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The Accused as Co-Counsel: The Case for the Hybrid Defense

NOTES

THE ACUSED AS CO-COUNSEL: THE CASE FOR THE HYBRID DEFENSE

INTRODUCTION

The sixth amendment's guarantee of "the assistance of counsel" is one of primary importance in the criminal justice process. In *Gideon v. Wainwright*[1] the United States Supreme Court held the right to counsel to be so fundamental to due process that it is incorporated by the fourteenth amendment and thereby made applicable to the states. The Court in *Faretta v. California*[2] also established that upon a knowing and intelligent waiver an accused has a right implicit in the sixth amendment to waive the guarantee of assistance of counsel and conduct his defense *pro se*. Under these interpretations of the sixth amendment the defendant may elect to proceed *pro se* or with counsel. The question then arises whether an accused in a criminal prosecution may combine these two constitutional rights and present a "hybrid defense."

The concept of a hybrid defense is one which must be clearly distinguished from other modes of presenting a defense. A hybrid defense is one in which the defendant decides that he and his counsel—either assigned or retained—together will take an active, verbal part in the defense at trial. Hybrid representation encompasses the notion that the accused will generally make the decision as to the tasks to be performed by each.[3] The role of each might include conducting *voir dire* of the jury, examining witnesses, making arguments, presenting motions, and other acts involved in the presentation of the defense.

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1. 372 U.S. 335 (1963).
2. 422 U.S. 806 (1975).
3. With certain exceptions relating to pleading guilty, testifying, and waiving trial by jury, the decisions of counsel are binding on the accused in cases where only the attorney presents the defense. The Court in Faretta v. California, 422 U.S. 806, 820 (1975), pointed out that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." In a hybrid defense, however, the accused is choosing not to relinquish the management and presentation of the defense; he is asserting his desire to manage the defense himself with the assistance of counsel.

Hybrid representation is clearly distinguishable from a purely *pro se* defense and from a *pro se* defense where the accused has standby or advisory counsel.[4] When a defendant elects to proceed *pro se* he conducts his entire defense with no assistance from an attorney. If the defendant fully and properly waives his right to counsel an attorney filling an active, verbal role may not be forced upon him.[5]

Standby or advisory counsel, upon appointment by the trial court, is present during the trial for the purposes of giving technical advice to the *pro se* defendant if he requests it. Advisory counsel also helps the defendant protect the record for appeal and takes over the defense if the accused gives up or constructively waives his *pro se* right. Advisory counsel may be appointed over the defendant's objection;[6] and depending on the court's definition of his role, will usually not take an active, verbal part in the defense. In addition, the appointment of advisory counsel, while recommended by the United States Supreme Court,[7] is a matter within the trial court's discretion. If the right to present a hybrid defense is accorded constitutional status it would not be subject to the broad discretion of the trial judge and the attorney's role would be for the defendant to determine not the court.

The purpose of this note is to examine the concept of hybrid representation in terms of whether the defendant has a right to such grounded in federal and state constitutional provisions. After looking at the status of the law, three methods will be used in suggesting that hybrid representation should be constitutionally protected under both state and federal provisions. First, the concept of hybrid representation will be discussed in light of general policy considerations and constitutional provisions as interpreted by the United States Supreme Court. Second, the sixth amendment, its relation to the Judiciary Act of 1789,[8] and the effect of these provisions in federal criminal cases on the hybrid defense question will be examined. Third, the issue will be reviewed with respect to state

4. United States v. Gaines, 416 F. Supp. 1047, 1050 (N.D. Ind. 1976).

5. Faretta v. California, 422 U.S. 806, 835-36 (1975).

6. *Id.* at 834 n.46. *See* United States v. Taylor, Docket No. 77-1013 (7th Cir. January 20, 1978).

7. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

8. Judiciary Act, ch. 20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1654 (1970)).

consitutional provisions, especially those of Indiana, and their effect on this question in state criminal cases.

The following section will show that courts have consistently ruled that the question of whether a hybrid defense may be presented is for the trial court to determine in its discretion. This general rule is found throughout both federal and state court decisions and was unaffected by the United States Supreme Court's decision in *Faretta v. California*.

STATUS OF THE LAW

In *Faretta v. California*[9] the Supreme Court of the United States conclusively established that an accused may waive the assistance of counsel and present his defense *pro se*. At Faretta's arraignment the trial judge appointed the public defender to represent him. Well before the trial Faretta requested that he be allowed to represent himself. The judge granted the request, but at a subsequent hearing reversed his previous ruling and reappointed the public defender. The judge also ruled that Faretta had no constitutional right to conduct his own defense. Throughout the trial the judge required that the defense be conducted only by appointed counsel. The California Court of Appeals affirmed the trial judge's ruling that Faretta had no federal or state constitutional right to represent himself. The United States Supreme Court reversed, holding that Faretta had a sixth amendment right to defend *pro se*.[10]

The Court's decision ratified a consensus among state and lower federal courts that there is a constitutional right to proceed *pro se*.[11] However, the *Faretta* decision is also of tremendous importance to the hybrid representation question. Circuit court cases which had recognized a *pro se* right prior to *Faretta* did so mainly on the strength of dicta from earlier Supreme Court opinions.[12] The *pro se* right and a solid foundation for the recognition of that right were thus firmly established for the first time in the *Faretta* decision.

The Court found the *pro se* right to have an independent basis in the sixth amendment.[13] Previously the *pro se* right had not been

9. *See* note 2 *supra*.

10. 422 U.S. at 807-12, 836. After the trial judge reappointed the public defender, Faretta requested leave to act as co-counsel and to make certain motions on his own behalf. These requests were denied and were not presented for review on appeal.

11. United States v. Swinton, 400 F. Supp. 805, 806 (S.D.N.Y. 1975).

12. *See, e.g.*, Adams v. United States ex rel. McCann, 317 U.S. 269 (1942).

13. 422 U.S. at 819.

described as being of independent origin in the sixth amendment. Thus for the first time both the right to the assistance of counsel *and* the right to proceed *pro se* were clearly and independently recognized under the sixth amendment. Furthermore, *Faretta* is of great importance to the hybrid defense issue inasmuch as the opinion reaffirms the Constitution's concern and respect for an individual's freedom of choice,[14] even if that individual is labelled an "accused" in a criminal proceeding.

Faretta applied this emphasis on freedom of choice to the individual's decision whether to use an attorney in presenting his defense. The Supreme Court held that an attorney may not be forced upon an unwilling defendant.[15] The clear recognition in *Faretta* of an independent *pro se* right and the emphasis placed on procedural fairness and freedom of choice would seem to have merited a reevaluation of the hybrid defense rule in post-*Faretta* cases. However, as this discussion will show, no such meaningful reevaluation has as yet taken place.

Both prior and subsequent to *Faretta's* recognition of a constitutional *pro se* right, federal and state courts have held with notable consistency that a defendant has no constitutionally based right to present a hybrid defense. The United States Supreme Court has not been presented with the hybrid representation question and has in fact declined to hear the issue on numerous occasions,[16] thereby allowing decisions resting on a variety of grounds to stand.[17]

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14. *Id.* at 833-34.

15. *Id.* at 819, 836.

16. United States v. Cyphers, 556 F.2d 630 (2d Cir.), *cert. denied*, ___ U.S. ___ (1977); United States v. Bennett, 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Williams, 534 F.2d 119 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); United States v. Hill, 526 F.2d 1019 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); United States v. Shea, 508 F.2d 82 (5th Cir.), *cert. denied*, 423 U.S. 847 (1977); United States v. Condor, 423 F.2d 904 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); United States v. Private Brands, 250 F.2d 554 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); Braiser v. Jeary, 256 F.2d 474 (8th Cir.), *cert. denied*, 358 U.S. 867, *reh. denied*, 358 U.S. 923 (1958); Shelton v. United States, 205 F.2d 806 (5th Cir.), *petition for cert. denied on motion of petitioner*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944); People v. Richardson, 4 N.Y.2d 224, 149 N.E.2d 875, 173 N.Y.S. 587, *cert. denied*, 357 U.S. 943 (1958); State v. Townley, 149 Minn. 5, 182 N.W. 773, *cert. denied*, 257 U.S. 643 (1921).

17. *See* notes 18-76 *infra* and accompanying text.

Pre-Faretta Federal Decisions on Hybrid Representation

Some federal courts prior to *Faretta*, while willing to recognize "the right of an accused to act for himself and his right to have a lawyer assigned in his behalf," nevertheless required the defedant to choose one type of defense or the other before trial.[18] These holdings arose from the belief that the right to counsel and the right to proceed *pro se* cannot be exercised at the same time.[19] Relying on dictum from *Adams v. United States ex rel. McCann*,[20] these courts concluded that the two rights were "correlative" and therefore incapable of active co-existence.[21]

Federal courts also found a statutory basis for the rule that there is no constitutional right to present a hybrid defense. Several decisions prior to *Faretta* based the conclusion that the Constitution does not protect hybrid representation in federal courts on a literal reading of 28 U.S.C. § 1654, which states: "In all courts of the United States the parties may plead and conduct their own causes personally or by counsel." The courts felt that under this statute the accused has a right to represent himself or to be assisted by counsel but that he has no right to a hybrid of the two.[22]

Section 1654 has withstood constitutional attack with respect to its applicability to the hybrid defense question. In *Shelton v. United States*[23] the defendant was denied hybrid representation at trial and challenged the validity of § 1654 on appeal. The Fifth Circuit Court of Appeals upheld the validity of the statute and approved the trial court's action in not allowing the defendant to dictate the type of defense to be presented.[24] The *Shelton* case also

18. United States v. Mitchell, 137 F.2d 1006, 1010 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944). *See* United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973).

