In **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525 (1975), the United States Supreme Court mandated the inquiry which must take place between the judge and the defendant. The judge must inquire into the defendant's:

1. Mental condition;

2. Knowledge and experience in criminal proceedings;

3. Capacity to make a decision regarding self-representation;

4. Understanding of the benefits of counsel;

5. Understanding of the risks of proceeding without counsel;

6. Understanding of the right to represent himself/herself, but that the court will appoint counsel if requested; and

7. Understanding of the potential sentence if convicted.

The record must reflect that the defendant is making a knowing and intelligent waiver of counsel after being advised of the benefits of counsel. If the defendant declines counsel, it is imperative that the trial judge renew the offer of counsel throughout the proceedings, including jury selection, the trial, and sentencing.

The Sixth Amendment speaks of assistance of counsel, and an assistant, no matter how expert, is still an assistant. See Faretta v. California, 422 U.S. 806, at 820 (1975). . . . Accused has never waived his right to defend himself. The Accused demands his right to preserve actual control over his case. This is the core of the Faretta right. See McKaskle v. Wiggins, 465 U.S. 168, at 178 (1984). . . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another. See Simmons v. United States, 390 U.S. 377, at 394 (1968). It is further expected that the Accused will have meaningful and effective assistance of counsel at each and every step of any and all proceedings in order that he will not be denied due process. He requires the guiding hand (not controlling) of counsel at every step in the proceedings against him. See Powell v. Alabama, 287 U. S. 45 at 69 (1923).

The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial. See McKaskle v. Wiggins, 465 U.S. 168, at 174 (1984).

The pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. See McKaskle, supra, at 178. The Accused further cautions this court against misconstruing his discussion regarding assistance of counsel as if it were a demand for hybrid counsel. The Accused is not demanding a "right" to self-representation and also a right to be represented by an attorney. The "right" to self-representation and the "right" to representation by counsel would be construed to be disjunctive rights. However, he right to defend one's self as well as the right to assistance of counsel ARE NOT disjunctive rights. See United States v. Daniels, 572 F.2d 535, at 540 (5th Cir. 1978).

The Accused has more constitutionally secured rights than just a choice of either going it alone without the assistance of counsel (in order to maintain his Sixth Amendment (Faretta) right to defend himself), or waiving both rights by acquiescing to the appointment of counsel to represent him, and thus allowing court-appointed counsel to become master of the case as opposed to being the assistant. The express language of Faretta (along with McKaskel v. Wiggins) clearly shows that the right to defend one's self is a coexistent right guaranteed by the Sixth Amendment; and not merely one of two disjunctive rights created by statute. Faretta clearly shows that the right to defend one's self is to be supplemented by assistance of counsel; not replaced by counsel. A defendant who represents himself is "entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's case. See In re: Little, 404 U.S. 553, at 555 (1972). The United States Supreme Court has held that a forced choice between two fundamental constitutional guarantees is untenable. See Simmons v. United States, 390 U.S. 377, at 394 (1968). Given the general likelihood that pro se defendants have only rudimentary acquaintanceship with the rules of evidence

and courtroom protocol, a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in pro se cases. The energy and time toll on the trial judge, as fairness calls him to articulate ground rules and reasons that need not be explained to an experienced trial counsel, can be relieved, at least in part, by appointment of amicus curiae to assist the defendant. If defendant refrains from intentionally obstructive tactics, amicus would be available to provide advice on procedure and strategy. See United States v. Dougherty, 473 F.2d 1113, at 1124-1125 (D.C. Cir. 1972). We [the Second Circuit] suggest that the district courts would be well advised to offer as an alternative to an indigent defendant who wishes to proceed pro se the assistance o appointed counsel available as a resource to the extent that the defendant may wish to make use of his services. Such assigned counsel would be available at least to meet with the prosecuting attorney, to see that discovery procedures are followed and necessary motions are made, to confer with the defendant, to be present in the courtroom during trial, and otherwise to do those things which the defendant is unable to do for himself. See United States v. Spencer, 439 F.2d 1047, at 1051 (2nd Cir. 1971).

