THE RIGHT TO "NO TRIAL" AND THE RIGHT TO "NO COUNSEL"

INTRODUCTION

During the spring of 1968, two shocking crimes occurred in this country—the murders of Dr. Martin Luther King and Senator Robert F. Kennedy. On March 10, 1969, James Earl Ray, the accused assassin of Dr. King, pleaded guilty to the charge of first-degree murder and was sentenced to ninety-nine years imprisonment by a Tennessee court. A California court, however, refused the request of Sirhan Sirhan, the accused murderer of Senator Kennedy, to dismiss his counsel and plead guilty; Sirhan was subsequently found guilty and was sentenced to death.

The purpose of this note is not to evaluate the prosecutions of Sirhan or Ray, but to discuss certain constitutional issues which arose from the action of the court in denying Sirhan's requests. The principle questions involved are whether a defendant has a constitutional right to waive a trial by pleading guilty and whether a defendant has a constitutional right to waive counsel and appear pro se.

It may appear paradoxical to speak of a right to "no trial" and a right to "no counsel" at a time when our system of justice is taking steps to assure all defendants a fair trial and to provide counsel for the indigent defendants. The right to "no trial" and the right to "no counsel," however, in no way infringe upon a defendant's right to trial and right to counsel. The right to trial and right to counsel refer to the assurances that a trial and counsel will be available to a defendant if he so desires. However, there may be situations where a defendant will decide that he does not want to go through the procedure of a trial or does not want to be represented by counsel. It is in these situations that the right to "no trial" and the right to "no counsel" become important.

THE RIGHT TO "NO TRIAL"

The Right to Trial

The Sixth Amendment guarantees to a defendant his right to a trial

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1. The New York Times is the source used for all information concerning James Earl Ray and Sirhan Sirhan.
2. Pro se is defined as: "For himself; in his own behalf; in person." BLACK'S LAW DICTIONARY 1364 (4th ed. 1951).

Produced by The Berkeley Electronic Press, 1969
by jury. In *Patton v. United States*, the Supreme Court interpreted "trial by jury" as referring to

a trial . . . as understood and applied at common law, and . . . including the essential elements as they were recognized in this country and England when the Constitution was adopted. . . . Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge . . .; and (3) that the verdict should be unanimous.

Furthermore, the Federal Rules of Criminal Procedure state: "Cases to be tried by jury shall be so tried unless the defendant waives a jury trial . . . ."

In the federal courts, the right to trial by jury entitles the defendant to be tried by twelve jurors. All state constitutions afford a defendant the right to trial by jury. Since the Sixth Amendment has never been made directly applicable to the states, however, the right of a state to limit the size of the jury to less than twelve has been upheld. Thus, a question arises as to whether a defendant has the right to request a trial by jury where the number of jurors is less than that prescribed by the particular constitution. Although *Patton* affirmed the right of a defendant to submit to a trial by a jury of less than twelve or a trial by the court, the Court indicated that a trial by a jury of twelve was the normal and preferable mode. In accordance with the *Patton* decision, the Federal Rules of Criminal Procedure afford a defendant the right to waive a trial by jury and allows the parties to consent to a jury of less than twelve persons.

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3. U.S. Const. amend. VI. U.S. Const., art. III, § 2, also provides:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.


5. Id. at 288.


10. We do not mean to hold that the waiver must be put into effect at all events. . . . Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases.

11. Fed. R. Crim. P. 23(a) [hereinafter cited as Federal Rules]. The defendant must have the "approval of the court and the consent of the government" to waive a jury trial. Id.

12. Federal Rules 23(b). This rule requires that both parties so stipulate and that it be done with the approval of the court.
The Sixth Amendment warrants that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." 13 If this language is literally interpreted, a defendant could never waive a trial by jury. It has been well established, however, that a defendant has the right to waive both a "speedy trial" 14 and a "public trial." 15 If a defendant has the right to waive a "speedy" and a "public" trial, rights which the Sixth Amendment states that he "shall enjoy," it would also seem that he should have the right to waive a trial by jury.