19. United States v. Mitchell, 137 F.2d 1006, 1010 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944).

20. "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms." 317 U.S. at 279 (1942) (establishing the right of an accused to waive a jury trial without a lawyer's help).

21. "An accused has the constitutional right to be represented . . . by competent counsel and the correlative constitutional right to dispense with counsel and assume the management and control of his defense *pro se*." United States v. Dujanovic, 486 F.2d 182, 185 (9th Cir. 1973).

22. Lee v. Alabama, 406 F.2d 466 (5th Cir. 1969). *See, e.g.*, United States v. Shea, 508 F.2d 82 (5th Cir.), *cert. denied*, 423 U.S. 847 (1975); Braiser v. Jeary, 256 F.2d 474 (8th Cir.), *cert. denied*, 358 U.S. 867, *reh. denied*, 358 U.S. 923 (1958); Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).

23. 205 F.2d 806 (5th Cir.), *petition for cert. denied on motion of petitioner*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955).

24. *Id.* at 813.

reflected the third basis for saying that a defendant has no constitutional right to present a hybrid defense: the belief that such matters are subject to the trial court's discretionary power to avoid confusion.[25]

Prior to *Faretta* at least one federal court chose not to rely on § 1654 and determined that efficient and orderly administration of the criminal process required leaving the question within the discretion of the court.[26] In affirming the trial court's denial of a co-defendant's motion to represent himself[27] the circuit court stated: "[The trial judge] may well have thought this would cause delay and confusion in the trial. We cannot see any abuse of discretion . . . nor any prejudice resulting to the defendants."[28] The use of judicial discretion to avoid prolonged and confused proceedings thus constituted the third ground for denying hybrid representation.

Federal courts prior to *Faretta* thus determined that there were three separate bases for denying the existence of a constitutional right to present a hybrid defense. First, United States Supreme Court dicta indicates the right to counsel and the right to proceed *pro se* are correlative in nature and therefore cannot co-exist. Second, the language in 28 U.S.C. § 1654 apparently also reflects an either-or quality in these two rights. Third, it was believed that the hybrid defense question is properly left for determination by the trial court. Federal court cases after *Faretta* show a continued reliance on these same grounds.

Post-Faretta Federal Decisions on Hybrid Representation

After the *Faretta* decision the claim of a constitutional right to present a hybrid defense was renewed in federal courts. Many defendants argued that hybrid representation was now constitutionally protected, inferring the right existed under a combination of the right-to-counsel[29] and right-to-defend *pro se* holdings.[30] Although the Supreme Court indicated its approval of the use of *advisory*

25. *Id. See* Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).

26. United States v. Private Brands, 250 F.2d 554 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

27. In *Private Brands* the co-defendant requested that he be allowed to represent himself while the defendant corporation, whose interests were identical to his, continue with counsel. Thus while technically a motion to proceed *pro se*, the request if granted would have resulted in a hybrid defense.

28. *Id.* at 556-57.

29. *See* note 1 *supra*.

30. *See* note 2 *supra*.

counsel,[31] federal courts subsequent to *Faretta* have continued to answer the right-to-hybrid defense question in the negative.

United States v. Wolfish[32] was the first federal case after *Faretta* involving the issue of whether there is a constitutional right to hybrid representation. The court in *Wolfish* stated that nothing in *Faretta* suggests the existence of such a right and cited 28 U.S.C. § 1654 in holding that there is neither a statutory nor a constitutional right to present a hybrid defense.[33] The court thus concluded the trial court had not erred in refusing to grant the defendant's request to participate as co-counsel.[34] The *Wolfish* court's reasoning as to the import of *Faretta* on the hybrid defense question is consistent with other federal court decisions.[35]

United States v. Swinton[36] agreed with the *Wolfish* court's assessment of the effect of *Faretta* on the hybrid defense question. The *Swinton* court held there is no sixth amendment right to present a hybrid defense on the authority of *Wolfish* and on pre-*Faretta* decisions from the Second Circuit.[37] The district court did not rely on 28 U.S.C. § 1654, which seems to mandate an either-or choice,[38] but instead treated the question as one subject to the discretion of the trial judge.[39] The court stated that the defendant should be re-

31. Faretta v. California, 422 U.S. 806, 834 n.46 (1975). For a discussion as to the differences between advisory counsel and a hybrid defense, see note 3-7 *supra* and accompanying text.

32. 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

33. *Id.* at 462. A subsequent case in the Second Circuit did not interpret *Wolfish* as establishing a rule which precludes hybrid defenses. United States v. Swinton, 400 F. Supp. 805 (S.D.N.Y. 1975). *See* notes 36-40 *infra* and accompanying text. The most recent decision on this issue from the Second Circuit, United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977), which reaffirmed *Wolfish* in holding, *inter alia*, that there is no sixth amendment right to hybrid representation.

34. 525 F.2d at 462-63.

35. United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Pinkey, 548 F.2d 305 (10th Cir. 1977); Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976); United States v. Bennett, 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Williams, 534 F.2d 119 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); United States v. Hill, 526 F.2d 1019 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); United States v. Lang, 527 F.2d 1264 (4th Cir. 1975); Goodspeed v. Estelle, 436 F. Supp. 1383 (N.D. Tex. 1977); United States v. Gaines, 416 F. Supp. 1047 (N.D. Ind. 1976).

36. 400 F. Supp. 805 (S.D.N.Y. 1975).

37. *Id.* at 806.

38. "In all courts of the United States the parties may plead and conduct their own cases personally *or* by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." [Emphasis added.] *But see* notes 122-65 *infra* and accompanying text.

39. 400 F. Supp. at 806. *But see* notes 32-35 *supra* and accompanying text.

quired to show that the "normal mode of representation" is inadequate or inappropriate to justify requesting a hybrid defense.[40]

United States v. Hill[41] also held that *Faretta* does not alter the established hybrid representation rule. Noting that 28 U.S.C. § 1654 is written in the disjunctive,[42] this court concluded that no statutory right to a hybrid defense exists. The court then cited *Swinton*[43] in holding that the trial court's discretion, not the sixth amendment, controls the hybrid defense question.[44]

Thus federal courts adhere to the pre-*Faretta* rule that no constitutional right to present a hybrid defense exists. In spite of the Supreme Court's language regarding the nature of the defendant's procedural rights[45] and its suggestion of using advisory counsel,[46] *Faretta* appears to have had no effect upon the federal courts' determination of the hybrid representation issue. The next two sections will show that with one exception state courts both prior and subsequent to *Faretta* have also uniformly held that there is no constitutional right to hybrid representation.

Pre-Faretta State Decisions on Hybrid Representation Under State and Federal Constitutions

When presented with the argument that hybrid representation is protected under the Indiana Constitution, the Indiana Supreme Court in *McDowell v. State*[47] held that the decision to allow a hybrid defense was within the discretion of the trial court. Article one, section thirteen of the Indiana Constitution appears to provide protection of a right to hybrid representation. This provision states: "In all criminal prosecutions, the accused shall have the right . . . to be

40. *Id.* at 807; United States v. Lang, 527 F.2d 1264 (4th Cir. 1975); United States v. Gaines, 416 F. Supp. 1047 (N.D. Ind. 1976).

41. 526 F.2d 1019 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976).

42. Disjunctive may be defined as "marked by mutually exclusive alternatives joined by *or*. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 651 (1961). Section 1654 states "the parties may plead and conduct their own cases personally *or* by counsel. . . ." [Emphasis added].

43. *See* note 36 *supra*.

44. 526 F.2d at 1024-25. *See* United States v. Wilson, 556 F.2d 1177 (4th Cir. 1977); United States v. Pinkey, 548 F.2d 305 (10th Cir. 1977); Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976); United States v. Bennett, 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Williams, 534 F.2d 119 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); United States v. Gaines, 416 F. Supp. 1047 (N.D. Ind. 1976).

45. Faretta v. California, 422 U.S. 806, 819-20 (1975). *See* notes 101-21 *infra* and accompanying text.

46. *Id.* at 834 n.36. *See generally* notes 1-8 *supra* and accompanying text.

47. 225 Ind. 495, 76 N.E.2d 249 (1947).

heard by himself *and* counsel."[48] The defendant in *McDowell*, while on the witness stand, volunteered incompetent and irrelevant testimony, and asked if he might ask a question. The trial court informed the defendant his attorney would ask the questions and that the defendant would only be allowed to speak from the witness stand in response to those questions.

Upholding this ruling the Indiana Supreme Court stated that in order to control the orderly progression of the proceedings the trial court properly exercised its discretion in these situations.[49] Possibly the court intended to confine its ruling to situations where the defendant is testifying[50] because the court also explicitly applied article one, section thirteen to hybrid defense-type activities:

> Under our Constitution, art. I., § 13, appellant had a right to be heard by himself as well as counsel and in this case appellant elected to prepare his own specifications of alleged irregularities . . . and errors of law . . . which his counsel incorporated by reference in a motion for a new trial. Appellant also prepared his own points and authorities and arguments . . . [which] [h]is counsel incorporated . . . in the brief after preparing the more formal parts.[51]

Thus the single Indiana decision on the hybrid defense question prior to *Faretta* applied article one, section thirteen only to the appellate process.[52] The *McDowell* court refused to apply the provision to trial procedure and in effect held, consistent with other jurisdictions, that no right to hybrid representation existed.

Thirty-one states in addition to Indiana have constitutional provisions which recognize the right of the accused to be heard "by himself and counsel,"[53] or "by himself, by counsel, or both."[54] Hybrid

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48. IND. CONST. art. 1, § 13 [emphasis added].

