The Right of an Accused to Proceed without Counsel

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Notes

The Right of an Accused
To Proceed Without Counsel

The Gideon decision requires that every person accused of a serious criminal offense be afforded counsel. The author of this Note considers the treatment to be accorded an accused who expresses a desire to proceed without counsel. He discusses the origin and nature of the right to waive counsel and the interests of society which compel the application of certain restrictions upon the exercise of this right. He concludes that a defendant should be permitted to forego legal assistance only if he thoroughly appreciates the consequences of doing so and if the interest of society in providing a fair and orderly trial are not thereby compromised, and suggests procedures by which trial judges may determine whether these standards have been met.

INTRODUCTION

Despite the newly won availability of counsel to every person facing serious criminal charges1 and the obvious advantage to be derived by an accused from professional legal assistance,2 a number of criminal defendants waive their constitutional right to counsel and attempt to defend themselves.3 The reasons for doing so are many and varied. The defendant may feel he can do a

better job than could a lawyer. This belief might be based upon the observation of television shows or movie dramas which lead him to think that he is capable of being a superpleader or that a criminal trial is a simple matter. Or it might stem from a belief or hope that the jury will be sympathetic toward a layman who pits himself against the Goliath of the state. Alternatively, the defendant may believe counsel to be unnecessary because of a blind faith in his own innocence and the infallibility of the judicial system. The experienced and wily defendant may refuse counsel to lay a foundation for later attack upon the conviction. Finally, the waiver may reflect a desire to avoid delay before starting to serve a prison sentence or obtaining a release on probation or arise simply from a desire to save money.

This Note considers whether defendants have a right to waive counsel and proceed in person; if so, upon what foundation it rests and whether it is an absolute right or is qualified in some fashion; and if qualified, the nature of the qualification. Finally, the procedures appropriate for the use of trial courts to safeguard both the defendant's right to counsel and any right he may possess to proceed without counsel are examined.

I. RECOGNITION OF A RIGHT

A number of courts have recognized the right of criminal defendants to waive counsel and proceed in person. In *Adams v. United States ex rel. McCann*, the Supreme Court referred to "the right to assistance of counsel and the correlative right to dispense with a lawyer's help." The Second Circuit recently held that the right to proceed pro se is absolute and counsel is not required.

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7. *Laub*, supra note 5.

8. See *Sanchez v. United States*, 311 F.2d 827, 839 (9th Cir. 1962), cert. denied, 373 U.S. 949 (1963); *Kamisar & Choper*, supra note 8, at 35 n.133.


12. Id. at 270.

13. 380 F.2d 271 (2d Cir. 1964) (Medina, J.).
is implicit in the fifth and sixth amendments. The court noted:

[...]

... is a right arising out of the Federal Constitution and not the mere product of legislation 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.

... [The right to counsel guaranteed by the sixth amendment] was surely not intended to limit in any way the absolute and primary right to conduct one's own defense in pro peron.14

Another court has granted habeas corpus for failure to allow a pro se defense, recognizing the opportunity to defend oneself as "one of the most elementary prerequisites of a fair trial."15 A number of state constitutions provide that a criminal defendant may defend in person or by counsel, some adding "or both."16 Two cases have been found reversing convictions for failure to allow defendants to proceed alone on the ground that this constituted a violation of such constitutional provisions.17 The right of a defendant to proceed without counsel in federal courts is given by the Judicial Code, which provides that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel ... ."18 The Ninth Circuit has reversed a conviction because of the trial court's failure to accede to the defendant's request to dismiss his counsel, emphasizing that the statute gives to an accused "an unquestioned right to defend himself,"19 and several other cases have stated that the statutory right is absolute or unqualified.20

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14. Id. at 273-74.
18. 28 U.S.C. § 1654 (1958). Further, rule 44 of the Federal Rules of Criminal Procedure provides: "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."
20. E.g., United States v. Bentvena, 319 F.2d 916, 928 (2d Cir. 1963); Butler v. United States, 317 F.2d 249 (8th Cir.), cert. denied, 375 U.S. 838
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 the reference in *Adams* to the "correlative right" to sustain the proposition that it does so implicitly may be unwarranted, for clearly a right correlative to a constitutional right need not itself be constitutional. Further doubt is cast upon the "correlative right" rationale by the recent Supreme Court decision in *Singer v. United States*, where the petitioner argued that the sixth amendment right to trial by jury implied a correlative constitutional right to refuse a jury trial. A unanimous Court rejected his contention, noting that "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." 

