Category: Evidence

Legally Blonde

Time Marker: 53:06-54:04

If Callahan [lawyer] learns that Brooke [defendant] was getting liposuction at the time of the murder but knows that she will commit perjury if she is asked on the stand about her alibi, can Callahan ask Brooke about her alibi?

1 . Yes, Brooke has an obligation to tell the truth and Callahan cannot be held responsible if Brooke commits perjury
2. No, unless the false testimony is offered in the form of a narrative
3. No, but if on cross-examination Brooke falsely testifies about her alibi the duty of loyalty prevents Callahan from taking any remedial measures since Brooke is a criminal defendant with due process protection from self incrimination.
4. No, Callahan may not permit Brooke to offer testimony that he knows to be false

Answer: 4

Rule 4-3.3 Candor Toward the Tribunal
(a) False Evidence; Duty to Disclose. A laywer shall not knowingly:
...
(4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Smith v. State, 931 So.2d 790 (Fla. 2000)(a defendant does not have a due process right to require counsel to present perjurious testimony)

Category: Attorney Client Relations

Legally Blonde
Time Marker: 58:40-1:01:13

When a client tells a criminal defense lawyer of an alibi that will be a complete defense to a criminal charge, but instructs the lawyer not to present the defense, the lawyer:

1) must, pursuant to Rule 4-1.6, nevertheless present the alibi to prevent the client from being convicted of a crime.
2) may, pursuant to Rule 4-1.6, present the alibi to the extent the lawyer believes necessary to establish a defense to the criminal charge.
3) must, pursuant to Rule 4-1.2, abide by the client's decision and either defend the client without the alibi or withdraw from representation.

Discussion: Answer # 3 is correct.

Rule 4-1.6 is entitled "Confidentiality of Information"
and provides in sub (a) "A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent."

Subdivision (b) provides that the lawyer "must" reveal the information to the extent the lawyer "reasonably believes necessary" to prevent the client from committing a crime or to prevent death or substantial bodily injury to another. Not applicable here.

Subdivision (c) provides when a lawyer "may" reveal information and includes "when it is in the client's best interest "unless it is information the client specifically requires not to be disclosed". Information may also be disclosed to defend a criminal charge against the lawyer under certain circumstances. Here the client specifically required that the information not be disclosed.

Rule 4-1.2 is entitled "Objectives and Scope of Representation". Sub (a) provides: "subject to subdivisions (c) and (d), a lawyer shall abide by the client's decisions concerning the objectives of representations, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify".

The comments to Rule 4-1.2 provides: "On occasion, however a lawyer and client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation."

Category: Ethics

Legally Blonde
Time marker: 1:13:30-1:15:24

Which of the following rules of Professional Conduct did the Callahan (attorney/employer) violate when he harassed and threatened Elle (his law student employee).

a) Rule 4-8.4 (b) A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
b) Rule 4-8.4 (c); A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
c) Rule 4-8.4 (I) A lawyer shall not engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.
d) None of the above, but the conduct violates one or more other rules of professional conduct.
e) No Rule of Professional Conduct was violated.

Answer: E

Per Lorraine C Hoffman, Bar Counsel, The Florida Bar:
"The relationship between Elle and her boss is an employment relationship, not an attorney-client one. Accordingly, the boss does not violate the Bar rules in sexually harassing his employee-he engages in a Title VII civil rights violation. Elle must seek redress (pardon the pun) through ordinary civil process. The Bar would dismiss her complaint (if she filed one) on that ground."

Category: Trial Procedures

Legally Blonde
Time Marker: 1:19:58-1:21:30

Question: A client may request a law student to represent him/her in a criminal case when:

1) The client feels the law student is competent to do so;
2) The law student has completed four semesters and the client consents;
3) The law student has been certified by the law school dean and has the assistance of a supervising attorney at all critical stages of the proceeding;
4) The law student is registered in a clinical program coordinated by a law school; the client is an indigent person and consents in writing; and the student has a supervising attorney at all critical states of the proceeding.

Answer: 4 is correct

Chapter 11 of the Rules Regulating the Florida Bar controls. The instance cited in the movie would not be permissible in the State of Florida. In order to represent a criminal defendant, the law student, pursuant to Rule 11-1.2 must:
a) Be a member of a credit bearing clinical program coordinated by a law school;
b) The client must be an indigent person who has indicated his consent in writing to such representation;
c) The supervising lawyer must also indicate in writing his approval of the appearance. The supervising attorney shall be personally present at all critical stages of the proceeding.