More resources:

ARGERSINGER v. HAMLIN, 407 U.S. 25 (1972)
BURGETT v. TEXAS, 389 U.S. 109 (1967)
ESCOBEDO v. ILLINOIS, 378 U.S. 478 (1964) - counsel need when
GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963)
GOVERNMENT of VIRGIN ISLANDS v. ZEPP - loyal counsel
HOLLOWAY v. ARKANSAS, 435 U.S. 475 (1978)
JOHNSON v. ZERBST, 304 U.S. 458 (1938)
McKASKLE v. WIGGINS, 465 U.S. 168 (1984)
SIMMONS v. UNITED STATES, 390 U.S. 377 (1968)
WASHINGTON v. TEXAS, 388 U.S. 14 (1967)

Regarding a "**Marsden Motion**" - *A motion made by the defendant claiming he is not being represented adequately.*

Public Defenders are over worked and under paid. Because of this some Public Defenders are slack on their job to the point of even refusing to contact their clients prior to trial.

In any case if you feel that your Public Defender is not working in your best interest because (s)he fails to visit or meet with you, or does not return your calls, you should request the court to appoint you another counsel.

It is an attorney's duty, whether a public defender or privately employed by you, to be diligent in keeping contact with you. A common complaint is that they fail to communicate with the defendant prior to trial. Communication with your attorney is a must and you and your defense counsel should agree upon defense strategy. As with all cases the pretrial work begins with a meeting with you. Communication must remain open throughout the investigation phase as well as the trial phase of your case.

In most jurisdictions a "Marsden Hearing" is allowed. This hearing is to allow the court to hear the defendant's problems with their court appointed counsel giving the court cause to appoint new counsel. However you must show the court serious problems, such as lack of contact and/or communication.

To seek a Marsden Hearing, write a letter to the judge, requesting to a meeting with him regarding your appointed counsel. Send a copy to both your counsel and the prosecutor, remember to keep a copy for yourself. This letter should state all problems you are having with your attorney. Keep the letter concise, compact and truthful do not jeopardize your honor before the judge by stretching the truth.

Thursday, April 29, 2004

Really, Really Dumb Clients

This blog is not about ripping on clients. That being said, there are a couple of realities here that must be shown:

1) Most non-public defenders do not know about the inner workings of our job, and don't realize the characters we deal with. Sure you can have contacts with the same population of people (socially, professionally, or, less fortunately as a victim), but likely you will not deal with them in the same manner as we do. This means that if you are friends with people who use public defenders, they will not act the same way to you as they do towards us (for better or worse), the same as if you are a DA or Judge, or a social worker, or a co-worker. We see a side of people that most never see, this is part of what makes our job very fun and interesting.

2) Much of our job entails this personal interaction with fascinating people. As much as writing motions, arguing in court, jury trials, or any other aspect of our job, we spend

time talking with these people in terrible positions who react in dramatically different, and often bizarre manners. I'm not just talking about poor minorities, lest anyone think this is where I'm going. I've dealt with wealthier defendants on occasion, and I've certainly read about them. I see little difference between some of my clients and Michael Jackson, Robert Blake, OJ Simpson, Jason Williams, Courtney Love or many other high profile defendants.

Thus, one of the major parts of my job that I love recounting are what David Letterman may call "Stupid Defendant Tricks." Today was a classic one.

Client is charged with various charges that can land him in prison for 30 or more years (serving 85% of that sentence, no "soft" time here). At prelim, the DA tells me that the witnesses to the most serious charges have moved out of state, but they will proceed nonetheless and push it to trial (they do not need the witnesses for prelim, they can proceed using the policeman's recounting of what the victim told him) unless the defendant wishes to plead to a lesser charge right now. Instead of making a 12 year (at 85%) offer to the serious charge (the mandatory minimum), they will offer a plea to the other charge they can easily make for 5 years (serving as little as 50% of the time). If my client was charged only with the less serious charge and not the more serious charge, the offer would be a poor offer, but not out of the question (his max was still 9 as to the lesser charge). However, since he is avoiding 85% time and the serious charges, it is a great deal. I tell him that, he says no, he wants the same offer as the co-defendant (who has no record and is offered probation). I tell him it's not in the cards. We do the prelim, he's held to answer on all charges, the case proceeds towards trial.