Although most states provide, by constitutional or statutory provision, that a defendant has the right to waive a trial by jury, 16 qualifications are placed upon this right of waiver. Some states allow a waiver regardless of the nature of the crime, 17 while others will not allow a waiver when the crime is punishable by death. 18 Still others allow a waiver only when the crime is less than a felony. 19

The right to trial by jury is a personal right for the protection of the defendant, and, therefore, no qualification should be placed upon his right to waive a trial if he so desires. 20 The right to waive a trial should not be denied on the ground that it would be against public policy, since the trial is designed for the protection of the accused rather than the public. 21

Right to Waive Trial by Pleading Guilty

Generally, a defendant in a criminal prosecution has three pleas available to him: 22 1) not guilty, 23 2) guilty, 24 and 3) nolo contendere. 25 The inquiry here is restricted to pleas of guilty. Although it has been said that a plea of nolo contendere has the same effect as a plea of

13. U.S. Const. amend. VI.
17. Id.
18. Id.
19. Id.
21. In Patton v. United States, 281 U.S. 276 (1930), the Supreme Court said: "[T]he view that the power to waive a trial by jury . . . should be denied on grounds of public policy must be rejected as unsound." Id. at 308.
22. E.g., FEDERAL RULES 11.
25. See generally 21 AM. JUR. 2d CRIM. LAW §§ 497-502 (1965); Annot., 89 A.L.R. 2d 540 (1963). This plea is sometimes referred to as non vult, non vult contendere or nolle contendere.
guilty,\textsuperscript{26} the similarity is confined to the case in which the plea is entered. While a plea of guilty may be used against the defendant in a subsequent criminal or civil proceeding, a plea of \textit{nolo contendere} may not be used in a subsequent proceeding. Because of the difference in the subsequent effect of the two pleas, the courts have been vested with greater powers of discretion in accepting pleas of \textit{nolo contendere}.\textsuperscript{27}

While the Sixth Amendment's right to a trial by jury has not been made directly applicable to the states,\textsuperscript{28} the due process clause of the Fourteenth Amendment assures a defendant of the right to a trial before conviction. Although the defendant may waive the trial by pleading guilty, such a power of waiver is not extended to the states. The state may neither deny the defendant his right to trial nor force the defendant to plead guilty to the charged offense. If the court may not force the defendant to plead guilty, should it have the power to force him to plead not guilty if he has intelligently and voluntarily entered a plea of guilty and the court has informed him of the consequences of such a plea? Should the court have the right—regardless of the statutory power granted to it—to reject the plea of guilty, enter a plea of not guilty and force the defendant to stand trial?

A minority of three states give their courts the absolute power to reject a plea of guilty to capital offenses. The New Jersey courts are vested, by statute, with an \textit{in toto} power of rejection.\textsuperscript{29} In Louisiana\textsuperscript{30} and New York\textsuperscript{31} the defendant is forced to plead not guilty unless the


29. In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such a plea is offered, it shall be disregarded and the plea of not guilty entered. . . .


30. A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him. The defendant, with the consent of the district attorney, may plead "guilty without capital punishment."


31. A conviction shall not be had upon a plea of guilty where the crime charged is murder, except upon consent of the court and district attorney to the entry of such plea.

It seems unquestionable that a defendant who enters a plea of guilty is entitled to the protection of a court's inquiry as to whether the plea is intelligent and voluntary. The power of rejection in Louisiana, New Jersey and New York, however, is not grounded upon such an inquiry. By statute, these states have reworded the Sixth Amendment. They disregard the import of the wording that the defendant shall enjoy the right to a trial and consider a trial as being sine qua non.

To Whom Is Protection Extended by the Prohibition of Pleas of Guilty?

Protection of the Defendant

The obvious answer is that the prohibition of guilty pleas to capital offenses is for the protection of the defendant. Yet, a guilty plea should indicate to the court that he does not want such protection. Assuming that the court, in its preliminary inquiry, is assured that the plea is voluntarily and intelligently given, and that the defendant is sane and is not motivated by a self-punititive act of confession, the possibility of a death sentence should substantially eliminate the danger of a defendant pleading guilty to first-degree murder if he did not commit the crime.

There may be factors other than the defendant's sense of guilt that will prompt him to plead guilty. He may wish to forego the often agonizing and tedious proceedings of a trial or he may desire to prevent a public display of facts or occurrences which might prove embarrassing to himself, his family or his friends. He might also plead guilty in the hope that the court will be lenient in prescribing punishment.

