, even to the extent of requiring standby counsel to be present merely in an advisory capacity.

Pro se defendants who wish to prepare their cases by means of personal research and investigation might argue that reliance on standby counsel for pretrial preparation is an unjustifiable limitation on the right of self-representation. As yet, however, the right to self-representation extends no farther than the right to make one’s own defense personally. And the right to an adequate opportunity to prepare does not guarantee that a pro se defendant be allowed to pick and choose between various possible means of preparing a defense, but only that if the state, by jailing a pro se defendant before trial, restricts that defendant’s trial preparation, it must provide alternative means of preparing a defense.

It might be suggested that a resourceful pro se defendant may now obtain the benefit of standby counsel’s services simply by accepting appointed counsel up to the date of trial and then dismissing his appointed attorney. Even after the Faretta decision, however, courts have refused such untimely requests to proceed pro se, and with good reason: since appointed counsel has prepared to present the case

82. United States v. Bennett, 539 F.2d 45, 49-51 (10th Cir. 1976); Sapienza v. Vincent, 594 F.2d 1097, 1010 (2d Cir. 1979).
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himself, the last-minute pro se is usually totally unprepared for self-representation.

Even absent this consideration, there should be serious objection to any scheme of partial representation which would allow a defendant to be fully represented by counsel at one stage of the proceedings and to represent himself at another. When a lawyer manages a lawsuit, law and tradition allocate to him the power to make binding decisions of trial strategy in all but a few areas. When an accused defends himself, decisions of trial strategy are his; standby counsel is merely advisory, and his performance may not be attacked on the grounds of ineffective assistance of counsel. Partial representation by counsel, however, creates two masters of a lawsuit and presents difficult problems in the allocation of control over a lawsuit. For example, if a defendant, against all sound advice, adopts a strategy that no competent counsel could possibly recommend, an attorney representing him only in pretrial motions must decide whether to make the competent decision or to heed the wishes of his temporary client. If the client’s wishes prevail to the detriment of the defense, an appellate court will probably be forced to decide whether counsel’s failure to take competent action in the pretrial hearing amounted to ineffectiveness of counsel. In short, any scheme for partial representation forces both the defense attorney and the courts to determine who, exactly, is the dominus litis, for the term has never been written in the plural.

2. The Advantages of Standby Counsel

Serving as standby counsel may well seem a waste of professional time, particularly wasteful to the public defender who is already burdened by a crushing caseload. But appointment of standby counsel is politically the most feasible solution to the problem of the jailed

83. See Faretta v. California, 422 U.S. 806, 820 (1975).
84. United States v. Johnson, 434 F.2d 827, 830 (9th Cir. 1970); see p. 301 supra.
85. Assume, for example, that the defendant wishes the jury to hear tape recordings of a confession made without Miranda warnings because the defendant irrationally feels that material within the recordings may evoke sympathy from the jury.
86. A 1973 survey found that a full-time public defender staff attorney handles, on the average, 173 felony defendants per year. If assigned to handle misdemeanors, he handles 483 defendants per year. Asked to consider the maximum number of defendants that one full-time attorney could effectively represent per year, defenders reported that one full-time attorney can represent no more than 140 felony defendants or 295 misdemeanor defendants. NAT’L LEGAL AID AND DEFENDER ASS’N, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 29 (1975); see LaFrance, Criminal Defense Systems for the Poor, 50 NOTRE DAME LAW. 41, 43-44 (1974); Wice & Sewak, Current Realities of Public Defender Problems: A National Survey and Analysis, 10 CRIM. L. BULL. 161 (1974); Recent Developments: The Right to Counsel—Argersinger v. Hamlin: An Unmet Challenge, 11 CRIM. L. BULL. 67 (1975).
The advantages of standby counsel over other methods of preparation—both to the defendant himself and to the functioning of the judicial system—are many. Being responsible for both legal and factual preparation, standby counsel can provide a coordinated defense preparation. Pro se defendants often waste their efforts on filing a flurry of motions rather than preparing for the trial itself, and standby counsel will be more effective and efficient in preparing a defense than law students or paraprofessionals. By guiding a defendant’s preparation for trial, suggesting possible defenses, coordinating defense theories with factual investigations, and providing the defendant with the knowledge he needs in order to make an adequate presentation of his case, standby counsel may be expected to implement one of the Faretta decision’s basic concerns: that the accused have the opportunity to present his best defense.69

Despite oft-repeated warnings by courts that a pro se defendant will be granted no special concessions, a pro se defendant’s ignorance of law and procedure often forces the court to assume a more active posture on the pro se defendant’s behalf, guiding him in pretrial hearings.