I visit him in jail, and he's mad at me for not getting him a 1 year deal, and says he wants to fire me and get another state appointed attorney (in California a "Marsden" motion, something that I have never seen succeed, although frequently tried). We go to court, the DA re-offers the 5 years, in front of my client I counter with 1, she declines. Now my client runs the Marsden motion, which is denied (of course), so he says that he wants to go pro-per (represent himself). The judge grants him pro per status, and I'm taken off the case.

A week later, 2 days before trial is supposed to begin, I'm called by the Court, where my client has asked to withdraw his pro per status and have an attorney appointed, so the Judge re-appoints me. I talk to my client, who tells me that he would like the 5 years. I speak with the DA, and guess what she says?

Sorry, no deal, I subpoenaed the witnesses, they are flying in from out of state, and the offer is now 12 years (at 85%). My client begs -- no dice.

So, we'll see what happens. 12 years is the minimum to one count, but if convicted at trial, other enhancements would make the minimum 22 years. I can almost predict what happens from here. My client rejects 12 asking continuously for 5, the DA keeps saying no. We start trial, my client gets really scared and says he'll take the 12, but that offer is now off the table, and the offer is something like 18 or 20. My client says no way, but

he'll take 12. We keep going, he says he'll take 18, the DA or Judge says too late in the trial, we're going all the way through. My client is convicted and he gets 30 years.

I can see it now, and it's a pity, but its reality.

A frequent refrain from clients (including this one) is something to the effect of "I've talked to a lot of guys in here [jail] and they got less time than they're offering," or "I know that they are making a high offer now, and if I push it all the way they'll come up with a better offer than this." After this case is over, if, as expected, my client gets a huge amount more time than he was first offered, I want him to do his time in the local jail instead of in state prison so he can relay his story to all future defendants about the cost of stupidity and not trusting your lawyer. Alas, that won't happen, rather he'll blame it all on me.

How's that for a dose of reality about this job?

…as found on, http://publicdefenderdude.blogspot.com/2004/04/really-really-dumb-clients-this-blog.html

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The court will take Judicial Notice:

> Due Process provides that the "rights of pro se litigants are to be construed liberally and held to less stringent standard [with appropriate benevolence] than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements. Haines v Kerner, 404 U.S. 519-520 (1972); further at, supra, 520; allegations of pro se complaints are held to "less stringent standards than formal pleading drafted by lawyers," reaff'd, Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (Emphasis added.)
>
> "Right to proceed pro se is fundamental statutory right that is afforded highest degree of protection" DEVINE V INDIAN RIVER COUNTY SCHOOL BD., 11TH CIR. 1997

All officers of the court are hereby lawfully placed on notice under authority of the supremacy and equal protection clauses of the United States Constitution, incorporated into this instant matter, and the common law authorities of Haines v

Kerner, 404 U.S. 519-421 (1972), Platsky v. C.I.A. 953 F.2d. 25, and Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), Trinsey v. Pagliaro, D.C. Pa. 1964, 229 F. Supp. 647. In re Haines: pro se litigants are held to less stringent pleading standards than bar licensed attorneys. Regardless of the deficiencies in their pleadings, pro se litigants are entitled to the opportunity to submit evidence in support of their claims. In re Platsky: court errs if court dismisses the pro se litigant without instruction of how pleadings are deficient and how to repair pleadings. In re Anastasoff: litigants' constitutional rights are violated when courts depart from precedent where parties are similarly situated. All litigants have a constitutional right to have their claims adjudicated according the rule of precedent. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000)

On "pro se"

> **pro se** For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court. Black's Law Dictionary, Fifth edition, 1979, page 1099
>
> **pro se** For one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court. Black's Law Dictionary, Sixth edition, 1990, page 1221
>
> **pro se** *adv. adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. — Also termed *pro persona*; *in propria persona* Black's Law Dictionary, Seventh edition, 1999, page 1236
>
> > *pro persona* adv. & adj. [Latin] For one's own person; on one's own behalf <a *pro persona* brief>. – Sometimes shortened to *pro per*. See PRO SE. Black's Law Dictionary, Seventh edition, page 1232