Yet this right, resting upon the defendant's interest in being accorded treatment as a person possessing human dignity, appears so fundamental as arguably to be a requisite of due process. The *Adams* Court recognized the interest of the defendant in making a "free choice" as a "self determining individual" and that to deny a defendant "in the exercise of his free choice the right to dispense with some of these safeguards . . . although he reasonably deems himself the best advisor of his own needs, is to imprison a man in his privileges and call it the Constitution." It must be borne in mind that in the final analysis the defendant himself is the person who stands to suffer the most from an improvident choice

21. See, e.g., *United States v. Plattner*, 330 F.2d 271, 275 (5th Cir. 1964); *Egan v. Teets*, 251 F.2d 571, 578 & n.12 (9th Cir. 1957) (assuming without deciding); *United States v. Mitchell*, 137 F.2d 1006, 1010 (2d Cir. 1943); *Tompsett v. Ohio*, 146 F.2d 95, 98 (6th Cir. 1944) (dictum). 


24. Id. at 790. 

25. See *Browne v. State*, 24 Wis. 2d 491, 511-11a, 129 N.W.2d 175, 184 (1964). See *MacKenna v. Ellis*, 263 F.2d 35, 41 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959), where the court said, "Clearly, we think, it would be a denial of due process of law for the court to refuse to permit the accused . . . to defend himself and, instead, require him to accept the services of inexperienced and incompetent counsel . . . ."


27. Id. at 280. See *Laub*, supra note 5, at 256.
to reject counsel.  

II. QUALIFICATIONS UPON THE RIGHT

While it is well established that there is some right to proceed without counsel, a number of cases indicate the existence of qualifications on the right where countervailing interests are involved. The fundamental basis of these interests seems to be society's interest in the integrity of the truth-determining process.  

A. INTEREST IN ORDERLY PROCEDURE AT TRIAL

One facet of this interest is the need to have the trial proceed in an orderly fashion. Underlying this concern is the belief that only through an orderly exposition of the issues can society be adequately assured that the truth has been determined. Thus it has been said that the defendant's right to represent himself "is not so absolute that it must be recognized when to do so would jeopardize a fair trial of the issues."  

There is a considerable body of federal case law and some state authority holding that although there may be a broad right before trial commences to elect to defend pro se, the disposition of a request to dismiss counsel after trial has begun is completely within the discretion of the trial court. Several reasons have been given for permitting the trial court to refuse the defendant's request in the latter situation: the trial might become confused or confounded; the case is "too complicated to allow self-representa-

28. See Browne v. State, 24 Wis. 2d 491, 511–11a, 129 N.W.2d 175, 184 (1964).
tion;" or the defendant might take undue advantage of an opportunity to represent himself, as for example by making assertions of fact unsupported by the evidence.34

Despite the distinction which has been drawn between a request made before trial to proceed pro se and a request to dismiss counsel during trial, all the reasons enumerated above for allowing the court to deny a defendant's request to dismiss counsel during trial would be equally applicable to a request made at the outset. It is just as likely that the trial will be confused, the case complicated, or the assertions of material fact unsworn when the request precedes trial as when it is made after the trial has begun. It might be sought to justify the distinction on the ground that a defendant who commences trial with counsel has made a binding election. However, this argument not only begs the question but is irrelevant to the asserted ground for refusing to permit a defendant to dismiss his counsel, viz., to promote the fair administration of justice by maintaining the order and decorum of the court.