49. 225 Ind. at 502, 76 N.E.2d at 251-52.

50. This hypothesis, however is not born out by post-*Faretta* Indiana cases. *See* notes 166-72 *infra* and accompanying text.

51. 225 Ind. at 497, 76 N.E.2d at 250.

52. This note examines the hybrid defense question at the trial level. One jurisdiction has, contra to *McDowell*, held that whether a hybrid appeal may be presented is within the appellate court's discretion. Callahan v. State, 30 Md. App. 628, 354 A.2d 191 (1976).

53. ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 8; KY. CONST. BILL OF RIGHTS § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEV. CONST. art. 1, § 18; N.H. CONST. art. 1, § 13; N.M. CONST. art. 2 § 14; N.Y.

representation would thus seem to be constitutionally protected in these jurisdictions. With only one exception[55] the courts of these states held prior to *Faretta* that no constitutional right to present a hybrid defense existed.

The single exception to the rule that there is no state constitutionally protected right to hybrid representation was stated in *Wake v. Barker.*[56] The court in *Wake* viewed the issue to be whether a defendant may "make a qualified waiver of counsel under which he will receive assistance of counsel only to the extent he specified in his waiver."[57] The question was examined from the standpoint of whether an accused may exercise his freedom of choice to determine the amount of assistance of counsel he will receive.[58] The court concluded that a defendant's right to specify the kind or extent of services his attorney will perform is "embraced within the right-to-counsel and equal protection provisions of the federal and state constitutions."[59] The opinion also indicated that the trial court's discretion in this matter should be exercised only when the defendant's actions during the trial constitute a waiver of his sixth amendment rights.[60] The type of defense to be presented is to be the defendant's choice.[61] This concept of allowing the accused to determine his counsel's role was not accepted in other jurisdictions prior to *Faretta.*

The majority of jurisdictions before *Faretta* held that an accused was not entitled as a matter of right to have his defense presented by himself and counsel at the same time.[62] Constitutional provisions which guarantee the accused the right to defend per-

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CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; UTAH CONST. art. 1, § 12; VT. CONST. c.1, art. 10; WIS. CONST. art. 1, § 7. *See* LA. CONST. art. 1, § 9.

54. ALA. CONST. art. 1, § 6; FLA. CONST. art. 1, § 16; MA. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 14; TEX. CONST. art. 1, § 10.

55. Wake v. Barker, 514 S.W.2d 692 (Ky. App. 1974).

56. *Id.*

57. *Id.* at 694.

58. *See* notes 149-65 *infra* and accompanying text.

59. 514 S.W.2d at 696.

60. *Id.* at 696-97.

61. *Id.* at 696. *See* notes 101-21 *infra* and accompanying text.

62. Miller v. State, 86 Nev. 503, 471 P.2d 213 (1970); People v. Richardson, 4 N.Y.2d 224, 149 N.E.2d 875, 173 N.Y.S. 587, *cert. denied,* 357 U.S. 943 (1958); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1957); In re Conner, 16 Cal. 2d 701, 108 P.2d 10 (1940). The court in *Mattson* also expressed the belief that no federal constitutional right to a hybrid defense existed. 336 P.2d at 945 n.3.

sonally and with counsel[63] were held not to protect a defendant's right to hybrid representation. The decision whether to allow a hybrid defense was held by the majority of courts to be within the trial court's discretion.[64]

On the basis of interpretations of state constitutional provisions, state courts before *Faretta* were very consistent in holding that no right to present a hybrid defense existed. As the next section illustrates, state courts, much like federal courts, were little influenced by the Supreme Court's opinion in *Faretta*. Consequently, state decisions after *Faretta* show no change in the hybrid representation rule.

Post-Faretta State Decisions on Hybrid Representation Under State and Federal Constitutions

After *Faretta* the Indiana Supreme Court in *Bradberry v. State*[65] was presented with a claim that the federal constitution guarantees a right to present a hybrid defense. A claim of this right under article one, section thirteen of the Indiana Constitution was not presented; thus *McDowell v. State*[66] afforded no authority for the issue. The defendant in *Bradberry* unsuccessfully attempted to "supercede" his attorney in the cross-examination of a witness, and asserted on appeal that his right to represent himself under *Faretta* had been denied.[67] The Indiana Supreme Court disagreed with the defendant's contention and stated that no constitutional right to hybrid representation exists.[68] *Faretta*[69] was interpreted to mean that when a defendant attempts to present a hybrid defense after

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63. *See* note 53 *supra*.

64. State v. Carr, 13 Wash. App. 704, 537 P.2d 844 (1975); People v. Lindsey, 17 Ill. App. 3d 137, 308 N.E.2d 111 (1974); Mosby v. State, 249 Ark. 17, 457 S.W.2d 836 (1970); Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970); People v. Richardson, 4 N.Y.2d 224, 149 N.E.2d 875, 173 N.Y.S. 587, *cert. denied*, 357 U.S. 943 (1958); State v. Townley, 149 Minn. 5, 182 N.W. 773, *cert. denied*, 257 U.S. 643 (1921); Rehfeld v. State, 102 Ohio St. 431, 131 N.E. 712 (1921).

65. ___ Ind. ___ , 364 N.E.2d 1183 (1977).

66. *See* note 47 *supra*. Conversly, the *McDowell* court was not presented with the question under federal constitutional provisions.

67. ___ Ind. at ___ , 364 N.E.2d at 1187.

68. Bradberry v. State, ___ Ind. ___ , 364 N.E.2d 1183, 1187 (1977). *See* Wallace v. State, ___ Ind. App. ___ , 361 N.E.2d 159, *petition to transfer denied* ___ Ind. ___ , 366 N.E.2d 1176 (1977) (Pivarnik, J., dissenting).

69. "When a defendant consents at the outset to accept counsel as his representative 'law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.' " 422 U.S. at 820-21.

consenting to representation by counsel, the question of whether to allow the defense is one of judicial discretion.[70]

The question whether the Indiana Constitution guarantees hybrid representation remains open depending on the court's interpretation of the pre-*Faretta* decision in *McDowell v. State.*[71] However, when faced with the hybrid defense question under state constitutional provisions, other jurisdictions have held, subsequent to *Faretta*, that no such right exists.

Several other jurisdictions subsequent to *Faretta* have considered the hybrid representation question under state constitutional provisions. In spite of constitutional language which would argue for a right to a hybrid defense,[72] state decisions have consistently held that no such right exists.[73] The post-*Faretta* decisions reflect a belief that whether to allow a hybrid defense is a question for the trial court's discretion.[74]

A number of state courts subsequent to *Faretta* have been presented with the question of whether the federal constitution guarantees a right to present a hybrid defense. These courts have denied such a right consistent with federal cases and the Indiana Supreme Court's holding in *Bradberry v. State.*[75]

The New Jersey Superior Court in *State v. McCleary*[76] cited several post-*Faretta* cases[77] and stated:

> The courts, after considering the effect of *Faretta*, rejected the absolute right of a defendant to a hybrid ar-

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70. 364 N.E.2d at 1187. Although made without citation to either article one, section thirteen of the Indiana Constitution or prior cases, the court apparently intended for this statement to refer to Indiana as well as federal law.

71. *See* notes 47-52 *supra* and accompanying text.

72. *E.g.*, MO. CONST. art. 1, § 18(a); TENN. CONST. art. 1 § 9; TEX. CONST. art. 1, § 10. *See* notes 53-54 *supra.*

73. Landers v. State, 550 S.W.2d 272 (Tex. Crim. App. 1977) (opinion on state's motion for rehearing); State v. Burgin, 539 S.W.2d 652 (Mo. App. 1976); State v. Burkhart, ___ Tenn. ___ , 541 S.W.2d 365 (1976).

74. *Id.* People v. Wheeler, 68 Cal. App. 3d 1056, 137 Cal. Rptr. 791 (1977); Houston v. State, ___ Iowa ___ , 246 N.W.2d 908 (1976); State v. Randall, 530 S.W.2d 407 (Mo. App. 1975).

75. *See* note 65 *supra.*

76. 149 N.J. Super. 77, 373 A.2d 400 (1977).

77. United States v. Bennett, 539 F.2d 45 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); United States v. Williams, 534 F.2d 119 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); United States v. Hill, 526 F.2d 1019 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); United States v. Gaines, 416 F. Supp. 1047 (N.D. Ind. 1976); United States v. Swinton, 400 F. Supp. 805 (S.D.N.Y. 1975).

rangement, pointing out that the *Faretta* opinion does not guarantee such a right as a constitutional mandate.[78]

Faretta has been considered unpersuasive by state courts.

It is clear that both state and federal courts almost uniformly refuse to recognize any constitutional bases for the presentation of a hybrid defense. As will be shown, the courts have stated or implied a variety of reasons and explanations for their positions. A detailed examination of the hybrid representation question reveals certain weaknesses in these reasons and explanations, and thus these reasons do not justify the courts' refusal to recognize hybrid representation as constitutionally protected. In fact recognition and implementation of general policies of the criminal justice system warrant the establishment of a constitutional status for the hybrid defense.

EXAMINATION AND ANALYSIS OF THE HYBRID DEFENSE RULE

The almost universal rule is that the granting of a hybrid defense request is in the discretion of the trial court and is not constitutionally protected under either federal or state provisions. The rationales advanced in support of and in opposition to this position can be categorized into three general areas.

First, various policy reasons advanced in support of the current hybrid defense rule and the effect of these policies on the rule are examined. An examination of the meaning of the Judiciary Act of 1789, its relationship to the sixth amendment, and the effect of this relationship on the hybrid defense rule is presented in a following section. Finally, the state courts' reasoning for refusing to recognize a right to present a hybrid defense under state constitutional provisions is discussed.