> *pro persona* (= for his own person, on his own behalf) is a LATINISM used in some jurisdictions as an equivalent of *pro se* and *in propria* persona. A Dictionary of Modern Legal Usage, 1987
>
> In Propria Persona. "In ones own proper person. It was a former rule in pleading that pleas to the jurisdiction of the court must be plead in propria persona, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is free to answer charges after "taking leave" of the accused, which admits the jurisdiction." Black's Law Dictionary, Fifth edition, 1979, page 712

> **pro se**, *n.* One who represents oneself in a court proceeding without assistance of a lawyer <the third case on the court's docket involving a pro se>. — Also termed *pro per*. Black's Law Dictionary, Seventh edition, page 1237 (also Black's Eight edition, 2004)
>
> **pro se** = on his own behalf. The phrase is two words, and should not be hyphenated. Functionally, the phrase may be either adjectival or adverbial. Here it is the former: "In this *pro se* action, plaintiff contends that…" Just as frequently it is adverbial, as here: "The petitioner appeals *pro se* from…" A Dictionary of Modern Legal Usage, 1987

It may be said that the authorized agent, the man sometimes designated with the appellation John Henry Doe, as may be case manager, is *pro se*. If the court means that the authorized agent, the man sometimes designated with the appellation John Henry Doe in p*ropria persona* proceeding *sui juris* is without assistance of a lawyer or disability of an attorney – he agrees. If the Court concludes anything else, the man sometimes designated with the appellation John Henry Doe does demand the Court to timely and factually explain it on the record, as the man sometimes designated with the appellation John Henry Doe is not an attorney or a lawyer.

> ***Sui Juris*** - Possessing all the rights to which a freeman is entitled; not being under the power of another, as a slave, a minor, and the like. To make a valid

> contract, a person must, in general, be *sui juris*. Every one of full age is presumed *sui juris*. Story, Ag 10, Harrison v. Laveen 196 P.2nd 456, 461

A man's "name" is that person's property. For a man's "name" to enjoy *Sui Juris* status, that "name" must be free of explicit legal disability resulting from some contract, indenture or commercial agreement, which is "held-in-due-course" by a fellow Citizen, alleged corporation or by an alleged agency of government.

> **Sui juris** Lat. Of his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship. Having capacity to manage one's own affairs; not under legal disability to act for one's self. Black's Law Dictionary, Fifth edition, 1979, page 1286

This court should know, a STATE, or MUNICIPAL corporation [THE STATE OF TEXAS], by the 13th amendment to the Constitution of the united States of America, cannot compel performance of any kind, over any natural, flesh and blood man, up/down to and including even a 'juristic person', unless he, or it, has entered into an unconditionally and knowingly signed contract free of fraud, voluntarily and freely entered into, compelling such performance. Pursuant to Uniform Commercial Code (UCC) § 3-501, without dishonor, I am not in possession of nor am I aware of any originating contract or manner of contract or agreement existing that in any way compels me to any manner of performance, regarding the above captioned matter, or that binds me to the jurisdiction of this court or "THE STATE OF TEXAS." I do claim and reserve all rights, remedies, defenses, statutorial or procedural, and I retain full constitutionally secured rights, power, privileges and prerogatives and enjoy the benefits thereof, at all times - in all places; and pursuant to Maritime Claims Rule E(8) [gold-fringed flag in courtroom signifies admiralty / commercial jurisdiction], UCC 1-103, and UCC 1-308, without prejudice, I reserve my common law right not to be bound by or compelled to perform under any contract, indenture, commercial agreement or bankruptcy that I did not enter into knowingly, voluntarily and intentionally; I do not accept the liability of the "compelled benefit" of any unrevealed contract, commercial agreement or bankruptcy. All competent jurists know and understand that statements of counsel (prosecutor), even if "sworn to on a stack of Bibles" are not facts before any court in

any proceeding but merely the conclusions of counsel. “Statements of counsel, in brief or in argument, are not sufficient for a motion for summary judgment.” *See* Trinsey v. Pagliaro, D. C. Pa. 1964, 229 F. Supp. 647. Show me the contract [commercial law] or [common law] show me the damaged party. I deny existence of any.

Uniform Commercial Code § **3-501**. **PRESENTMENT**.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Article 4, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.

(2) **Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so**, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) **Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement**, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.

(Also known as the Texas Business & Commerce Code Uniform Commercial Code)

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