At least one federal case has recognized the applicability of the arguments based upon securing the orderly administration of justice to cases where the request to proceed alone was made before trial. In United States v. Private Brands, Inc.,35 the defendant had been represented by attorneys for some time, but requested prior to trial that he be allowed to proceed pro se. The court reasoned that “an accused’s right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court’s business.”36 Several state courts have also recognized a limitation on the right of a defendant to waive counsel before trial where interference with the orderly disposition of the case is threatened.37

B. INTEREST IN PROTECTING THE RIGHTS OF THE ACCUSED

In addition to the need for orderly procedure at trial, the interest of society in the proper administration of justice extends

37. Id. at 557. But see United States v. Plattner, 330 F.2d 271, 277 (2d Cir. 1964).
to full protection of the rights of the accused. This means that weight must be given the social interest in establishing the defendant's innocence if he is innocent or, if he is guilty, in his being punished only for that of which he is guilty, and in securing for him in all cases the full range of "due process of law." Although a defendant's conviction and punishment primarily affect him, "more than the rights of an accused are involved in a criminal case."

1. Denial of Incompetent Waiver Attempts

It has been established by numerous decisions that a defendant will be allowed to proceed without counsel only if he has an intelligent understanding of the consequences of his doing so. This qualification is based upon the constitutional right of an accused to counsel. The Supreme Court in Powell v. Alabama established that a conviction will not necessarily be upheld merely because the defendant did not take the initiative to request counsel. The Powell Court noted the ignorance and illiteracy of the defendants involved in the case before it and stated: "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." This rationale is equally applicable to a case where the defendant purports to waive counsel but does not fully understand the consequences of so doing. As was said by the Supreme Court in Johnson v. Zerbst:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused— whose life or liberty is at stake—is without counsel. This protecting

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91. 287 U.S. 45 (1932).
92. See generally Annot., Duty To Advise of Right to Counsel, 3 A.L.R.2d 1003 (1949).
93. 287 U.S. at 72.
94. 304 U.S. 458 (1938).
duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. . . .

This approach represents a necessary balance of the interests concerned. It is no real burden to require that defendants capable of understanding the consequences of waiver be made aware of these consequences before deciding what course to pursue. As for defendants incapable of understanding these consequences, the interest of society in achieving justice outweighs any interest an individual might have in proceeding without counsel in ignorance of the serious consequences of this choice.

Careful examination of even those cases in which the right to proceed without counsel has been accorded federal constitutional status shows that the qualification of competent waiver must be appended to the right. In Adams the Court noted that the defendant had studied law and had declared that he "was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be," and concluded that a defendant "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. . . ." Even in Plattner, which makes the strongest case for a constitutional right to proceed without counsel, the court quoted Adams and noted that if the defendant says he wants to waive counsel and defend personally, the trial court "should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. . . ." It was concluded that the defendant plainly met this test, being "quite evidently both intelligent and articulate," and likely to have "probed deeper [than his counsel] had he been given an opportunity to conduct the cross-examination himself. . . ."
The other two cases relying upon the federal constitution for a right to proceed alone do not state that defendant must understand the consequences of so proceeding; however, they involve defendants who clearly did so understand. In one defendant was found to be a college-educated journalist with a "considerable, though at times faulty and inaccurate, knowledge of law. . . ." and

45. Id. at 485. See also People v. Kemp, 55 Cal. 2d 458, 369 P.2d 913, 11 Cal. Rptr. 361 (1961).
46. 317 U.S. at 270.
47. Id. at 279. (Emphasis added.)
48. 390 F.2d at 276.
49. Id. at 277.
with fairly extensive experience before criminal courts, and in the other defendant was an ex-convict and handled himself well during his colloquy with the trial judge.

There is language in several cases characterizing the federal statutory right to proceed pro se as absolute or unqualified. Nevertheless, it is plain that statutory and state constitutional provisions must be construed so as to give full effect to the constitutional right to counsel and its corollary that a defendant may not proceed alone unless he has competently waived that right. Moreover, there is no hint in any case where it has been held that the defendant was wrongfully denied a statutory or state constitutional right to proceed alone that he was not fully competent to waive; on the contrary, the facts of most indicate that he was. In one the court made an express finding that defendant "voluntarily, intelligently, and effectively waived . . .," based upon his "mental alertness and capacity to know and understand his rights," familiarity with criminal procedures, and "full knowledge and understanding of the danger and possible pitfalls of representing himself"; in another, defendant was a college professor accused of violating an AEC regulation prohibiting citizens from entering nuclear test areas.