The Hybrid Defense and Policy Considerations

The question whether there is a right to present a hybrid defense involves problems of policy. To insure that rulings of law will accurately reflect public policy, the criminal justice system recognizes two basic goals: to protect and insure the reliability of the guilt-determining process and to insure procedural fairness to

78. 373 A.2d at 401. *See* People v. Harris, 65 Cal. App. 3d 978, 135 Cal. Rptr. 668 (1977), State v. Pratts, 71 N.J. 399, 365 A.2d 928 (1976); State v. Burkhart, ___ Tenn. ___, 541 S.W.2d 365 (1976); Junior v. State, 91 Nev. 439, 537 P.2d 1204 (1975); Stiner v. State, 539 P.2d 750 (Okla. Crim. App. 1975).

the individual defendant.[79] Both society and the accused have an interest in seeing each of these goals achieved but do not always agree on the amount of emphasis that should be placed on these goals or how one should affect the other. Thus these goals tend to compete with each other.

Questions of policy involve weighing and balancing these competing goals in an attempt to effect the desired policy. This section presents a discussion of the law of hybrid representation as it should be affected by the balancing of the various interests and goals.

Reliability of the Guilt-Determining Process

The interest of insuring the reliability of the guilt-determining process is found in both society and the individual defendant. This interest is incorporated into the system by carrying on an orderly trial which insures the reliability of the guilt-determining process and is also an end in itself. The means for achieving an orderly trial may be categorized into three areas: preventing unnecessary consumption of time, preserving the dignity and decorum of the system, and maintaining an efficient system. Each of these means has been cited as a justification for denying a hybrid defense.

Consumption of Time

One reason given for the rule which places the hybrid representation question in the judge's discretion is the belief that the presentation of a hybrid defense will unreasonably and needlessly consume too much time at trial.[80] Courts may feel the orderliness of the proceedings will be lost if too much time is consumed. Conferences between the defendant and his counsel,[81] requested and

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79. Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 346-47 (1957).

80. United States v. Private Brands, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); Sheldon v. United States, 205 F.2d 806, 813 (5th Cir.), *petition for cert. denied on motion of petitioner*, 346 U.S. 892 (1953), *motion to vacate denied*, 346 U.S. 943 (1955); United States v. Mitchell, 1006, 1010 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944); United States v. Foster, 9 F.R.D. 367, 372 (S.D.N.Y. 1949); State v. Burkhart, ___ Tenn. ___ , 541 S.W.2d 365, 370 (1976); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937, 951-52 (1959); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALBANY L. REV. 423, 441 (1976). *See* State v. Pratts, 145 N.J. Super. 79, 366 A.2d 1327, 1334 (1975), *aff'd* 71 N.J. 399, 365 A.2d 928 (1976). *Accord*, United States ex. rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965).

81. These conferences could involve, for example, witnesses to be called, questions to be asked, or motions and arguments to be presented.

granted continuances to resolve questions or differences of opinion, and repetitious arugments are examples of characteristics envisioned to be part of a hybrid defense. The courts predict the occurrence of these events and see them as leading to unnecessary delay and wasteful consumption of time. In addition, courts feel that defendants who are uneducated or lacking in knowledge of the practice of law will be potentially, though unintentionally, disruptive if allowed to consume the court's time.[82]

It is clear that a hybrid defense will take more time than a defense in which the accused has an attorney, and takes no active, verbal part himself. However, this reason alone would not seem to warrant denying a hybrid defense.[83] The Supreme Court has suggested implementing a standby counsel procedure for use in *pro se* defense cases.[84] This system is probably used frequently[85] in those cases where the defendant asserts his *pro se* right but would require as much if not more of the court's time than a hybrid defense. The scope or importance of standby counsel's role possibly varies from case to case but even a minimal role will give rise to consumption of time.[86] A defendant might frequently request a recess for the purpose of consulting with standby counsel; and even if the requests are infrequently granted the motions themselves will take up the

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82. State v. Randall, 530 S.W.2d 407 (Mo. App. 1975); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); Comment, *Faretta v. California and the Pro Se Defense: The Constitutional Right of Self-Representation*, 25 AMER. U.L. REV. 897, 915 (1976); Recent Development, *Criminal Defendants at the Bar of Their Own Defense—Faretta v. California*, 13 AMER. CRIM. L. REV. 335, 362 (1975). *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALABANY L. REV. 423 (1976).

83. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudiciation. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the due process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize . . . government officials. . . .

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (overturning as unconstitutional a state statutory scheme which deprived an unwed father the custody of his children without a hearing as to his fitness).

84. Faretta v. California, 422 U.S. 806, 834 n.36 (1975).

85. Advisory or standby counsel is probably used frequently because of the courts' concern with a *pro se* defense. *See* notes 87-95 *infra* and accompanying text.

86. A minimal role might consist of merely giving advice to the defendant when requested, or taking over the defense if the accused gives up or constructively waives his *pro se* right.

court's time. Further, the prospect of a time-consuming defense is not confined to advisory counsel or hybrid defense situations.

The concerns of the courts with respect to the consumption of time involved in a hybrid defense also manifest themselves, perhaps to a greater degree, in a *pro se* defense. The unskilled defendant who represents himself will no doubt consume much time in presenting his defense. A *pro se* defense will likely find the defendant asking irrelevant questions, making groundless motions, and presenting irrelevant and repetitous arguments. However, the right to defend *pro se* is constitutionally protected under *Faretta v. California*,[87] and it is very doubtful that a trial judge's ruling would be upheld if he took away the defendant's *pro se* right merely because he unintentionally consumed too much time in presenting his defense.[88] A hybrid defense request should not be kept within the judge's discretion and excluded from constitutional protection merely because it may consume more time than a "normal" defense.

Preserving Dignity and Decorum

A second avenue toward conducting an orderly trial is the preservation of the "dignity and decorum" of the court and the criminal justice system.[89] Preserving this dignity will tend to create an atmosphere more conducive to the administration of an orderly trial and thereby make the guilt-determining process more reliable. In addition, the proceedings are of such importance to the defendant and to society that there is a need for society to believe that the criminal justice process is conducted with dignity and decorum. In partial response to these needs appellate courts have determined that placing the hybrid representation question under the discretion of the trial court will help preserve the desired dignity and decorum.

Some courts perceive the hybrid defense to be a vehicle for an accused to be disruptive, either intentionally or unitentionally, and thereby compromise the dignity of the proceedings.[90] Even if pro-

87. 422 U.S. 806 (1975).

88. The right to defend *pro se* was qualified by the Court in *Faretta* only insofar as it requires a knowing and intelligent waiver of full representation by counsel. The opinion nowhere implies that a defendant may lose his *pro se* right if he unintentionally consumes too much time in exercising it.

89. United States v. Condor, 423 F.2d 904 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); Duke v. United States, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); Casenote, *Criminal Procedure: Problems of Self-Representation and the Hybrid Defense*, 45 U.M.K.C.L. REV. 130 (1976).

90. *Id. See* Goodspeed v. Estelle, 436 F. Supp. 1383 (N.D. Tex. 1977). *Accord*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

ceeding with co-counsel, an unskilled defendant trying to take a verbal part in his defense will obviously detract from the decorum of the proceedings.[91] In addition, a defendant who consciously wishes to disrupt his trial may seize the opportunity to do so if given the chance to speak. There are three possible responses to this reasoning.

First, recognizing hybrid representation as constitutionally protected should not operate to prevent the court from maintaining the proper amount of dignity. The judge would not lose control of the proceedings—he would only lose the power in most cases to determine the type of defense to be presented. The defendant would still most certainly be subject to the sanctions of the court if he were to become intentionally disruptive.[92]

Second, an accused who intentionally disrupts the proceedings would very likely do so regardless of the type of defense presented. With this type of defendant disruption might only be prevented or avoided by removing the defendant from the courtroom.[93]

Finally, a defendant who is fully allowed to choose a hybrid defense if he desires may feel less fearful of the criminal justice system knowing that *he* has chosen the defense. He may not be so quick to conclude that he is being "railroaded" by the system, and thus his respect for the system may increase. The defendant is more likely to disrupt the proceedings if he is disrespectful of the system which effects those proceedings. Thus, the dignity and decorum of the proceedings would still be preserved if the defendant can choose a constitutionally protected hybrid defense.

Maintaining An Efficient System

The fear that a hybrid defense will lead to inefficiency is another reason given for placing this question in the discretion of the trial judge. This inefficiency is thought to occur in the actual presentation of the hybrid defense. A proceeding where the accused

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91. The defendant's co-counsel will not be able to instruct or advise the defendant so completely before trial that the defendant will be capable of participating as ably as an attorney. *But see* notes 95-96 *infra* and accompanying text.

92. Illinois v. Allen, 397 U.S. 337 (1970) (holding that the defendant may constructively waive his sixth amendment right to confrontation if he becomes unruly).

93. This procedure is not prohibited under the Constitution. *Id.* Removal of an unruly defendant in a hybrid defense would also result in fewer administrative problems than the same situation when the defendant is proceeding *pro se*. If the defendant has active co-counsel, the attorney could continue with the presentation of the defense after the defendant has been removed.

acts as co-counsel is considered to be too complicated and confusing and thus disruptive and not conducive to an orderly trial.[94]

There is good reason to believe that a hybrid defense will be more complicated or confusing than a defense presented solely by an attorney, but this would not necessarily make the proceedings or the defense less capable of being efficiently administered. Following the line of reasoning which keeps the hybrid defense question under the discretion of the trial court, *pro se* defenses should also be precluded. If hybrid representation is denied in order to avoid confusion and complication because attorneys are not exclusively handling the proceedings, then *pro se* defenses should be denied for the same reason. The *pro se* defendant may have *no* attorney to assist him.