Regardless of the factors prompting the defendant to plead guilty, the court's duty to protect the defendant should end once it informs him of the consequences of his plea and is satisfied that his plea is intelligently, competently and voluntarily given.

Protection of the Public

The Sixth Amendment guarantees to a defendant the right to a "public trial." If this were a right of the public, it would necessarily follow that the right to a "speedy trial" is also a public right. Accordingly, the state, acting for the public, would be able to force a defendant to accept both a public and a speedy trial. This result would seem contrary to the language of the Sixth Amendment. In In re Oliver,32 the Supreme Court stated that the right to a "public trial" is a guarantee of the accused33
which is intended to "safeguard against any attempt to employ our courts as instruments of persecution." If a defendant wants to forego the ordeal of having a public audience present at his trial, he should not be prevented from doing so. Nor should he be forced to stand trial if he desires to plead guilty and accept the consequences.

The right to trial is available to all members of our society, but only accused individuals within the mass should be allowed to assert that right. It is a right intended for the protection of the accused and is guaranteed to him by the Sixth Amendment and the due process clause of the Fourteenth Amendment. Since the right is granted for the protection of the defendant, there seems to be no reason why he cannot intelligently, competently and voluntarily waive that right. Such a waiver would not be against public policy on the grounds that it would allow a defendant to escape punishment. By pleading guilty, a defendant is submitting himself to the court for punishment. Neither can it be argued that such a plea will suppress vital facts, since a plea of guilty does not prevent the state from making further investigations.

Protection of the Court

From what is the court protecting itself when it refuses to accept a defendant's plea of guilty? Should the right to a trial, which was originally intended as an instrument to protect the defendant from an unscrupulous court, be manipulated by the court to provide protection for the court? Of course, criticism might be leveled at the court for sentencing a defendant to death solely on the basis of a guilty plea. Yet, the same furor might arise even if a defendant were found guilty after a trial, not because of the means used to determine his guilt, but because of the punishment imposed upon him.

The court should not be allowed to force a defendant to stand trial as a display of its fairness and justice. The trial should be designed to protect a defendant who professes his innocence rather than to protect the court from criticism and the possibility of reversal.

Circumstances Under Which a Defendant Should Be Allowed to Plead Guilty

States which bar a defendant from pleading guilty have restricted this prohibition to capital offenses. Undoubtedly, this is due to the severity of the possible punishment. While death by asphyxiation,

34. Id. at 270.
35. See notes 29-31 supra.
36. See LA. CRIM. PRO. CODE ANN. art. 557 (West 1967) which allows the defendant to plead "guilty without punishment" with the consent of the district attorney.
electrocution or hanging is a most undesirable fate, it is questionable whether interment for a long period of time in a penal institution is any more desirable. Thus, it would seem that the gravity of the crime or the severity of the punishment would not be valid criteria for determining whether to accept a defendant’s plea of guilty. If the protection provided by a trial is essential to prosecutions for capital offenses, then it must also be essential to all felony prosecutions. The degree of possible punishment should not be the sole determining factor.

The Federal Rules of Criminal Procedure37 and the ABA Project on Minimum Standards for Criminal Justice38 provide ample guidelines for the state courts in determining whether to accept a defendant’s plea of guilty. The Federal Rules allow a defendant to plead not guilty,39 guilty40 or, with the consent of the court, nolo contendere.41 The ABA Project allows the same pleas as the Federal Rules,42 except that the plea of nolo contendere is not available unless provided for by the law of the particular state.43

Neither the Federal Rules nor the ABA Project provide for a rejection of a guilty plea because of the gravity of the crime or the severity of the punishment. Before a guilty plea can be accepted, both the Federal Rules and the ABA Project require that the court: 1) determine whether the plea of guilty is voluntarily made;44 2) address the defendant personally and determine whether the defendant understands the nature of the charge and the consequences of the plea of guilty;45 and 3) deter-

38. ABA Project, Pleas of Guilty.
40. Id.
41. Id.
42. ABA Project, Pleas of Guilty §§ 1.1(a), 1.1(b).
43. ABA Project, Pleas of Guilty § 1.1(a).
44. Federal Rules 11; ABA Project, Pleas of Guilty § 1.5.
45. Federal Rules 11; ABA Project, Pleas of Guilty § 1.4. Section 1.4 of the ABA Project provides:

The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

(a) determining that he understands the nature of the charge;
(b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and
(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;
(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.
mine whether there is a factual basis for such plea. If the above criteria are satisfied, the court should accept the plea of guilty. On the other hand, if the court determines that the plea is involuntary, that the defendant does not comprehend the nature of the charge or the consequences of the plea or that there is no factual basis for the plea, the plea will be rejected.