2. Competence: An Intelligent Appreciation of the Consequences

When a trial court is confronted with a defendant who asserts his desire to waive counsel, it must steer carefully between the Scylla of denying the defendant's substantial right to determine his own fate and the Charybdis of violating the constitutional right to counsel of a person who does not validly waive this right. Consequently a consideration of the prerequisites for a competent waiver of counsel is important.

Since valid waiver implies an intentional relinquishment of a right, it plainly may not be made without knowledge of its consequences. It may therefore be viewed as a truism that a valid waiver of counsel may not be made unless the accused knows that

62. See cases cited in note 20 supra.
64. Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959), reversing 180 F. Supp. 479 (D. Hawaii 1958). In State v. Penderville, 2 Utah 2d 281, 272 P.2d 195 (1954), the statement of facts is insufficient to evaluate the defendant's competence.
he has a right to counsel, including appointed counsel if he is indigent. 56 But it is also clear that in addition to the knowledge that he has a choice between proceeding with counsel and proceeding alone, the defendant must realize exactly what he is foregoing when he waives the assistance of counsel. 57 In von Moltke v. Gillies, 58 in which petitioner disclaimed desire for counsel and pleaded guilty, Mr. Justice Black noted that for a waiver to be valid, it

must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. 59

This formulation or one similar to it has been approved by a number of courts. 60 However, some courts have rejected portions of it.

A broadside attack was leveled against it by the Indiana Supreme Court, 61 which did not feel bound by Justice Black's statement in von Moltke, since it was not supported by a majority of the Court. 62 The Indiana court was faced with a de-


57. But see People v. Terry, 224 Cal. App. 2d 415, 418, 36 Cal. Rptr. 722, 724 (Dist. Ct. App. 1964), where the trial court had attempted to explain much more than the mere availability of a choice to an apparently dull defendant, but the reviewing court was satisfied by a showing that the trial court "had made clear to him, beyond any possible confusion resulting from his lack of language facility, that he must choose between representation by his then counsel or by himself." Cf. United States v. McGee, 242 F.2d 629 (7th Cir.), vacated & remanded per curiam, 355 U.S. 17 (1957); Hoelscher v. Howard, 155 F.2d 909 (7th Cir. 1946).

58. 332 U.S. 708 (1948).

59. Id. at 724. Only three justices joined with Mr. Justice Black in the plurality opinion. Two justices, in a separate opinion, called for further findings on whether petitioner's waiver and guilty plea were based, as she alleged, upon misinformation received from the government attorney as to the nature of the offense charged.


62. Id. at 587, 187 N.E.2d at 483; see note 58 supra; cf. United States
The defendant who asserted that his alleged waiver was ineffective because he had not been informed as to related charges and included offenses, the penalties and possible defenses to such charges, “and all other matters essential to a full understanding of the services which an attorney might perform in his behalf.” The court held that these assertions were not grounds for reversal, rejecting any suggestion that a criminal defendant must be given “the same complete legal briefing on his case by the court as would be given by counsel.”

More selective divergences from the standard set forth in von Moltke take the form of attempts to shorten the list of matters with which the defendant must be familiar. The component most often sought to be eliminated is that requiring knowledge of possible defenses. Some courts have stated that once the defendant has competently waived, the court is no longer obligated to inform him of possible defenses, one court reasoning that since it is not the duty of the judge to point out possible defenses to a defendant represented by counsel there is no duty to a defendant proceeding alone after having waived.

But this misses the point that if defendant was not informed as to these matters, then he did not have a full knowledge of the relevant facts upon which to base his decision to waive. In any event, the question whether knowledge of defenses is required should have been considered settled since the Supreme Court in 1957 found a sufficient ground for reversal in defendant’s allegation that his alleged waiver was made in ignorance of the “independent contractor” defense to the crime with which he was charged—embezzling funds of a common carrier in interstate commerce.