The trial court does not have to appoint advisory counsel in a *pro se* case, and should advisory counsel be appointed, the *pro se* defendant may refuse any assistance from him. If an inexperienced lay defendant attempts to practice criminal law with *no* help from an attorney one can easily envision the inefficiency which would result. If the efficiency of the proceedings is to be given such a paramount value then *pro se* defenses should be prohibited.

However, the United States Supreme Court has indicated that efficiency is not the only factor to be considered in determining an accused's procedural rights. The Court in *Faretta* held, consistent with notions of fairness, that a defendant totally lacking in legal experience nevetheless has a sixth amendment right to actively and verbally participate in the proceedings.[95] In other words, he may choose to represent himself apparently regardless of how much "inefficiency" his choice brings to the proceedings.[96] If efficency is an issue and if the defendant may force the system to tolerate the inefficiency resulting from a *pro se* defense then he should be able to demand a hybrid defense which would very likely bring *greater* efficiency to the proceedings.

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94. *See, e.g.*, United States v. Bowdach, 561 F.2d 1160, 1176 (5th Cir. 1977); Duke v. United States, 255 F.2d 721, 728 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); State v. McCleary, 149 N.J. Super. 77, 373 A.2d 400 (1977). *See* United States v. Private Brands, 250 F.2d 554 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958); ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE 87 (Approved Draft 1972) (Approved by House of Delegates July, 1971); Recent Development, *Faretta v. California*, 4 HOFSTRA L. REV. 449, 465 (1976); Casenote, *Criminal Procedure: Problems of Self-Representation and the Hybrid Defense*, 45 U.M.K.C.L. REV. 130, 133 (1976).

95. 422 U.S. 806, 835 (1975).

96. *See* note 88 *supra*.

The attorney in a hybrid defense would lend stability and therefore the desired efficiency to the proceedings. He will be able to assist the defendant with complicated and confusing substantive and procedural problems. This should help the court and the jury deal with these problems, thereby making the proceedings capable of being more efficiently administered than a situation where the defendant proceeds *pro se.*

A hybrid defense should be preferred over a *pro se* defense as a means of achieving efficiency in another way which will greatly assist the trial judge. The accused who defends himself *pro se* is not entitled to any help or advice from the court,[97] yet the court should require the accused to conform to the same rules of evidence and procedure that attorneys are obliged to follow.[98] The judge may quite reasonably feel obligated to assist the defendant in various ways, such as suggesting possible defenses, questions, or tactical maneuvers.[99] Although the trial court's ultimate responsibility is to insure justice to both parties,[100] giving active assistance to the *pro se* defendant compromises the trial court's role. Allowing the accused to choose a hybrid defense will largely eliminate this problem.

Presentation of a hybrid defense should remove any extra burden or obligation the judge perceives with respect to guarding the defendant's rights. The judge would be able to assume that the defense has been adequately prepared. If the defendant overlooks or is not aware of some evidentiary rule or procedural right the court can justifiably rely on counsel to assist or educate the defendant in these matters. If the defendant has chosen a hybrid defense neither he nor his co-counsel should be able to rely on any assistance from the judge while the defendant is participating in the proceedings.

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97. United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950); Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1949); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALBANY L. REV. 423, 440-41 (1976); Recent Development, *Criminal Defendants at the Bar of Their Own Defense—Faretta v. California*, 13 AMER. CRIM. L. REV. 335, 362 (1975). *See* Carnley v. Cochran, 369 U.S. 506, 510 (1962).

98. United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); State v. Randall, 530 S.W.2d 407 (Mo. App. 1975); People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), *cert. denied*, 410 U.S. 944 (1973).

99. Grubbs v. State, 255 Ind. 411, 419, 265 N.E.2d 40, 45 (1970) (Arterburn, J., concurring); Comment, *Faretta v. California and the Pro Se Defense: The Constitutional Right of Self-Representation*, 25 AMER. U.L. REV. 897, 917 (1976).

100. United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); United States v. Dougherty, 473 F.2d 1113, 1127 (D.C. Cir. 1972); Grubbs v. State, 255 Ind. 411, 416, 265 N.E.2d 40, 43 (1970).

The judge will then not be torn between his obligation to remain essentially impartial and his desire to actively help insure procedural fairness to the accused. Removing this perceived burden from the trial judge will make the proceedings more efficient.

If the type of defense allowed is to be determined solely by how much efficiency will result then a *pro se* defense request should, like a hybrid defense, be subject to the trial court's discretion. Denying a hybrid defense because of anticipated inefficiency logically requries denying a *pro se* defense for the same reason. The *Faretta* case held, however, that the right to a *pro se* defense is guaranteed under the sixth amendment and is not subject to efficiency standards. In addition, allowing a *pro se* defendant to employ active co-counsel will make the proceedings less confusing and will remove any extra burden felt by the trial judge in a *pro se* defense case. Therefore, the desire for efficiency, or a fear of inefficiency, does not constitute a legitimate reason for refusing to recognize a right to present a hybrid defense.

Procedural Fairness to the Individual

A counterpart to the goal of achieving reliability in the guilt-determining process is the goal of insuring procedural fairness to the individual. With respect to the sixth amendment and especially its "right-to-counsel" clause, the United States Supreme Court in the past half-century has placed a great deal of emphasis on the notion of achieving reliability in the criminal justice system by carefully guarding the defendant's right to procedural fairness or "due process."[101] Insuring procedural fairness involves recognition of and emphasis on the defendant's freedom of choice and personal autonomy. Procedural fairness can be achieved and the defendant's freedom of choice respected by recognizing a constitutional right, implicit in the sixth amendment, to present a hybrid defense.

Faretta v. California expressly emphasized the importance of the accused's freedom of choice in holding that counsel may not be forced upon an unwilling defendant and in recognizing a constitutional right to proceed *pro se*.[102] The Court acknowledged[103] those

101. *See* note 104 *infra*. Implicit in this discussion is the concept of incorporation, whereby the rights included in the Bill of Rights are deemed so fundamental to due process that they are made applicable to the states by incorporation in and through the fourteenth amendment.

102. 422 U.S. 806 (1975).

103. *Id.* at 832-33.

cases which set forth the thesis that the help of a lawyer is essential to insure a fair trial,[104] but stated:

> [I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.
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> * * *
>
> [W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.[105]

The Court noted that the notion of freedom of choice is found throughout "the constitutional design of procedural protections."[106]

That an individual's freedom of choice is of great importance is evidenced in the sixth amendment itself, which speaks of the rights as being personal to the *accused.*[107] The Court in *Faretta* pointed out that the defendant bears the personal consequences of a conviction,[108] therefore he must have the freedom to personally decide whether the use of counsel is to his advantage. Respect for the individual requires that his choice be honored even if it operates to his detriment.[109]

The notion that the defendant's rights are personal in nature convinced the Court that no matter how disastrous the choice might

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104. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1948); Powell v. Alabama, 287 U.S. 45 (1932).

105. 422 U.S. at 833-34.

106. *Id.* at 834 n.45.

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

U.S. CONST. amend. VI.

108. 422 U.S. at 834. *Contra,* 422 U.S. at 836 (Burger, C.J., dissenting).

109. 422 U.S. at 834. *See* Chapman v. United States, 553 F.2d 886, 891 (5th Cir. 1977), where, in the context of holding that denial of an accused's *pro se* right was not harmless error, the court pointed out:

> [W]e recognize the defendant's right to defend *pro se* not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is utlimately responsible for choosing his own fate, including his position before the law.

prove to be the defendant must be allowed to represent himself if he so chooses. Choosing to defend *pro se*—a right which is recognized out of procedural fairness to the individual—could *by itself* result in disastrous consequences to the defendant and would also place in jeopardy the reliability of the guilt-determining process.[110]

Recognizing a right to choose hybrid representation will protect both the individual's freedom of choice *and* the reliability of the guilt-determining process. If the defendant has a sixth amendment right to choose a *pro se* defense, which carries with it such potential for impeding achievement of the system's goals, he should also have a constitutionally protected right to choose a hybrid defense which is much more likely to insure the protection of these goals. The accused will be much less likely to effectively help bring about his own conviction[111] if he has a lawyer to actively assist him in presenting the defense.

Recognition of the personal character of the individual's procedural rights has occurred in the context of the right to waive trial by a jury. The United States Supreme Court in *Adams v. United States ex rel. McCann*[112] held that the accused has the right to waive trial by jury. While subject to the approval of the trial court, the accused may waive this right "in the exercise of a free and intelligent choice" without the assistance of an attorney.[113] The Court noted that the accused makes the choice after deciding what is best for himself.[114] Procedural fairness to the individual is achieved by recognizing the defendant's right to make his choice personally. This personal right of the accused to make procedural choices should be extended to cover a right under the sixth amendment to choose the type of defense to be presented.

If the court refuses to allow a hybrid defense the defendant must choose from two alternatives, neither of which meets the defendant's needs. He must decide to accept either no assistance of counsel or full representation by counsel. If he chooses the latter alternative counsel is interjected into the defense to the degree that the attorney can no longer legitimately be considered an assistant the accused does not really want *this much* aid.

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110. *See* Faretta v. California, 422 U.S. 806, 836 (1975) (Burger, C.J., dissenting).

111. *See* note 109 *supra*.

112. 317 U.S. 269 (1942).

113. *Id.* at 275.

114. *Id.* at 276.

