

Why Defendants Shouldn't Be Allowed to Represent Themselves

By [Robin L. Barton](#) | December 13, 2016

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If I told you that a defense lawyer didn't make any objections to witness testimony, failed to challenge the admissibility of questionably seized evidence and gave a rambling nonsensical closing argument, you'd probably assume that the defendant had viable grounds for an appeal due to ineffective assistance of counsel.

You'd probably be right—unless, of course, the lawyer in question was the defendant himself.

Defendants in criminal cases have a constitutional right to represent themselves, even if they have no legal training or even any higher education. They must merely be “competent,” which is a fairly low standard.

For example, a South Carolina court recently held that [Dylann Roof](#) could represent himself at his capital murder trial for the shooting of nine African-American individuals in a church.

Federal Judge Richard M. Gergel ruled that Roof was competent to represent himself, but tried to discourage him from doing so, saying “I continue to believe it is strategically unwise, but it is a decision you have the right to make.”

Roof may have taken that advice to heart. He [changed his mind](#) and will now let his attorneys represent him at trial, while he'll represent himself during the sentencing phase, if necessary.

The right to represent oneself—or go “pro se”—stems from the 1975 Supreme Court case [Faretta v. California](#), which held that a defendant in a state criminal trial has an independent constitutional right of self-representation. An accused may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so.

The *Faretta* decision places a lot of weight on the language of the Sixth Amendment, which states that in all criminal prosecutions, the defendant shall have the right “to have the *Assistance* of Counsel for his defence” (emphasis added).

As the Court explains, “The language and spirit of the Sixth Amendment contemplate that counsel...shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.”

In other words, we shouldn't force lawyers on defendants who don't want them.

Although this argument may sound reasonable—and technically be correct in a strict interpretation of the Constitution—it's impractical.

This position essentially says that it's perfectly acceptable to let the person with the most at stake in a criminal case try to navigate the complexities of the criminal justice system without the knowledge, training and experience to do so effectively.

It's almost court-sanctioned procedural suicide by a defendant.

Moreover, the right to self-representation seems to be inconsistent with the right to effective assistance of counsel. In fact, the Court in *Faretta* made it clear that a pro se defendant necessarily waives any claim he might otherwise make on ineffective assistance grounds.

But true justice can only be achieved if defendants have competent, effective representation, safeguarding their rights and holding the prosecution to its burden of proof. And wouldn't most lay people be considered incompetent as defense lawyers?

The statistics on the outcomes for pro se defendants appear to support the conclusion that they're *not* effective as their own lawyers.

For example, [a study on patterns and trends in federal pro se defense from 1996-2011](#) found that pro se defendants are more likely to be found guilty by either a jury or the court than represented defendants. Specifically, 95% of cases involving pro se defendants resulted in a guilty verdict, compared with 82% of those involving retained counsel and 86% of cases involving appointed counsel.

if there's an argument in favor of letting defendants represent themselves in less serious criminal cases, we certainly shouldn't let them go pro se in cases where a loss at trial can literally result in their death via execution. And nowhere are the stakes as high as they are in a capital case such as Roof's.

Even if there's an argument [for] letting defendants represent themselves in less serious cases, we shouldn't let them go pro se in cases where a loss can result in their death via execution

. I agree with the dissent in *Faretta* by Chief Justice Burger, who wrote that "there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges."

Of course, defendants aren't really left to fend for themselves. They're usually assigned lawyers to assist them.

But it's inevitable that pro se defendants will make mistakes, the kinds of errors that would raise eyebrows and lead to successful appeals if made by licensed attorneys. So why are such mistakes acceptable, or at least condoned, if made by the defendant?

Self-representation raises other issues, which also weigh against permitting it.

For example, the right to represent oneself includes the right to cross-examine witnesses. But some [commentators](#) have argued that pro se cross-examination provides one last opportunity for the defendant to torment the victim.

Allowing a pro se defendant to question a police officer or expert witness is one thing. But is it proper or acceptable to let, say, an accused rapist directly question his alleged victim? Or let a defendant accused of domestic violence question his abused wife? It's traumatic enough for victims to have to testify in court at all, much less to have to interact directly with the accused himself.

The sanctity of the criminal justice system as a whole also needs to be protected.

There are protections in place to prevent pro se defendants from directly questioning child-witnesses. But adult witnesses don't get the same protection.

The sanctity of the criminal justice system as a whole also needs to be protected.

Because pro se defendants are usually given more leeway in how they conduct themselves and aren't strictly held to typical legal standards, it's easy for them to take advantage and turn criminal proceedings into mayhem.



Dylann Roof. Photo courtesy Wikipedia

When Roof said he was going to represent himself, some raised concerns that he was merely going to use self-representation as a device to let him grandstand and promote his racist agenda. And that fear may not have been groundless.

In November 2015, [Frazier Glenn Miller Jr.](#), a 74-year-old white supremacist who gunned down three people during an anti-Semitic shooting spree near Kansas City, was sentenced to death.

Miller had represented himself, turning the trial into a circus. He disrupted the proceedings, made periodic outbursts and, as the jurors left to deliberate, stood up, saying “*Sig heil*” and delivering a Nazi salute.

Is that how we want serious proceedings such as criminal cases to be conducted?

It’s time for the unfairness and inconsistencies created by *Faretta* to be recognized and the decision overturned.



Robin Barton

In his dissent to *Faretta*, Justice Berger said, “If there is any truth to the old proverb ‘one who is his own lawyer has a fool for a client,’ the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.”

I agree and would go a step further. A system that allows defendants to represent themselves makes a fool of the very concept of criminal *justice*.

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