While the court must assure a defendant of his right to trial, it should not force a trial upon a defendant who wishes to plead guilty. By following the guidelines enunciated by the Federal Rules and the ABA Project, the courts will be able to better preserve the defendant’s right to trial without encroaching upon his right to plead guilty.

The Right to “No Counsel”

The Right to Counsel

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” Because of a lack of formal debate when this amendment was first proposed, it was difficult to determine the intended application of the amendment. In 1938, the Court in Johnson v. Zerbst determined the application of the Sixth Amendment’s right to counsel. The Court averred:

The Sixth Amendment guarantees that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other amendments were submitted . . . as essential barriers against arbitrary or unjust deprivation of human rights.

In accordance with the Court’s decision in Johnson, the Federal Rules of Criminal Procedure provide:

Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every

Id. The ABA Project is much more explicit as to what is required of the court than are the Federal Rules.


48. Without any records of debates surrounding the proposal of the Sixth Amendment, the courts were unable to conduct historical analysis such as they were able to do in cases involving the Fourteenth Amendment. See Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

49. 304 U.S. 458 (1938).

50. Id. at 462.
stage of the proceedings from his initial appearance before the
commissioner or court through appeal, unless he waives such
appointment.\textsuperscript{51}

Since Johnson was originally decided in a federal court, the rule
enunciated therein had no effect on state court proceedings. In Powell v.
Alabama,\textsuperscript{52} the Court held that the failure of a state court to appoint
counsel was a violation of due process under the Fourteenth Amend-
ment.\textsuperscript{53} The Court, however, restricted its holding by stating: [W]het-
ther this would be so in other prosecutions, or under other circumstances,
we need not determine.\textsuperscript{54} Ten years later, in Betts v. Brady,\textsuperscript{55} the Court
declared that the "appointment of counsel is not a fundamental right,
essential to a fair trial."\textsuperscript{56} The Court concluded that they were "unable
to say that the concept of due process . . . obligates the States . . . to
furnish counsel in every such case."\textsuperscript{57}

The Sixth Amendment's guarantee of right to counsel was not
applicable to state courts until the decision of Gideon v. Wainwright.\textsuperscript{58}
Reversing its holding in Betts,\textsuperscript{59} the Court held that the right to counsel
is a fundamental right made applicable to the states through the Four-
teenth Amendment.\textsuperscript{60}

In light of judicial recognition of the right to counsel, the question
remains of whether the defendant must accept the assistance of counsel
when he wishes to appear in court pro se. Gideon was not addressed to
this question. Therefore, if the right of waiver does exist, the problem
to be determined is whether the right is implicit in the Sixth Amendment,
and therefore applicable to the states through the Fourteenth, or whether
the right must be created by statute.

The Right to Waive Counsel

In Johnson v. Zerbst,\textsuperscript{61} the Court said that when the Sixth Amend-
ment's right to counsel "is properly waived, the assistance of counsel is
no longer a necessary element of the court's jurisdiction to proceed to

\textsuperscript{51} Federal Rules 44(a).
\textsuperscript{52} 287 U.S. 45 (1932).
\textsuperscript{53} U.S. Const. amend. XIV, § 1 provides: "[N]or shall any state deprive any
person of life, liberty, or property without due process of law . . . ."
\textsuperscript{54} 287 U.S. 45, 71 (1932).
\textsuperscript{55} 316 U.S. 455 (1942).
\textsuperscript{56} Id. at 459.
\textsuperscript{57} Id.
\textsuperscript{58} 372 U.S. 335 (1963).
\textsuperscript{59} The Court agreed that Betts was "an anachronism when handed down." Id. at
345.
\textsuperscript{60} Id. at 342.
\textsuperscript{61} 304 U.S. 458 (1938).
conviction and sentence."\textsuperscript{62} Subsequently, in Adams v. United States ex rel. McCann,\textsuperscript{63} the Court held that the accused may "competently and intelligently waive his Constitutional right to the assistance of counsel."\textsuperscript{64} The Court further asserted:

The right to the assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . . But the Constitution does not force a lawyer upon a defendant.\textsuperscript{65}

The right of a defendant to conduct his own defense was further defined in United States v. Plattner.\textsuperscript{66}

A defendant in the trial of a criminal case . . . has a right to conduct and manage his own case pro se . . . . Moreover, we hold the right to act pro se as above stated is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision.

This safeguard [the Sixth Amendment right to the assistance of counsel] was surely not intended to limit in any way the absolute and primary right to conduct one's own defense in propria persona.\textsuperscript{67}

Accompanying the cases which mention the correlative constitutional right to waive the assistance of counsel is a similar right of statutory origin. The Federal Rules of Criminal Procedure provide that if the defendant is unable to obtain counsel and appears without counsel, the court will appoint counsel "unless he waives such appointment."\textsuperscript{68} The United States Code also states that "in all courts of the United States the parties may plead and conduct their own cases personally . . . ."\textsuperscript{69}

Yet, the right to waive the assistance of counsel would exist even in the absence of statutory decrees. The defendant's right to waive the assistance of counsel is analogous to a defendant's correlative rights not to be a witness against himself and "to be a witness against himself,"\textsuperscript{70} and his correlative rights to a trial by jury and "to waive a trial by
jury.  

If a defendant has the right to waive a "speedy and public trial," which is also guaranteed to him by the Sixth Amendment, it would seem that he should also have the right to waive the assistance of counsel.

**Competency to Waive the Assistance of Counsel**

In *Johnson v. Zerbst*, the Court held that the defendant must "competently and intelligently waive his right to counsel." This holding raises the questions of what is meant by a competent and intelligent waiver, and who is to determine whether the waiver was competent and intelligent. The *Johnson* opinion indicated that the determination of whether there has been a "competent and intelligent" waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." One can readily understand why the courts feel compelled to require a standard of competency, but it is questionable whether the ad hoc test used in *Johnson* provides a meaningful standard. Under this standard, cases allowing a waiver of counsel have varied from one where the defendant had formal legal training to one where the defendant was an ex-convict with little education. By requiring a high degree of professional competency, the courts may be expressing their preference toward members of the bar. By applying a "sliding" standard of competency, a court can greatly restrict a defendant's right to appear *pro se*.

In *von Moltke v. Gillies*, the Supreme Court held that a waiver is valid if it is made with an apprehension of the nature of the charges, the statutory offenses included under them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

72. See notes 14-15 supra and accompanying text.
73. 304 U.S. 458 (1938).
74. Id. at 469. See also United States v. Kniess, 264 F.2d 353 (7th Cir. 1959).
78. Referral is made to the requirement that the defendant have knowledge of, or experience with, legal proceedings. Although "legal" competency seemed more apropos, this note is not intended to give the impression that reference is made to the competency of the defendant to stand trial.
79. 332 U.S. 708 (1948).
80. Id. at 724.
If a defendant is informed of, and understands, the consequences of his waiver, the waiver is deemed to be competent, intelligent, voluntary and, therefore, valid.

Thus, the burden is on the court to determine whether a defendant will be allowed to conduct his own defense. Is the court the proper participant in the legal process to determine whether a defendant may appear pro se? The courts may be interested parties in the litigation because of their fear that criticism would result from allowing a defendant to appear pro se. There may be cases, especially those in which the public interest has been inflamed, where a court will impose a high standard of competency and force the defendant to accept the assistance of counsel. By attempting to protect its own reputation for fairness and justice, the court would be forcing the defendant to relinquish his right to defend himself. The courts need not surrender their power of determining whether a defendant is competent to appear pro se, but they should not be allowed to rely on a variable standard which they can apply as befits their mood.

What Constitutes a Waiver of Counsel?

What course of action should the court pursue when a defendant pleads guilty after appearing in court without counsel, uninformed of his right to counsel and without requesting such assistance? Should the court conclude that the defendant has waived his right to counsel and accept his plea of guilty?