87. Reform of the nation’s jail system has always been hindered by the division of responsibility for jails among a variety of state, county, and municipal executive, legislative, and judicial officials, for whom jail expenditures occupy a low priority. See President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 163-66 (1967); Mattick, supra note 58, at 787; McGee, Our Sick Jails, in R. Carter, R. McGee & E. Nelson, Corrections in America 92-95 (1975). It is highly unlikely that support could be mustered among these diverse authorities for the substantial capital outlay necessary to provide “legal runners” or a law library for each of the nation’s 4,037 locally administered jails. See pp. 306-07 supra. And law student volunteers are available only at certain fortuitously located jails.

The appointment of standby counsel, though not requiring an immediate large capital outlay, may in the long run be more expensive than alternative means of providing for pro se trial preparation. Even if, as is often the case, the public defender is appointed to serve as standby counsel, such appointments exact costs by increasing the caseload of the public defender and his investigatory services. The costs, however, are less visible because the substantial start-up costs of the public defender’s office have already been borne. And, of course, the public defender’s burden can be eased through use of paralegals. See J. Stein, PARALEGALS: A RESOURCE FOR PUBLIC DEFENDERS AND CORRECTIONAL SERVICES 8-22 (Nat’l Inst. of Law Enforcement & Crim. Justice 1976). The most economical method of providing for pro se preparation will, of course, vary from district to district, depending upon the size of jails, the number of pro se defendants, the availability of law students, the possibilities of limited releases, the caseload of the public defender, and a series of other generally unquantifiable data.

88. See Appendix, supra note 5, at 35-36.

89. See State v. Walle, 182 Neb. 642, 645, 156 N.W.2d 810, 812 (1968) (services of public defender as technical advisor of much greater value to defendant untrained in law than access to fully equipped law library).

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and in his presentation at trial. Such judicial intervention, though necessary to protect the fairness of the proceedings, fundamentally alters the nature of an adversary trial. Standby counsel may guide a pro se defendant past the errors compelling judicial intervention and thus aid in implementing another concern of Faretta: the need to minimize strains on the adversary process.

Courts often appoint standby counsel when they fear that a pro se defendant's disruptive conduct may force termination of his self-representation. In addition, it often happens that a pro se realizes in mid-trial: "I find myself drowning . . . I have to get my own self . . . somebody that knows how to swim so he can help me swim out." If standby counsel is not available to assume the conduct of the trial, a pro se defendant's second thoughts confront the court with a Hobson's choice: it must either refuse the request for counsel (at the risk of later reversal for denying the right to assistance of counsel), declare a mistrial, or recess until newly appointed counsel can familiarize himself not only with the facts of the case but also with the transcripts of the prior proceedings. When standby counsel is available, a pro se defendant's mid-trial request for the assistance of counsel creates little inconvenience.

The appointment of standby counsel for pro se defendants creates another benefit. Because the right to an adequate opportunity to prepare has traditionally been bound up in the right to effective assistance of counsel, investigative assistance is provided by statute to counsel for indigent defendants, but not to indigent pro se defendants themselves. The Federal Criminal Justice Act provides that investigative, expert, and other services necessary for an adequate defense may be requested in an ex parte application by "[c]ounsel for a person who is financially unable to obtain" such services. Services may also be obtained without request, but subject to later review and a $150 limit, by "counsel appointed under [the Act]."


95. Id. (emphasis added).
larly precondition state payments for corollary services upon a request by defense counsel. 96

Provision of corollary services for indigent defendants need not necessarily be conditioned upon a request by defense counsel, 97 but there is good reason to do so: the provisions of the Criminal Justice Act and the corresponding state acts are subject to abuse by the unscrupulous, and the application of a statutory standard for government reimbursement of defense-chosen expert assistance is a complex matter for legal determination. 98 A trial judge, unless he is to explore possible defenses himself, must "have a healthy respect for the judgment of the defense attorney in making his findings of necessity." 99 The ethics of defense counsel and his concern for his professional reputation tend to ensure that an application for collateral services is not frivolous. Professional ethics and judgment, however, are not to be expected from the jailed pro se defendant. In addition, application through standby counsel relieves the defendant from having to reveal potentially damaging information to the court in order to support a request for corollary services.

To deprive an indigent pro se defendant of the services of investigators, psychiatrists, and other experts, while providing such services to indigent defendants represented by counsel, seems an unfair discrimination. The purpose of the Criminal Justice Act is to guarantee "the crucial right of an indigent to reasonably fair equality with those who have adequate financial means to protect their rights." 100 Indeed, there is some authority to support the argument that an indigent criminal defendant has a due process right to court-appointed experts


97. Certainly when standby counsel disagrees that collateral services are necessary, the pro se defendant should be allowed to petition the court directly, subject to the court's close scrutiny of the request. The possible abuses of unwanted counsel's "final say in all but a few matters of trial strategy" was one of the factors that influenced the Faretta decision, 422 U.S. at 812 n.8.