Another matter which it has been sought to strike from the list is knowledge of the degrees of the offense. A waiver has been


63. 243 Ind. at 585, 187 N.E.2d at 488.
64. Id. at 586, 187 N.E.2d at 488; cf. United States v. Redfield, 197 F. Supp. 559, 572 (D. Nev.), aff’d, 295 F.2d 249 (9th Cir. 1961), cert. denied, 369 U.S. 803 (1962). In Gates v. State, 243 Ind. 325, 330, 183 N.E.2d 601, 604 (1962), the court said that all a defendant needs to know is “the nature of the charge against him, the punishment for that specific offense, and his right to have an attorney to advise him concerning the law, if he so desires.”
66. Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).
67. United States v. McGee, 355 U.S. 17 (per curiam), vacating & remanding 242 F.2d 520 (7th Cir. 1957).
held effective despite its being made in ignorance of the fact that there were degrees of homicide in the state concerned and that on an indictment of first degree murder one could be found guilty of a lesser offense. But it would seem that defendant does not fully appreciate what he is foregoing if he does not know that the charges are reducible.

A defendant should be allowed to proceed without counsel only if he has an intelligent understanding of what an attorney could do for him. It is not sufficient that he has a vague notion that lawyers are sometimes of assistance in such matters or that he realizes he is facing serious charges or that he is in danger of grave punishment.

But it is equally insufficient alone that accused has been exposed, either by the court or from another source, to complete information regarding the consequences of his waiver. He must also possess an intelligent appreciation of the significance of these consequences. A lack of ability so to appreciate may exist either when the facts are such that the average layman could comprehend them but the defendant is below average and thus cannot do so, or when the facts are so complex that although defendant is fairly intelligent he, being a layman, cannot comprehend them. In Rice v. Olson, one of the Supreme Court’s reasons for refusing to find a valid waiver was that the defendant’s defense involved a question “obviously beyond the capacity of even an intelligent and educated layman . . . .”

68. Hoelscher v. Howard, 155 F.2d 909 (7th Cir. 1946).
72. 324 U.S. 786 (1945).
73. Id. at 790.
follows that in some cases, because of either the nature of the defendant or of the case, presence of counsel is mandatory.

3. Proposed Classification of Defendants by Competence To Waive

For convenience, defendants attempting to waive may be classified into three groups. One type could be called fully competent. This defendant, a rare individual, possesses a sufficient knowledge and understanding of the requisite facts to enable him fully to realize the consequences of foregoing legal assistance in facing the charges in question. Another type of defendant might be termed the marginal defendant. He is intelligent enough to apprehend the consequences of proceeding alone if advised of them; but he has no present knowledge of them. Marginal defendants are not a homogeneous group; differences exist in the quantum of facts and intelligence possessed by various individuals comprising the group, so that more comprehensive explanation will have to be given some than others to transform them into fully competent defendants. If the defendant is of this type, he must be given the type of explanation necessary to make him understand the situation, even if this is more explanation than would be necessary for another marginal defendant. A third type, the submarginal defendant, lacks the ability to appreciate the consequences of his proceeding without counsel. Given the complicated and highly specialized nature of the legal proceedings which must be comprehended, it is clear that many persons who meet the standards of mental ability applied in other areas of law may be submarginal for purposes of waiving counsel.

The only type of defendant who should be permitted to waive is the fully competent defendant, because only he has the requisite knowledge and appreciation of the consequences of waiver. The marginal defendant may be transformed by proper and effective explanation into a fully competent defendant, but until this transformation occurs he may not waive, even though a "mature, intelligent individual" or an "intelligent, mentally acute" person.

Probably the primary cause of poor results in the waiver area is the failure on the part of some courts to recognize the distinc-

tions between these classes. Some courts have affirmed convictions of defendants who quite clearly were not exposed to the requisite facts on the ground that they were intelligent, which is to treat the marginal defendant as if he were fully competent. Further, a number of courts have been guilty of treating submarginal defendants as if they were marginal by affirming convictions where the defendants seem clearly to have been incompetent to understand the facts on the ground that the trial court did explain the facts.