Johnson v. Zerbst stands for the propositions that a defendant must "competently and intelligently waive his right to counsel" and that "courts indulge every reasonable presumption against waiver . . . [and] do not presume acquiescence in the loss of fundamental rights." The Johnson decision apparently requires an express manifestation by the defendant before there can be a valid waiver of counsel. Subsequently, the Court, in Walker v. Johnston, declared that unless a defendant voluntarily waives his right to counsel, he will be "deprived of a constitutional right." More recently, in Carnley v. Cochran, the Court elaborated upon the voluntary aspect of waiver by saying:

[P]resuming waiver from a silent record is impermissible.

81. Johnson v. Zerbst, 304 U.S. 458 (1938); Zahn v. Hudspeth, 102 F.2d 759 (10th Cir. 1939); Federal Rules 44(a).
82. 304 U.S. 458 (1938).
83. Id. at 469.
84. Id. at 464.
85. 312 U.S. 275 (1941).
86. Id. at 286.
The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.\textsuperscript{88} The Court has also declared that a waiver is not to be presumed from a failure to request counsel.\textsuperscript{89}

One writer has suggested that one of the questions left unanswered by\textit{Gideon v. Wainwright}\textsuperscript{90} is whether the federal court standards as to waiver of counsel are applicable to state court proceedings.\textsuperscript{91} He suggested that "an easy finding of waiver in the state courts may substantially undermine the right guaranteed in\textit{Gideon}."\textsuperscript{92} The Court, in\textit{Carnley}, has already asserted that "the principles declared in\textit{Johnson v. Zerbst} [are] equally applicable to asserted waivers of the right to counsel in state criminal proceedings."\textsuperscript{93} Even without such an express declaration, it would seem unreasonable for the Court to require the assistance of counsel in the state courts and at the same time allow these courts to deprive a defendant of his right to counsel by an "easy" finding of waiver. Unless federal standards are imposed upon state courts, the effect of\textit{Gideon} is substantially nullified.

When federal standards are applied, a defendant cannot make a valid waiver until the court has informed him of his right to counsel and he has made an express, competent and intelligent waiver. "A waiver is . . . an intentional relinquishment of a known right or privilege"\textsuperscript{94} and should not be inferred from a defendant's failure to request counsel or his plea of guilty.\textsuperscript{95}

\textbf{Assistance of Counsel: The Effect of Request or Waiver}

If a defendant either hires counsel or the court appoints counsel, and during the course of the trial proceedings the defendant decides to release his counsel and conduct his own defense, is the defendant's prior request for the assistance of counsel an irrevocable waiver of his right to appear \textit{pro se}? In\textit{United States ex rel. Russo v. New Jersey},\textsuperscript{96} the court

\textsuperscript{88} Id. at 516.
\textsuperscript{89} Miranda v. Arizona, 384 U.S. 436 (1966).
\textsuperscript{90} 372 U.S. 335 (1963).
\textsuperscript{92} Id.
\textsuperscript{93} Carnley v. Cochran, 369 U.S. 506, 515 (1962).
\textsuperscript{94} Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
\textsuperscript{95} See ABA \textit{Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services} §§ 7.2, 7.3 (Tent. Draft 1967).
\textsuperscript{96} 351 F.2d 429 (3rd Cir. 1965).
was concerned with whether the failure to request counsel at the interrogation stage of the proceedings constituted a waiver of counsel when such a failure would not act as a waiver at later stages of the proceedings. The court stated that "the test of waiver is the same, or should be, no matter what stage of the proceedings is at issue, so long as the right [to counsel] has . . . attached." The absoluteness of this statement is questionable. Undoubtedly, there should be an objective minimum standard for determining whether there has been a waiver. When the proceedings have passed beyond the investigatory stage, however, there is no reason why the standard cannot be raised to prevent any unnecessary delays in the conduct of the trial. As was pointed out in United States v. Llanes, "[j]udges must be vigilant that requests for the appointment of a new attorney on the eve of the trial should not become a vehicle for achieving delay."