The imprecise nature of the "right-to-counsel" clause of the sixth amendment also supports this notion. The amendment guarantees the "assistance of counsel,"[115] and as the Court in *Faretta* remarked: "[A]n assistant, however expert, is still an assistant."[116] However, under the present law of hybrid representation the trial court has discretion to force an all-or-nothing choice on the accused and thereby change the ordinary meaning of "assistance."

Given the meaning of "assistance,"[117] perhaps the concept of a criminal defense should be viewed as a spectrum of degrees or amounts of assistance given by counsel. On one end of this line would be full representation by counsel, on the other, the *pro se* defense. Under United States Supreme Court interpretations of the sixth amendment the defendant may choose either end of the spectrum *as a matter of right.* However, under the present hybrid representation law his freedom to choose any other degree of assistance is curtailed to the point of being subject to the discretion of the trial court. Arguably, two *distinct* constitutional rights are involved. One, the right to the assistance of counsel, is explicitly stated in one clause of the sixth amendment. The other, the right to represent oneself, does not flow from that same clause but is implied by the sixth amendment as a whole. Given the apparent separate origin of these two rights it is totally incongruous to tell the defendant his freedom to assert one *or* the other exists as a matter of right, but his freedom to choose both is subject to the whim of the trial court. The accused's freedom to choose a hybrid defense—to choose self-representation *and* the assistance of counsel—should be recognized as constitutionally protected, and not subject to the trial court's discretion.

Alternatively, it could be argued that the right to defend *pro se* and the right to defend with an attorney's assistance are not independent. In fact, the Supreme Court's analysis of the sixth amendment in *Faretta v. California*[118] implies that these two rights are actually subparts of a broader, more general right—the right to make a defense. The Court referred with approval to a court of appeals' statement that the sixth amendment implicitly guarantees " 'the right of the accused personally to manage and conduct his own

115. U.S. CONST. amend. VI.

116. Faretta v. California, 422 U.S. 806, 820 (1975).

117. Assistance may be defined as: "the act or action of assisting: aid, help; the help supplied or given: support." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 132 (1963).

118. 422 U.S. 806 (1975).

defense in a criminal case.' "[119] In establishing the right to defend *pro se* the *Faretta* opinion recognized that "[t]he sixth amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."[120]

Viewing the amendment in this manner the right to defend *pro se* and the right to be defended by an attorney are two methods thus far recognized by which an accused may make his defense. The hybrid defense would be an additional alternative method for presenting a defense under the sixth amendment. In choosing to defend by counsel, *pro se*, or with a hybrid defense, the accused would only be choosing from alternatives that should be open to him in presenting his defense. This analysis is completely consistent with the Supreme Court's definition of an attorney as "an aid"—"like the other defense tools."[121] Thus even if the *pro se* defense and the "standby-counsel" defense are not two distinct rights but are actually two protected methods of asserting the broader sixth amendment right to personally make a defense, incongruity would clearly result if no alternative method—especially one which combines characteristics of the others—were protected under the sixth amendment.

Applicability of 28 U.S.C. § 1654 to the Hybrid Representation Issue

In finding that hybrid representation is not constitutionally protected several federal courts have emphasized a historical analysis of the sixth amendment in conjunction with 28 U.S.C. § 1654.[122] A tension exists between § 1654 and the sixth amendment as those two documents have been and are presently interpreted. First, § 1654 was not intended to be applicable to the question of whether an accused may present a hybrid defense. Second, if the statute was applicable prior to *Faretta v. California* that decision effectively overrides application of § 1654 to the hybrid defense question. Third, even if the statute remains applicable the language of the statute and Supreme Court interpretations of the sixth amendment indicate that an either-or interpretation is inaccurate. Finally, if the either-or interpretation of § 1654 is proper then hybrid defenses should never be allowed, and the accused is forced to

119. *Id.* at 817, *citing* United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).

120. 422 U.S. at 818-19.

121. *Id.* at 820 [emphasis added]. *See* note 117 *supra*.

122. Judiciary Act, ch.20, § 35, 1 Stat. 73, 92-93 (1789) (current version at 28 U.S.C. § 1654 (1970)).

forego the assertion of one constitutional right in order to assert another.

The basic syllogism of the courts in applying § 1654 is this: the sixth amendment and its interpretations do not reach the question of hybrid representation; § 1654 apparently indicates that the defendant must *either* represent himself *or* be represented by an attorney; therefore § 1654 precludes hybrid representation in federal courts. The validity of this argument must be examined in light of the intent of the two provisions.

The original language of § 35 of the Judiciary Act reads:

> [I]n all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.[123]

The present form of the provision is:

> In all courts of the United States the parties may plead and conduct their own cases personally *or* by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[124]

Thus § 1654 remains, with one exception, substantially unchanged from its forerunner. When the act was amended in 1948 the words—"the assistance of such"—were deleted apparently without explanation[125] and have not been replaced.[126] The right-to-counsel clause of the sixth amendment remains unchanged from its original form.

The Bill of Rights and the Judiciary Act were passed simultaneously by the First Congress.[127] Although it is "difficult, if

123. *Id.* Section 35 goes on to create the offices of United States Attorneys, Attorney General of the United States, and the duties of each.

124. 28 U.S.C. § 1654 (1970).

125. With respect to this clause, research indicates only that "changes were made in phraseology." H.R. REP. No. 2646, 79th Cong., 2d Sess. A 139 (1948).

126. Public Laws, ch.646, § 1654, 62 Stat. 944 (1948); ch.139, § 91, 63 Stat. 103 (1949) (current version at 28 U.S.C. § 1654 (1970)).

127. Several judicial opinions and scholarly works have incorrectly stated that the Judiciary Act was passed the day before the Bill of Rights was proposed. Faretta v. California, 422 U.S. 806, 831 (1975); Chapman v. United States, 553 F.2d 886 (5th Cir. 1977); United States v. Dougherty, 473 F.2d 1113, 1122-23 (D.C. Cir. 1972); United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964); Recent Developments, *Faretta v. California*, 4 HOFSTRA L. REV. 449, 467 (1976); Case Note, *The Right to Defend Pro Se*

not impossible with the available material, to reach any positive conclusion concerning the intention of Congress in proposing the [sixth amendment right-to-counsel] clause,"[128] it is arguable that § 35 of the Judiciary Act and the sixth amendment were not intended to be contradictory with respect to the two provisions which speak to the use of counsel.[129]

The language of the entire Judiciary Act shows that the clause in question has received undue emphasis in the consideration of the hybrid defense question. This becomes apparent when the statute is compared with the language of the Bill of Rights. When looking at the Judiciary Act this clause of § 35 appears as only a small part of the whole. The Act was one "to establish the Judicial Courts of the United States" and contains thirty-five sections relating to the creation and operation of the federal court system.[130] On the other hand, the provisions of the Bill of Rights deal primarily with the rights of individuals with respect to the government.[131] It is therefore doubtful that the import of § 35 has to do with the amount of legal assistance an accused may have.

More probable, the importance of the first sentence of § 35 is to be found in the requirement that when counsel is employed, he must conform to the rules of the court in which the case is being heard.[132] This is clear from congressional action in amending the section. When the statute was amended in 1948 the words—"as by the

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in Criminal Proceedings—Faretta v. California, 37 OHIO St. L.J. 220, 222 (1976). President Washington signed the Judiciary Act into law on September 24, 1789. The same day the House of Representatives passed the Bill of Rights in its final form, with the Senate following suit the next day. 2 B. SCHWARTZ, THE BILL OF RIGHTS—A DOCUMENTARY HISTORY 1159, 1162-65 (1971) [hereinafter cited as SCHWARTZ]. However, James Madison introduced the Bill of Rights, including what was to become the sixth amendment, to the First Congress on June 8, 1789. 2 SCHWARTZ, *supra* at 1016.

128. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 24 (1955). There was apparently no discussion as to this portion of the amendment. *See* 2 SCHWARTZ, *supra* note 127, at 1006-1166.

129. This assumption would seem obvious, given the very close proximity in time of the passage of the two documents, the relatively small size of the House and Senate, and the intelligence of the majority of members of the two houses.

130. *See* note 120 *supra*.

131. U.S. CONST. amend. I-X.

132. [I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law *as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.*

Judiciary Act, ch.20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1654 (1970)) [emphasis added].

rules of the said courts respectively shall be permitted to manage and conduct therein"—were removed as "surplusage."[133] Section 1654 then read: "In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel."

If, as some federal courts have indicated, the impact of § 1654 lies in this sentence by itself then no further modification or revision would have been necessary. However, the clause containing the requirement that counsel conform to the court's local rules was placed back into the statute just one year later in almost identical language. This action on the part of Congress clearly indicates that this clause constitutes the important part of § 1654.

The subject matter of the entire Judiciary Act and the language of § 1654 combined with the legislative history of this section support the conclusion that § 1654 should have little applicability to the hybrid defense question. If this conclusion is correct, and because the right to defend *pro se* and the right to counsel are now both constitutionally protected, the hybrid defense question should be decided according to constitutional rather than statutory standards.

The Court in *Faretta* pointed out that the concept of *pro se* representation has roots in many state constitutions and other documents recognizing an accused's fundamental rights. It was noted that if the right to counsel provision of the sixth amendment had been thought to preclude the right to self-representation much discussion would surely have resulted.[135] Under *Faretta* these two rights have had constitutional bases since the adoption of the sixth amendment.

Thus the *statutory* right to appear *pro se* given by § 1654 has via *Faretta* been elevated by the Supreme Court to constitutional status. If the accused so desires, and upon a valid waiver, he cannot be denied this course of action. After *Faretta* it appears that the only portion of 28 U.S.C. § 1654 which has not been elevated by the Supreme Court to the constitutional level subjects counsel to the specific rules of the various federal district and circuit courts. This is additional support for the proposition that this clause constitutes an important part of § 1654, and that the first clause should not be applied to the hybrid defense question.