4. Inadequate Defense at Trial

In reviewing cases in which defendants proceed to trial without counsel, appellate courts often determine whether due process was accorded the defendant in terms of whether he had a "fair trial." In the vast majority of cases this is simply another way of examining whether or not the defendant competently waived his right to counsel. Indeed, a poor showing at trial may well be the best evidence that the defendant lacked an intelligent understanding of the consequences of proceeding without counsel. However, a case may arise in which a defendant competently waives counsel but, as it develops at trial, is unable actually to handle the case himself. Where the trial court can anticipate this failure it may be within its prerogative to require counsel to ensure a fair trial. But extension of forced appoint-

77. See, e.g., United States v. McGee, 242 F.2d 520 (7th Cir.), vacated & remanded per curiam, 355 U.S. 17 (1957); cf. Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1950), in which the court observed that although defendant's "ideas of a defense were extraordinarily unorthodox, he was alert and intelligent."


ments of counsel to every case where it is anticipated that defendant may not do as well as a lawyer could easily eliminate altogether the right of a defendant to proceed pro se. Consequently, absent a threat to the orderliness of the trial, the defendant should ordinarily be permitted to proceed to trial alone where competent to understand the consequences of doing so. Only when the resulting trial amounts to a travesty of justice should an appellate court feel compelled to find a denial of due process. Since a reversal may be obtained in the case where counsel, presumably thought to be competent when appointed or retained, proved incompetent in his conduct of the trial, due process may also be violated where a defendant competently waives counsel but then proceeds to conduct a defense that amounts to no defense at all. However, in a case where a defendant has waived counsel, he has chosen to rely on his own ability; the situation where counsel has proven to be incompetent has been out of his hands, particularly when counsel was appointed. Thus the defendant who competently chose to proceed alone should be required to show a much more compelling case to obtain a new trial than the defendant who claims his appointed counsel was inadequate. In most cases competence to waive will coincide with the ability to present an adequate defense; the societal interest in according all defendants a fair trial may occasionally require a reversal, but should not permit the experienced defendant to argue his own case and then obtain a new trial on right to counsel grounds if he loses.

III. PROPER PROCEDURE FOR THE TRIAL COURT

The most significant question raised by the principles discussed above relates to the procedure the trial court should follow in discharging its protective duty when confronted by a defendant without counsel. As one observer has remarked, the method used to inform defendant of his right to appointed or retained counsel “is not merely an administrative detail,” because “if there is a failure of communication, the purposes of affording

81. See text accompanying notes 30–38 supra.
83. Several courts have distinguished between appointed and retained counsel on the issue of whether inadequate counsel will merit a reversal. This distinction has been criticized as unwarranted. See Waltz, supra note 82, at 290–301.
him the assistance of counsel will be thwarted with a perverse effect, for the more ignorant and innocent will suffer while the wily and experienced take advantage of the offer. 88

A. EXPLANATION AND INQUIRY INTO DEFENDANT’S UNDERSTANDING BY THE COURT

The trial judge’s responsibility does not end when told by an accused that he is informed of his right to counsel and desires to waive that right. The court must go beyond routine inquiry and “investigate as long and as thoroughly as the circumstances of the case before him demand” to determine that defendant apprehends all the consequences of his proceedings without the assistance of counsel. 86 In order fully to inform the defendant of these consequences, the trial court should make known all facts which bear on the value of counsel and which might reasonably affect a defendant’s decision whether to proceed without counsel. 87

The investigation that should and easily can be a part of the trial judge’s explanatory procedure serves the important function of enabling the judge to determine to which class the defendant before him belongs — fully competent, marginal, or submarginal. 88 As a part of this procedure it would be wise for the court to inquire into the defendant’s motives for wishing to waive 89 to ensure that no waiver is based upon erroneous preconceptions. If the defendant is found to be fully competent, the judge may allow him to waive immediately. If a marginal defendant is involved, the judge should continue his explanation to prevent him from waiving until he has attained the status of full competence. On the other hand, if the defendant is found to be submarginal, the judge should see that the defendant receives the aid of counsel. 90 He may cease explanation and appoint counsel as soon as it is clear that the defendant is of this type, bearing in mind

87. See notes 57, 58, 60 & 64 supra and text accompanying notes 55–68 supra.
89. See text accompanying notes 4–10 supra.
90. If defendant has sufficient funds, he may be required against his will to retain counsel. People v. Mitman, 184 Cal. App. 2d 685, 7 Cal. Rptr. 712 (Dist. Ct. App. 1960). It does not seem objectionable that defendant thus may
that this type comprises more than just those defendants who are not *sui juris*.