Just as requests for a change of counsel should not be used to effectuate delay, a defendant should not be allowed to use his right to appear pro se to achieve delay. The court in United States v. Birrell stated that "while the right to proceed pro se is unqualified if exercised before the trial, the right is 'sharply curtailed after the trial has commenced with defendant being represented by counsel.'" Citing United States ex rel. Maldonado v. Denno, the court further stated:

There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of the proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

The fact that a defendant and his counsel disagree on the course of

97. [W]hen the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his counsel. Id. at 436, citing Escobedo v. Illinois, 378 U.S. 478, 492 (1964).
100. A competent and intelligent waiver expressly made by the defendant. This minimum standard should be operative at all stages of the proceedings after the right to counsel has attached. See notes 73-80 supra and accompanying text.
101. 374 F.2d 712 (2d Cir. 1967).
102. Id. at 717.
104. Id.
105. Id. at 895.
106. 348 F.2d 12 (2d Cir. 1965).
action to be taken in the defense proceedings would seem sufficiently prejudicial to the defendant to allow him to discharge counsel and proceed *pro se*. The Birrell decision, however, avowed that "a defendant in a criminal case does not have a constitutional right to an attorney with whose advice he agrees." This view seems to give the defendant who is able to hire counsel greater control over the course of the proceedings than the indigent defendant who accepts court-appointed counsel. A defendant who hires counsel can choose counsel with whom he agrees, while an indigent defendant, according to Birrell, can only complain if the appointed counsel is so ineffective that he does not satisfy constitutional requirements.

In effect, the indigent defendant has no control over his counsel. Although the attorney-client relationship still exists, the employer-employee relationship which lingers in the background with hired counsel is not present. The ability of a defendant to hire counsel should not be the deciding factor in determining whether the attorney-client relationship is to continue.

If the delay caused by a defendant's subsequent waiver of counsel is prejudicial to him and he is aware of this prejudice and is willing to accept the consequences, it does not seem that the court should weigh this prejudice in determining whether the defendant can release counsel and appear *pro se*. The court should not concern itself with the delay unless it is prejudicial to itself or other parties.

A situation might also arise where a defendant, prior to the beginning of the trial proceedings, has waived the assistance of counsel and subsequently requests that the court appoint counsel. Should the delay, which may result from the request, outweigh a defendant's right to the assistance of counsel? This situation can be readily distinguished from that of a defendant who desires to replace counsel and that of a defendant who wishes to release counsel and appear *pro se*.

The Sixth Amendment insures the defendant of "the assistance of counsel for his defence." There is not, however, a requirement as to when the defendant must request the assistance of counsel. The right exists at every stage of the proceedings. Even though the defendant has previously waived the right to counsel, the right should always be open to him. The prejudice that would result if the court refuses the

109. *Id.* at 894.
110. *U.S. Const.* amend. VI.
defendant's request for counsel would seem to outweigh any delay that might result.\textsuperscript{112}

\textit{Suggested Methods of Handling Waivers}

Reject All Waivers

The simplest course for the courts to follow would be to disallow all waivers and either appoint counsel or compel the defendant to hire counsel. The simplicity of this method, however, would not compensate for its unconstitutionality. The court cannot force counsel upon a defendant who is competent to defend himself.\textsuperscript{113} "The dominant motivation for the insistence that the counsel appear with the defendant is probably based on the courts' 'fear of reversal . . . rather than concern for the rights of the accused' . . . ."\textsuperscript{114} Of course, there are circumstances where a court will be justified in not accepting a waiver of counsel, but such rejection should not infringe upon the defendant's right to appear \textit{pro se}.

Accept All Waivers

The acceptance or rejection of all waivers would result in devastating, unjust consequences. Some objective standard should be applied in determining whether a defendant is competent to conduct his own defense. Those defendants who do not meet the required standard should be compelled to have counsel present during the course of the proceedings.

One must distinguish between a situation where counsel is forced upon a defendant who is capable of appearing \textit{pro se} and one where counsel is forced upon a defendant who is not capable of conducting his own defense. The first situation violates the defendant's right to appear \textit{pro se}\textsuperscript{115} while the latter is necessary to protect the incompetent defendant.