Category: Ethics

The Client

Time Marker 21:12 to 21:53

If ambulance chasing attorney, Gill Beale, used the internet to engage in conversation with the accident victim in an internet chat room...that conversation would not violate the Florida Rules of Professional Conduct:

A. If the communication provided less opportunity to pressure or coerce the accident victim than a telephone call or an in-person solicitation;

B. If the conversation was limited to the attorney's personal interests or hobbies;

C. If the communication was an unrequested e-mail to a targeted person or group which stated on the subject line "RECOVER DAMAGES FOR YOUR INJURY";

D. All the above.

Answer: B

See Florida Bar Standing Committee on Advertising August 15, 2000. Answer A violated Opinion A-00-1, Florida Bar Standing Committee on Advertising August 15, 2000, re: internet chat rooms. Answer C violates Florida Rules of Professional Conduct 4-7.6.

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Category: Pre-Trial Procedures

The Client
Time Marker 1:10:00 to 1:11:20

Reggie's ex parte communication with the Juvenile Court Judge would have been proper:

a. If Reggie did not discuss the merits or intend to affect the outcome of the upcoming hearing;

b. The judge reasonably believed that no party would gain a procedural or tactical advantage and made provision to inform the other parties of the substance of the communication;

c. Ex parte communications with a judge are never proper.

d. A & B.

Answer: D

Sources:
A. **Rules Regulating the Florida Bar**

- Rule 4-3.5 Impartiality and decorum of the tribunal

(b) Communication with Judge or Official. In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;

(3) orally upon notice to opposing counsel or the adverse party if not represented by a lawyer or;

(4) as otherwise authorized by law,

© Disruption of Tribunal. A lawyer shall not engage in conduct intended to disrupt a tribunal.

- Lawyer Sanction Standards

Standard 6.3 Improper Communication With Individuals in the Legal System

6.31 Disbarment is appropriate when a lawyer:

b. makes an unauthorized ex parte communication with a judge or juror with intent to affect the outcome of the proceeding.

B. **Code of Judicial Conduct**

Canon 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

(7) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Category: Substantive Law

The Client
Time Marker 1:18:00 to 1:20:17

Question:

In Florida state court, a witness who has invoked his or her 5th Amendment right against self-incrimination, may be compelled to testify if:

A) The court grants the witness use immunity.

B) The prosecutor grants the witness absolute immunity.

C) The court makes a finding by clear and convincing evidence that the witness has knowledge of danger to another of imminent death or great bodily harm

D) All of the above

Answer: B.

Discussion:

The court cannot grant immunity from prosecution, only the State or Federal officials can. The court can hold someone in contempt for refusing to testify under a grant of immunity. And C is fiction, but sounds good.

Member Services

Ethics Opinions

The Florida Bar Ethics department is working hard at helping members negotiate the complicated legal system. Take a look at the many resources available below.

FLORIDA BAR STANDING COMMITTEE ON ADVERTISING

OPINION A-00-1
(August 15, 2000)

[Approved by the Board of Governors on December 15, 2000.]
An attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users.

RPC: 4-7.4(a)

Opinions: Illinois 96-10, Michigan RI-276, Philadelphia 98-6, Utah 97-10, Virginia A-0110, West Virginia 98-03

As use of the Internet becomes more and more a part of the practice of law, questions arise as to whether attorneys may ethically participate in chat rooms. As used in this opinion, the term "chat room" refers to a real time communication between computer users. A foremost concern in attorney participation in chat rooms is whether such activity constitutes impermissible solicitation. Rule 4-7.4(a) provides:

> **(a) Solicitation.** Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.

Several other states have considered the issue of whether attorney participation in chat rooms constitutes impermissible solicitation. For example, in Michigan Opinion RI-276, it was concluded that while e-mail communications were akin to direct mail communications:

> A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such "real time: communications about the lawyer's services would be analogous to direct solicitations, outside the activity permitted by MRPC 7.3.

Similarly, the West Virginia Lawyer Disciplinary Board stated in Opinion 98-03:

> The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.

The Utah State Bar's Ethics Advisory Opinion Committee has likewise concluded that an attorney's use of a chat room for advertising and solicitation are considered to be in person communications for the purposes of its Rule 7.3(a) and, thus, restricted by that rule. Utah Ethics Opinion 97-10. The Virginia State Bar Advertising Committee's Lawyer Advertising Opinion A-0110 is in accord with this reasoning.

Other states have also recognized the dangers inherent in attorney participation in chat rooms. For example, the Philadelphia Bar Association, in Opinion 98-6, acknowledge that attorneys could not engage in any activity that would be improper solicitation. The Committee further stated, "In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such." The Illinois State Bar Association, in ethics opinion 96-10, has also stated:

> The Committee does not believe that merely posting general comments on a bulletin board or chat room should be considered solicitation. However, if a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 4-7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.