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133. *See* note 125 *supra*.
134. *See* note 126 *supra*.
135. 422 U.S. at 831-32.

Nevertheless, the first portion of § 1654 is still held to control to the end that, through application of the word "or,"[136] the defendant is required to elect between using counsel and proceeding *pro se* in his defense.[137] Thus the courts are effectively determining that a statute must control the assertion of constitutional rights. The defendant may assert either right because both are guaranteed by the sixth amendment, but courts are holding that a statute—28 U.S.C. § 1654—indicates he may not assert these rights at the same time.

Even if after *Faretta* § 1654 is applicable to the question whether a defendant may act as his own co-counsel, the statute does not necessarily merit this "either-or" interpretation. If it had been the intent of the Framers to establish an all-or-nothing stance as to the amount of assistance a defendant may employ, the provision would have been more explicitly worded so as to indicate "either one or the other, but not both."[138] The statute in its original form says "the parties may plead and manage their own causes personally or by the assistance of . . . counsel."[139] A logical construction of this would be: a party may manage his cause personally or he may manage his cause with the assistance of counsel. Under this view the first clause would merely be restating accepted law[140]—that a party may represent himself—while the second clause would be restating the sixth amendment protection of the right to the assistance of counsel.[141] This interpretation would indicate Congress did not intend this clause of § 35 to establish mutual exclusivity in these two rights. Nevertheless, some federal courts consider the two rights to be correlative and therefore mutually exclusive, and thus adhere to an either-or approach. However, there are additional, constitutional grounds for rejecting this either-or interpretation of the right to counsel and the right to defend *pro se*.

The Court in *Faretta* found the right to self-representation implicit in the structure of the sixth amendment as a whole, not merely in the "assistance of counsel" clause.[142] That amendment was in-

136. The statute reads: "plead and manage their own cases personally *or* by counsel. . . ." 28 U.S.C. § 1654 (1970) [emphasis added].

137. *See* notes 16-44 *supra* and accompanying text.

138. *See* Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1489 (1971).

139. Judiciary Act, ch.20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1654 (1970)).

140. Faretta v. California, 422 U.S. 806, 826-32 (1975).

141. United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).

142. 422 U.S. at 817-18.

terpreted to constitute more than "legal formalisms"[143] which require that a defense be made for the accused; "it grants to the accused personally the right to make his defense."[144] Thus since the right to proceed *pro se* does not derive solely from the assistance of counsel clause it should be considered an independent right, and not "correlative" to the right to counsel.[145] The two rights would not be mutually exclusive but mutually independent in operation; that is, the assertion of one should not operate to logically require the defendant to forego the other.

The right-to-counsel clause was intended to supplement the idea of an accused making his defense personally. That clause

> speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the sixth amendment contemplate that counsel, like other defense tools guaranteed by the amendment, shall be an aid to a willing defendant. . . .[146]

The *Faretta* court thus recognized the import of the word "assistant" in the sixth amendment, pointing out that if counsel is forced on a defendant, the concept of assistance is lost and the right to personally make the defense is "stripped of the personal character upon which the amendment insists."[147] The concept of "assistance" and the personal character of the right are lost if the defendant cannot decide for himself how much assistance he will receive—if he cannot choose a hybrid defense.[148]

Under the all-or-nothing approach to the use of counsel, subject to the judge's discretion,[149] the defendant, if he does not wish to proceed entirely on his own, can be forced to acquiesce in full representation by counsel. In this situation the attorney can no longer be said to be an assistant. When forced into a choice between pro-

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143. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

144. 422 U.S. at 819.

145. *Contra*, United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964) (describing the two rights as "two faces of the same coin").

146. Faretta v. California, 422 U.S. 806, 820 (1975). The Court made these statements in the context of whether counsel may be forced on an accused.

147. *Id.*

148. *See* Wake v. Barker, 514 S.W.2d 692 (1974).

149. The ambiguity of this proposition is reflected in two cases from the Second Circuit, United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); and United States v. Swinton, 400 F. Supp. 805 (S.D.N.Y. 1975). The *Wolfish* court read § 1654 as statutorily prohibiting a hybrid defense, while the *Swinton* court held the question to be subject to the trial court's discretion.

ceeding *pro se* and having counsel present the defense, the defendant may acquiesce to full representation. From a practical standpoint, however, the "choice" is not really his, and it then becomes questionable whether the defense is his.[150]

Even if 28 U.S.C. § 1654 is relevant to the hybrid defense question it appears to have been improperly applied by the federal courts. Assuming arguendo that federal courts may properly rely on § 1654 when presented with the question of the constitutional right to present a hybrid defense, it seems reasonable that the statute should be applied according to its precise wording. The statute says that an accused may proceed "personally *or* by counsel. . . ."[151] A reasonable interpretation of this phrase would seem to leave no room for judicial discretion beyond the "either-or" application. Under this analysis a hybrid defense—combining the right to defend *pro se* with the right to assistance of counsel—might then be specifically forbidden by § 1654. If § 1654 does forbid hybrid representation then a defendant should *always* be precluded from presenting this type of defense since the statute creates no exception. However, this is not the position taken by the vast majority of courts.

The general rule is that hybrid representation is not constitutionally protected and that the question is for the determination of the trial court in its discretion.[152] If the trial court allows the accused to present a hybrid defense the apparent mandate of the statute will not be given effect. Citing § 1654 as support for the present rule and allowing the trial judge to make the final determination of the question, leaves the system in the inconsistent and curious position of allowing the application of an apparent statutory mandate to be subject to the whim of the trial judge. Even if § 1654 was given complete effect by forcing an all-or-nothing choice on the accused the operation of the statute may deny him his constitutional rights in another manner.

Under the present hybrid defense rule a defendant's sixth amendment right to make his own defense may be burdened when he is required under § 1654 to choose between asserting his *pro se* right and asserting his right to counsel. Supreme Court holdings in

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150. *See* Faretta v. California, 422 U.S. 806, 821 (1975).
151. 28 U.S.C. § 1654 (1970).
152. *See* notes 18-46 *supra* and accompanying text.

other contexts indicate that one should not have to forego one constitutional right in order to meaningfully assert another.[153]

In *Simmons v. United States*[154] the Supreme Court held that testimony given for the purpose of asserting a fourth amendment claim could not be used for the purpose of incriminating the defendant unless he makes no objection. Under any other rule a condition would be imposed upon a defendant which may deter him from asserting a fourth amendment objection—the condition being that his testimony would later be admissible over his claim of fifth amendment protection.[155] Courts in the past had said that the defendant might refuse to testify, thereby possibly foregoing his fourth amendment right, to gain the fifth amendment's "benefit." However, the Supreme Court in *Simmons* would not allow this procedure, noting that where the "benefit" to be gained "is that afforded by another provision of the Bill of Rights, an undesirable tension is created."[156]

This principle was apparently later limited in *McGautha v. California*.[157] Recognizing that the criminal process "is replete with situations requiring 'the making of difficult judgments' as to which course to follow,"[158] the Court in *McGautha* stated the issue in terms of "whether compelling the election impairs to any appreciable extent any of the policies behind the rights involved."[159] If § 1654 is strictly applied to a hybrid request the same type of dilemma criticized in *Simmons* may occur.

The Supreme Court in *Faretta v. California*[160] found the right to proceed *pro se* to be implicit in the sixth amendment as a whole.[161] The right to the assistance of counsel, on the other hand, is

153. The Court in Sherbert v. Verner, 374 U.S. 398 (1963), overturned a lower court ruling which forced the appellant to choose between following her religious beliefs and abandoning her beliefs in order to accept work. *Id.* at 403. The appellant was denied unemployment compensation under South Carolina law because her religious beliefs would not allow her to work on Saturday. Forcing the appellant to make this choice constituted an undue burden on her religious beliefs, in violation of her first amendment right. *Id.* at 404. This principle is applicable to the hybrid representation issue. Forcing the defendant to forego either his *pro se* right or his right to counsel, so that he may assert the other, places an undue burden on his sixth amendment rights.

154. 390 U.S. 377 (1968).

155. *Id.* at 393.

156. *Id.* at 394.

157. 402 U.S. 183 (1971).

158. *Id.* at 213.

159. *Id.*

160. 422 U.S. 806 (1975).

161. *Id.* at 817, 819.

explicit in the amendment.[162] If it follows that the two rights are thus independent then the policies behind the rights may be impaired if § 1654 is applied to force the accused to forego one or the other. If § 1654 is strictly applied the defendant who actually wishes to present a hybrid defense may waive his *pro se* right and allow counsel to present the defense. The policy behind the *pro se* right—that the defense should be personal to the accused[163]—might then be impaired. Where the defendant chooses to represent himself the policy behind the right to counsel—that the accused, like the government, is entitled to representation by an expert—will be impaired. By compelling a choice between proceeding with counsel or *pro se*, § 1654 vitiates the policies underlying the rights involved.

It may be argued that the nature of these two rights is such that they are not really independent. While the principle of *Simmons v. United States*[164] would then not apply to the hybrid defense question this would not destroy the case for the hybrid defense. A finding that the right to counsel and the right to defend *pro se* are not independent, supports the conclusion that the hybrid defense should be viewed as merely one method of exercising the sixth amendment right to make a defense.[165]

It is clear that past and present interpretations of § 1654 and the sixth amendment have unnecessarily given rise to a tension between the two provisions. Arguably, § 1654 should be considered inapplicable to a hybrid defense request. The *Faretta* case has effectively made it inappropriate to consider that statute with respect to the question of whether an accused may present a hybrid defense. It has also been shown that even if § 1654 remains applicable its language does not necessarily merit an either-or reading. Supreme Court interpretations of the sixth amendment indicate that such a reading is in fact incorrect. Furthermore, a strict either-or approach under § 1654 would force the defendant to forego the assertion of one constitutional right in order to assert another.