Accept Waivers Only if a High Standard of Professional Competency Is Met

Such a proposal would require a determination of the degree of competency the court would require before allowing a defendant to appear \textit{pro se}. In addition to the requirement of physical and mental competency, should the court also require some degree of professional competency? The difficulty here is that if the court requires professional competency, it may prejudice the defendant's right to appear \textit{pro se}, since the number of defendants who are capable of attaining this standard will

\textsuperscript{112} See notes 105-06 supra and accompanying text.
\textsuperscript{113} Adams v. United States \textit{ex rel.} McCann, 317 U.S. 269 (1942).
\textsuperscript{115} See notes 61-71 supra and accompanying text.
be greatly restricted.

Difficulty would also be encountered in establishing the criteria to be used in determining whether a defendant is professionally competent. The problem would be in determining whether the court should only measure the defendant's academic knowledge of the law or whether it should also consider his practical knowledge of the law.117

Accept Waivers on the Basis of Mental Competency

In applying this standard, the court would not be required to inquire into a defendant's familiarity with legal proceedings. Yet, it is questionable whether general mental competency, or intelligence quotient, will give a true indication of a defendant's capability to conduct his own defense. To be a viable standard, mental competency must at least include a defendant's ability to comprehend the nature of the charges against him, the lesser-included offenses, the applicable punishments and the circumstances in mitigation thereof.118 A lack of ability to comprehend these factors may exist because a defendant is of below-normal mentality. Of course, even a defendant of above-average intelligence may be unable to comprehend complex legal proceedings.119 This test, therefore, would require a detailed preliminary investigation by the court to determine whether a defendant is capable of defending himself. This proposal, however, may prove to be impractical because of the increased burden that it will place on the already over-taxed courts.

Accept Waivers But Require the Presence of Counsel During the Course of the Proceedings

The methods previously suggested were based on the assumption that if the waiver is allowed, the defendant would appear alone in court. The present method would require the presence of an attorney even though the defendant would theoretically conduct his own defense. The advantages of this method are twofold. First, the advisory counsel could help the defendant hurdle the many legal technicalities that are involved in court proceedings. Secondly, if the defendant should subsequently decide to have an attorney conduct the defense, the advisory counsel could step in with little delay or confusion.120

120. One of the reasons that courts have not allowed a defendant to change his mind during the course of the proceedings is the fear of delay and confusion that might result from such a switch. See United States v. Birchell, 286 F. Supp. 885 (S.D.N.Y. 1968).
The implementation of this method, however, would involve serious problems. For this "pure" advisory counsel system to function properly, the advisory counsel should merely advise and correct the defendant. The first problem would be in finding attorneys who are willing to act in a capacity with such restricted powers. The second problem would arise when the advisory counsel exceeds his power and attempts to dictate the conduct of the defense. Eventually, the defendant may find himself displaced by his advisor.121

Accept Waivers and Require That the Bench Assist and Advise the Defendant in the Conduct of the Defense

For this proposal to operate satisfactorily, the bench must be convinced that it has a duty to advise a defendant appearing pro se even though such a duty would not extend to defendants represented by counsel or to the prosecution.122 The court, however, should remain in a neutral position to dispel any inequities that might arise during the course of the proceedings. When the court places itself in an advisory capacity, for the benefit of the pro se defendant, it may undermine both the adversary and the judiciary systems.

CONCLUSION

There will undoubtedly be instances where a defendant, who has appeared pro se or has pleaded guilty, will appeal from an adverse verdict on the grounds that he was denied adequate counsel or was not afforded a fair trial. The trial court needs to be protected from such allegations, but its protection need not come from an absolute prohibition against pro se appearances or from statutes forbidding pleas of guilty to capital offenses. Rather, the court should protect itself by making a preliminary inquiry as to whether the waiver of counsel or the plea of guilty was voluntarily, intelligently and competently made by the defendant.

Since cases involving requests for the assistance of counsel outnumber those involving waivers of counsel and since only a small minority of the states statutorily forbid pleas of guilty, there is a tendency to forget that the right to "no counsel" and the right to "no trial" exist. The fact that these rights are requested less frequently should not deprive them of equal status. A defendant is entitled to have all of his constitutional guarantees made available to him. The court, therefore, must not only assure a defendant of his right to trial and right to counsel, but must also avert any infringement upon his right to "no trial" and right to "no counsel."

121. State v. Cappetta, 216 So. 2d 749 (Fla. 1968).