After considering the above opinions, the Standing Committee finds the reasoning of the opinions from Michigan, West Virginia, Utah and Virginia to be persuasive. The Standing Committee, therefore, finds that an attorney's participation in a chat room in order to solicit professional employment is prohibited by Rule 4-7.4(a).

However, this opinion should not construed so broadly as to prohibit a Florida attorney from participating in chat rooms when it is *completely unrelated to seeking professional employment* , such as when the chat concerns the attorney's personal interests or hobbies. Nor should this opinion be construed as limiting an attorney's ability to send e-mail to prospective clients in accordance with Rule 4-7.6(c). Other communications about a lawyer's services over the Internet remain subject to the requirements of the rules regulating attorney advertising.

[Revised: 06-01-2005]

sunEthics

Rule 4-7.4 Direct Contact with Prospective Clients

(a) Solicitation. Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.

(b) Written Communication Sent on an Unsolicited Basis.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(C) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(E) the communication contains a false, fraudulent, misleading, or deceptive statement or claim or is improper under subdivision (c)(1) of rule 4-7.2; or

(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Written communications to a prospective client are subject to the requirements of rule 4-7.2.

(B) The first page of such written communications shall be plainly marked "advertisement" in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark in red ink shall appear on the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain the "advertisement" mark.

(C) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(D) Every written communication shall be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.

(E) If a contract for representation is mailed with the written communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size 1 size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

(F) The first sentence of any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

(G) Written communications shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(H) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any written communication concerning a specific matter shall include a statement so advising the client.

(I) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule shall be specific enough to help the recipient understand the extent of the lawyer's knowledge regarding the recipient's particular situation.

(J) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

COMMENT

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies the 30-day restriction, particularly since lawyer advertising permitted under these rules offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications. Direct private communications from a lawyer to a prospective client are not subject to such third-party scrutiny and consequently are much more likely to approach (and perhaps cross) the dividing line between accurate representations and those that are false and misleading.

Direct written communications seeking employment by specific prospective clients generally present less potential for abuse or overreaching than in-person solicitation and are therefore not prohibited for most types of legal matters, but are subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure lawyer accountability if such should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if mailed at least 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

Letters of solicitation and their envelopes must be clearly marked "advertisement." This will avoid the recipient's perceiving that there is a need to open the envelope because it is from a lawyer or law firm, only to find the recipient is being solicited for legal services. With the envelope and letter marked "advertisement," the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions.

In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not. The lawyer or law firm must disclose sufficient information or explanation to allow the recipient to locate for himself or herself the information that prompted the communication from the lawyer.

This rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or the lawyer's law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are

functionally similar to and serve the same purpose as advertising permitted under other rules in this subchapter.

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Rule 4-7.6 Computer-Accessed Communications

(a) Definition. For purposes of this subchapter, "computer-accessed communications" are defined as information regarding a lawyer's or law firm' s services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

(b) Internet Presence. All World Wide Web sites and home pages accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;

(2) shall disclose 1 or more bona fide office locations of the lawyer or law firm, in accordance with subdivision (a)(2) of rule 4-7.2; and

(3) are considered to be information provided upon request.

(c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

(1) the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(E), (b)(2)(F), (b)(2)(G), (b)(2)(I), and (b)(2)(J) of rule 4-7.4 are met;

(2) the communication discloses 1 or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised, in accordance with subdivision (a)(2) of rule 4-7.2; and

(3) the subject line of the communication states "legal advertisement."

(d) Advertisements. All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of this rule, are subject to the requirements of rule 4-7.2.

COMMENT

Advances in telecommunications and computer technology allow lawyers to communicate with other lawyers, clients, prospective clients, and others in increasingly quicker and more efficient ways. Regardless of the particular technology used, however, a lawyer's communications with prospective clients for the purpose of obtaining professional employment must meet standards designed to protect the public from false, deceptive, misleading, or confusing messages about lawyers or the legal system

and to encourage the free flow of useful legal-related information to the public.

The specific regulations that govern computer-accessed communications differ according to the particular variety of communication employed. For example, a lawyer's Internet web site is accessed by the viewer upon the viewer's initiative and, accordingly, the standards governing such communications correspond to the rules applicable to information provided to a prospective client at the prospective client's request.

In contrast, unsolicited electronic mail messages from lawyers to prospective clients are functionally comparable to direct mail communications and thus are governed by similar rules. Additionally, communications advertising or promoting a lawyer's services that are posted on search engine screens or elsewhere by the lawyer, or at the lawyer's behest, with the hope that they will be seen by prospective clients are simply a form of lawyer advertising and are treated as such by the rules.