The Hybrid Defense Under State Constitutions

Because the wording of the state constitutional provisions under consideration differs from the language of the sixth amendment, a different analysis of the hybrid defense issue under these

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162. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for this defense." U.S. CONST. amend. VI.

163. *See* Faretta v. California, 422 U.S. 806, 819-20 (1975).

164. 390 U.S. 377 (1968).

165. *See* notes 118-21 *supra* and accompanying text.

state provisions must be made. Article one, section thirteen of the Indiana Constitution states: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel."[166] Twenty-five other states guarantee an individual this right in similar language.[167] Six states afford constitutional protection for the individual's right to be heard by himself, by counsel, or both.[168] Under language of either type of provision the right in these states to present a hybrid defense would seem to be guaranteed. However, all but one of these jurisdictions have interpreted their respective provisions to mean that a defendant may represent himself or be represented by counsel, but not both. This section presents an examination of the effect of these state constitutional provisions on the hybrid representation issue.

In *McDowell v. State*[169] the Indiana Supreme Court was presented with the issue whether a defendant who is represented by counsel may volunteer incompetent and irrelevant testimony or ask questions while testifying. The appellant claimed that the trial court, by refusing this course of action, denied the appellant the right to be heard by himself. This right was apparently claimed under article one, section thirteen of the Indiana Constitution. The court, without distinguishing or explaining the constitutional provision, held that "[t]hese situations were for the exercise of the court's discretion in controlling the trial and seeing to it that the trial progressed in an orderly manner."[170] It is not certain if the court meant to confine this holding to situations where the defendant offers irrelevant and incompetent testimony. Clearly the judge must have control over the trial and the presentation of testimony regardless of the type of defense presented. Yet the holding in *McDowell* does not preclude a finding of a right to present a hybrid defense under section thirteen of the Indiana Constitution. Dictum from the opinion seemingly recognizes hybrid representation under this provision.[171] Subsequent Indiana decisions have not faced this issue but have held, consistent with the general rule, that no federal constitutional right to a hybrid defense exists.[172]

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166. IND. CONST. art. 1, § 13.
167. *See* note 53 *supra*.
168. *See* note 54 *supra*.
169. 225 Ind. 495, 76 N.E.2d 249 (1947).
170. 225 Ind. at 502, 76 N.E.2d at 252.
171. *See* notes 50-51 *supra* and accompanying text.
172. Bradberry v. State, ___ Ind. ___, 364 N.E.2d 1183 (1977); Wallace v. State, ___ Ind. App. ___, 361 N.E.2d 159, *petition for transfer denied*, ___ Ind. ___, 366 N.E.2d 1176 (1977) (Pivarnik, J., dissenting).

Other jurisdictions when presented with a claim of a right to hybrid representation under state constitutional provisions have denied the claim by relying partially on policy reasoning and partially on distinguishing interpretations of the provisions themselves. The Tennessee Supreme Court in *State v. Burkhart*[173] considered the fact that the constitutional provision is worded conjunctively[174] to be of no consequence. The court explained the provision by pointing out that at the time the provision was drafted the accused had no right to testify in his own behalf. Essentially the court construed the word "heard" to mean that a defendant may testify and that he may also be represented by counsel. The court further held that the hybrid representation question rests with the discretion of the trial court, based upon a compelling policy "of maintaining an orderly administration of justice."[175]

The Texas Court of Criminal Appeals took a similar approach to the hybrid defense issue. In *Landers v. State*[176] the court cited decisions from other jurisdictions to support its finding that the Texas Constitution[177] does not protect hybrid representation. Utilizing a rational similar to that in *Burkhart*,[178] the Texas court held that the constitutional provision guaranteeing a "right of being heard by himself or counsel, or both" gives the accused the right to testify and the right to have counsel, but does not recognize a right to present a hyrbid defense.[179]

There would seem to be even more solid ground for recognizing a hybrid representation right under this type of state constitutional provision than under the federal constitution. Based on *McDowell v.*

173. ___ Tenn. ___ , 541 S.W.2d 365 (1976).

174. "[T]he accused hath the right to be heard by himself *and* his counsel." TENN. CONST. art. 1, § 9 [emphasis added].

175. State v. Burkhart, ___ Tenn. ___ , 541 S.W.2d 365, 370 (1976). *See* State v. McCleary, 149 N.J. Super. 77, 373 A.2d 400 (1977).

176. 550 S.W.2d 272 (Tex. Crim. App. 1977) (opinion on state's motion for rehearing).

177. TEX. CONST. art. 1, § 10.

178. *See* note 173 *supra*.

179. 550 S.W.2d at 277. The conviction in *Landers* was originally reversed by the Texas Court of Criminal Appeals. In this opinion the court quoted at length from Faretta v. California, 422 U.S. 806 (1975), and concluded that "[t]he denial of appellant's timely and properly presented request for his constitutional right to personally cross-examine witnesses against him" presented reversible error. Landers v. State, 550 S.W.2d 272, 275 (Tex. Crim. App. 1977) (reversed on rehearing). However, the court granted the state's motion for a rehearing and subsequently reversed itself by affirming the conviction. The second majority opinion stated that the opinion on original submission had misconstrued article one, section ten of the Texas Constitution. 550 S.W.2d at 275 (opinion on state's motion for rehearing).

State[180] the question has not been completely resolved under current interpretations of the Indiana Constitution.[181] If the Indiana courts, like those of Tennessee and Texas, are able to explain away the surface implications of article one, section thirteen, then it appears likely that Indiana will also find no constitutional grounds for presenting a hybrid defense and will leave the matter to the trial court's discretion.

The approach taken by the Texas and Tennessee courts was strongly criticized in the dissenting opinion in *Landers v. State.*[182] Referring to the seemingly clear language of article one, section ten of the Texas Constitution, the dissent stated:

> Under no possible construction of the English language as it has ever existed can one construe the term "heard" in the above Constitutional provision to have different meanings as to the terms "himself, or counsel, or both." Would the majority interpret this provision as guaranteeing defense counsel the right to testify? It is inconsistent to interpret "heard" to mean "the right to testify" when applied to the accused, while interpreting "heard" as "the right to conduct a defense" when applied to counsel.[183]

This discussion reveals the difficulty involved in holding that hybrid representation is not protected under state constitutional provisions which set down representation rights in conjunctive terms. The courts are indeed straining to say that "heard"[184] means "testify" *and* "present a defense" in the same sentence, depending upon which phrase—"by himself" or "by counsel"—it is applied to.

A state such as Indiana which has a constitutional provision guaranteeing a right in the accused to be heard by himself *and* counsel, should not have to reach the policy considerations behind the question when faced with the hybrid representation issue. The plain words of the provisions guarantee the right to present a hybrid defense.

CONCLUSION

Federal and state courts have refused to recognize a constitutionally protected right to present a hybrid defense. General policy

180. *See* note 169 *supra.*
181. *See* notes 169-71 *supra* and accompanying text.
182. 550 S.W.2d at 280 (Phillips, J., dissenting).
183. *Id.* at 281.
184. *See, e.g.,* IND. CONST. art. 1, § 13.

considerations do not support the present rule denying hybrid defenses, and in fact warrant a finding of constitutional protection for the hybrid defense. The system's goal of retaining reliability of the guilt-determining process through insuring an orderly trial would not be threatened and can be achieved by recognizing a hybrid defense right. A hybrid defense would not unnecessarily consume time or detract from the dignity and decorum of the proceedings or make the proceedings less efficient. A *pro se* defense would be more likely to give rise to any of these harmful results. Thus when it is remembered that the *pro se* right is constitutionally protected under *Faretta*, justifying a denial of a right to hybrid representation on any of these grounds lacks validity.

Recognition of a right to present a hybrid defense would also help achieve the goal of insuring procedural fairness to the individual accused. Procedural fairness in the context of presenting a defense is best achieved by respecting the accused's freedom of choice. The importance of the defendant's freedom of choice as expressed in the Bill of Rights and protected by the United States Supreme Court, indicates the accused should have, under the sixth amendment, the freedom to choose a hybrid defense.

Some federal courts have chosen to rely on 28 U.S.C. § 1654 in determining that the sixth amendment does not protect hybrid representation, while others have denied the right based on policy considerations and Supreme Court interpretations of the amendment. Jurisdictions having constitutional provisions which appear to guarantee the accused a right to be heard by himself and counsel have also refused to recognize a hybrid defense right. *Faretta v. California*, which recognized an independent sixth amendment *pro se* right, has been considered to be of no bearing on the hybrid defense question, and most courts, both state and federal, have held that a hybrid defense request is for the determination of the trial court.

As has been shown, § 1654 should not be applied to the hybrid representation issue. The right to represent oneself and the right to the assistance of counsel have separate bases in the sixth amendment, and should therefore not be considered to be correlative in nature. The Supreme Court's finding of an independent *pro se* right should preclude application of § 1654 to the hybrid defense question.

Even if the statute does control the issue it has been misapplied by federal courts. In spite of the statute's mandatory wording courts have held the question to be subject to the trial judge's discretion. If the statute has been accurately construed as requiring

an either-or choice between self-representation and representation by counsel, the judge's discretion should not be determinative.

State constitutional provisions which guarantee a right to self-representation and to have counsel should be held to guarantee a right to present a hybrid defense. These provisions facially protect such a right, and the judge's discretion should thus not be controlling when considering a request for hybrid representation.