Admittedly, it may sometimes be inconvenient for a court to have to follow these practices. But in view of the seriousness of the consequences to the parties involved and because of the necessity of determining the truth, a certain amount of inconvenience must be tolerated. It also must be borne in mind that the incidence of waiver may be reduced to insignificance if the trial judge genuinely encourages defendants to avail themselves of counsel.92

B. WAIVER BY DEFENDANTS WISHING TO STAND TRIAL

The consequences of proceeding without counsel are probably as great for the defendant planning to plead guilty as for one who plans to plead not guilty.93 This is so because of the danger that matters such as defenses and circumstances in mitigation will be hidden by the guilty plea94 and because of the significance of legal services such as securing reduced charges in return for the guilty plea and representing the defendant's interests in regard to sentence, probation, and parole determinations.95

Yet trial courts may feel justified in treating differently the defendant who wishes to waive and plead guilty and the rare defendant who wishes to waive and plead not guilty.96 The defendant who wishes to plead not guilty and proceed to trial without counsel must know about the evidentiary and procedural niceties of the courtroom.97 Thus it would seem proper for the

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92. See von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (opinion of Black, J.); Williams v. Kaiser, 323 U.S. 471, 475 (1945). However, in Gibbs v. Burke, 397 U.S. 773, 781 (1949), the Court said, "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty."


94. See Note, 76 Harv. L. Rev. 579, 597 (1963); 43 Texas L. Rev. 243, 244 (1964).

95. A survey has shown that far fewer of the defendants who waive plead not guilty than guilty. Note, 76 Harv. L. Rev. 579 (1963).

96. Browne v. State, 24 Wis. 2d 491, 511b, 129 N.W.2d 175, 185 (1964).

In People v. Terry, 12 Cal. App. 2d 415, 418, 36 Cal. Rptr. 722, 724 (Dist.
trial court to inform the defendant who wishes to proceed without counsel of all the consequences of this choice other than those relating to trial procedure before permitting him to plead. If it is then clear that he comprehends them and still desires to proceed alone, he may be asked to plead. If he pleads not guilty, the judge must explain and determine whether the defendant comprehends the consequences of proceeding to trial without counsel.

C. AUTOMATIC PROVISION OF COUNSEL

An alternative approach used by a considerable number of judges is to appoint counsel automatically, in the case of the indigent defendant, or direct defendant to secure counsel, if he has the means to do so. A pragmatic reason for automatic provision of counsel is that since a great many defendants, especially indigents, are probably not competent to waive at any rate, and since few defendants waive if they are genuinely encouraged to have counsel, it saves time to provide counsel as a matter of course. More significantly, it has been viewed as proper that someone other than the judge explain to a defendant the desirability of legal assistance in his case because of the danger that

Ct. App. 1964), the court stated that a court is "under an obligation to explain to a defendant who desires to represent himself the difficulties he will encounter . . . ."


99. In Browne v. State, 24 Wis. 2d 491, 511a, 129 N.W.2d 175, 184 (1964), the court said that "it is highly important to consider that many persons lack the capacity to evaluate intelligently their circumstances during the course of a criminal prosecution." See Kamisar & Choper, supra note 90, at 26; Potts, Right to Counsel in Criminal Cases: Legal Aid or Public Defender, 28 Tex. L. Rev. 491, 500-01 (1950).

100. See Kamisar & Choper, supra note 90, at 35 n.153.

101. Some judges go considerably further, refusing to permit waiver. Kamisar & Choper, supra note 90, at 35, 36 n.155. According to Bodenheimer, Manual for Justices of the Peace in the State of Utah 91 (1956), the "established practice" in Utah is to allow no waiver in capital cases. Other judges "almost insist" that counsel be appointed. Elison, Assigned Counsel in Montana: The Law and the Practice, 26 Mont. L. Rev. 1, 3 (1964).

Cf. Cal. Pen. Code § 1018, which forbids acceptance of guilty pleas in capital or life-without-parole cases unless the defendant is represented by counsel.