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where his case would be prejudiced by their absence.\textsuperscript{101} If the fairness of the adversary system is to be maintained, indigent defendants must have access to minimal defense aids; these collateral aids are especially important to a pro se defendant who is prevented by incarceration from conducting his own defense preparation. Application by standby counsel would enable pro se defendants to receive these aids without generating further strains on the judicial system.

A final advantage provided by the appointment of standby counsel is that standby counsel is available, at a pro se defendant's request, to participate in the plea-bargaining process. During trial, a prosecutor's misconduct may be limited by the watchfulness of the judge and the possibility of reversal on appeal. However, judicial participation during the plea-bargaining process is extremely restricted,\textsuperscript{102} and there is no written record upon which a charge of prosecutorial unfairness can be based. Without a procedure that can be relied upon to discourage over-indicting,\textsuperscript{103} bluffing,\textsuperscript{104} or taking advantage of a defendant's demoralization caused by confinement,\textsuperscript{105} the dangers of prosecutorial manipulation of untrained litigants is great.\textsuperscript{106}

Of course, if the pro se defendant wishes to enter directly into plea bargaining with the prosecutor, his wishes must be honored. And standby counsel can no more bind a pro se defendant to a plea bargain that he has struck than could appointed counsel bind his

\textsuperscript{101} United States v. Theriault, 440 F.2d 713, 716-17 (5th Cir. 1971), cert. denied, 411 U.S. 984 (1973) (Wisdom, J., concurring); Bradford v. United States, 413 F.2d 467, 473-74 (5th Cir. 1969); see Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 CORNELL L. REV. 632 (1970); Note, The Right to Aid in Addition To Counsel for Indigent Criminal Defendants, 47 MINN. L. REV. 1034 (1963). Contra, United States ex rel. Smith v. Baldi, 192 F.2d 540, 546-47 (3d Cir. 1951), aff'd, 344 U.S. 561 (1953). If such a constitutional right to the collateral aids necessary in presenting a defense does exist, the Criminal Justice Act should be interpreted, despite its restrictive wording, to provide such services for all pro se defendants, jailed or unjailed. Cf. United States v. Johnson, 434 F.2d 827, 829 (9th Cir. 1970) (Criminal Justice Act funds used to compensate standby counsel).

\textsuperscript{102} See Note, Restructuring the Plea Bargain, 82 YALE L.J. 286, 287 n.5 (1972) (documenting hostility of appellate courts and commentators to judicial participation in plea bargaining, but noting that limited participation may be widespread).


\textsuperscript{104} See Alschuler, supra note 103, at 56-57; Polstein, How to "Settle" a Criminal Case, 8 PRACT. LAW., Jan. 1962, at 35, 41; Rossett, The Negotiated Guilty Plea, 374 ANNALS 70, 71-72 (1967).


\textsuperscript{106} See generally ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 10-12 (Approved Draft 1968); see also ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1975).
However, the participation of counsel in the plea-bargaining process, even if that participation is limited to providing advice and information, will help ensure that the plea is reliable, that the risks of litigation have been considered, and that no unfair advantage has been taken of the defendant.\textsuperscript{108}

Conclusion

A jailed pro se defendant is usually granted little opportunity to prepare his defense. Yet an adequate opportunity to prepare is a fundamental component of a fair trial. The jailed pro se, then, presents a striking case of conflict between \textit{Faretta}'s Sixth Amendment right of self-representation and the due process right to a fair trial. This Note has suggested a measure to smooth the edges of that conflict: the appointment of standby counsel. Perhaps, in truth, no jailed pro se defendant can expect a trial as full and fair as the trials of his jailmates who are represented by counsel. Appointment of standby counsel is not a pro se defendant's panacea, but if pretrial incarceration deprives a pro se of all other opportunities to prepare a defense, due process requires no less.

\textsuperscript{107} The plea bargain is binding only when the defendant makes a voluntary and intelligent guilty plea. Tollett \textit{v.} Henderson, 411 U.S. 258, 267 (1973); \textit{cf.} United States \textit{v.} Montgomery, 529 F.2d 1404, 1406 (10th Cir.), \textit{cert. denied}, 96 S. Ct. 2231 (1976) (defendant's voluntary and intelligent guilty plea precludes defendant from asserting that his right to self-representation was infringed).

\textsuperscript{108} See A. \textsc{Goldstein} \& \textsc{L. Orland}, \textsc{Criminal Procedure} 186-87 (1974); \textit{see generally} Tollett \textit{v.} Henderson, 411 U.S. 258, 267-68 (1973) (representation of counsel frequently involves highly practical considerations, \textit{e.g.}, plea-bargaining prospects, as well as specialized legal knowledge).