102. Mazor, supra note 85, at 76.
a defendant will disclose an opinion as to his guilt in such a discussion.\textsuperscript{103}

Even when counsel is automatically provided a defendant may still fully assert his right to proceed pro se. Counsel is appointed in the first instance to confer with him as to the advisability of retaining counsel for the trial. If the defendant decides to proceed alone after consultation, he would be free so to indicate.\textsuperscript{104} Of course the court still must ascertain at this point whether the defendant sufficiently appreciates the consequences of waiver.

This arrangement does, however, lead to the possibility that the defendant will never be informed of his right to proceed alone. If the defendant is competent to waive and defend without prejudicing the order and decorum of the court must be aware of his right to do so if the right is to have any real content. But there is little authority for this proposition,\textsuperscript{105} and it has been held that a reversal for failure to inform of the right to proceed alone probably could be had only where the defendant can show resulting substantial prejudice.\textsuperscript{106}

D. Advisory Counsel

Another procedure that has been utilized in the case of a defendant who wants to represent himself is to appoint a lawyer to sit beside him during the trial to advise him.\textsuperscript{107} This approach has been praised\textsuperscript{108} and works well in cases where the defendant has competently waived.\textsuperscript{109} It has also worked where defendant probably did not waive competently, but after a short and fairly

\textsuperscript{103} See State ex rel. Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95 (1964).

\textsuperscript{104} People v. York, 207 Cal. App. 2d 880, 24 Cal. Rptr. 815 (Dist. Ct. App. 1962); see Kamisar & Choper, supra note 90, at 36 n.155. But see note 101 supra.


\textsuperscript{107} Kamisar & Choper, supra note 90, at 36.

\textsuperscript{108} Note, 76 Harv. L. Rev. 579, 585 (1963).

\textsuperscript{109} See, e.g., People v. Kenzik, 22 Ill. 2d 567, 177 N.E.2d 162 (1961).
unsuccessful attempt to represent himself put himself into the attorney's care. But in the latter situation it is only by chance that the method works well; if defendant is stubborn quite a different situation may develop, yielding extremely poor defense presentation, sometimes leading to reversal. In the case of the marginal or submarginal defendant who is adamant in his efforts to proceed without the aid of the advisory counsel provided for him, the net effect is the same as if no counsel at all had been afforded. The fact that the court saw to it that an attorney sat mutely by defendant's side while he unsuccessfully tried his own cause seems to be something less than what the Constitution requires in granting the right to counsel to all who have not competently waived counsel. Thus, this approach must not be used in lieu of a performance by the court of its duty to determine whether the defendant has competently waived, but should be used only where a competent waiver is made.

Several cases indicate that courts are not bound to appoint advisory counsel upon a defendant's request, and this is probably wise, since it would be a waste of manpower to require an attorney to sit through a trial in circumstances in which he will probably not be called upon to perform any services. But in a case where it appears the defendant will make use of advisory help, it may be desirable for the trial court, in its discretion, to extend this service.

CONCLUSION

Balancing the individual's interest in being allowed to govern his own affairs against society's interest in the achievement of criminal justice may be a difficult task for the courts. But it is one that can be neither avoided nor delegated. Although the


111. In Davis v. State, 368 P.2d 519 (Okla. Crim. App. 1962), advisory counsel was appointed to assist a defendant who alternatively thought Jesus Christ would defend him and that he himself was Jesus Christ, but the defendant made no use of his attorney and no attempt to examine or challenge jurors, to cross-examine or to make an opening statement. But see People v. Terry, 224 Cal. App. 2d 415, 36 Cal. Rptr. 782 (Dist. Ct. App. 1964), where a conviction was affirmed despite defendant's refusal to make use of his advisory attorney and the ineptness of his own defense.


“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. Such a right is provided by federal statutes and in many state constitutions. A proper interpretation of these authorities should require that the defendant be allowed to handle his own defense if he does not take undue advantage of this right to the serious prejudice of the order and decorum of the trial, and if he makes the decision to do so with knowledge of all its consequences, including an understanding of all the services an attorney would be able to perform for him. But if the defendant is found wanting in any of these matters, an attorney must represent him, even if this is contrary to the defendant’s wishes. He must not be allowed to proceed in an ignorance which may cause untold harm, not only to himself and those who have a substantial interest in his life and freedom, but also to the integrity of the judicial system as a truth-determining process.