This rule is not triggered merely because someone other than the lawyer gratuitously links to, or comments on, a lawyer's Internet web site.

Category: Substantive Law

Gideon's Trumpet
Time Marker 128:17 to 129:10

An attorney may question a witness about a prior felony conviction or a crime of dishonesty when the attorney possesses:

A) Knowledge,
B) Copy of a judgment of conviction,
C) Certified copy of a judgment of conviction,
D) Both A & B
E) Both A & C

Answer: E – Knowledge and a Certified copy of the judgment of conviction.

Pursuant to Florida Evidence Code §610.6 and
Brown v. State, 787 So.2d 136, 139 (Fla. 4th DCA 2001)
Peoples v. State, 576 So.2d 783, 389 (Fla. 5th DCA 1991)
Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982)
Brakeall v. State, 696 So.2d 1246 (Fla. 5th DCA 1997)

Category: Substantive Law

Gideon's Trumpet
Time Marker 119:06 to 122:18

Due process requires that when a criminal defendant is dissatisfied with his court appointed attorney:

a) The court must assign another attorney more to the defendant's liking.

b) The defendant must keep the court appointed counsel.

c) The defendant must either keep the court appointed counsel or represent himself

d) None of the above

Answer: (c) .

A criminal (insolvent) defendant does not have the right to pick and chose court appointed counsel, or to arbitrarily reject court-appointed counsel. See, *Donald v. State*, 166 So. 2d 453 (Fla. 2d DCA 1964). But, where a personal conflict arises between court-appointed counsel and the defendant, the court *may*, not must, appoint new counsel if the court-appointed counsel is rendered ineffective. Id. at 457.

Ordinarily, if a defendant wishes to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. See, *Jones v. State*, 449 So. 2d 253, 258 (Fla.), *cert. denied*, 469 U.S. 893 (1984). See also, *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). It then becomes incumbent on the court to determine whether the accuses knowingly and intelligently is waiving his right to court-appointed counsel, particularly if the defendant indicates his actual desire is to obtain different court-appointed counsel, which under *Donald*, is not a constitutional right. See, *Faretta v. California*, 422 U.S. 806 (1975).

Therefore, if a criminal defendant is dissatisfied with his court-appointed attorney, he may request to have the appointed counsel dismissed, which waives his right to court-appointed counsel, and instead represent himself.

Category: Judicial Demeanor

Gideon's Trumpet
Time Marker: 51:20 to 52:00

To what extent, if any, may the Court assist a *pro se* litigant with their case?

A. Court can never assist a *pro se* litigant.

B. Court can assist to prevent an injustice to the *pro se* litigant.

C. Court cannot assist the *pro se* litigant to the detriment of the opposing party.

D. Court cannot assist the *pro se* litigant to the point that the impartiality of the Court can be called into question.

E. Both C&D.

Answer is E.

The court cannot assist the pro se litigant to the detriment of the opposing party or to the point that the impartiality of the tribunal can be called into question. The Florida Rules of Judicial Conduct expressly dictate that "[a] judge shall perform his duties without bias or prejudice." Fla. Code Jud. Conduct, Canon 3B(5). Furthermore, the commentary to Canon 3B(5) states that "[a] judge must be alert to avoid behavior that may be perceived as prejudicial." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. Dist. Ct. App. 4th Dist. 1999).

Category: Substantive Law

Question – Gideon's Trumpet:
Time Marker 36:15 to 37:40 and 39:27 to 43:30

When an appellate court changes its prior decisional law, it is straying from what legal concept?

a) Res ipsa loquitur

b) Stare decisis

c) Law of the case

d) All of the above

e) Both B and C

Answer – (b), Stare decisis

As these are definitional terms, please see Black's Law Dictionary:

Res ipsa loquitur – "In tort law, the doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case."

Stare decisis - "The doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation."

Law of the case – "The doctrine holding that a decision rendered in a former appeal of a case is held to be binding in a subsequent appeal."

Based on these definitions, it is clear that a) Res ipsa loquitur, does not apply, while b) Stare decisis does apply. Answer (c), "Law of the case," does not apply because that doctrine references prior decisions in the *same* case.

Category- Extra Questions for an Ambitious Pupilage Time Permitting.

Gideon's Trumpet
Time Marker 122:20 to 123:35

Actor, Lane Smith, played Gideon's defense attorney, Fred Turner, what other legal movie did Lane Smith star in?

A. The Verdict

B. My Cousin Vinny

C. Liar, Liar

D. The Firm

E. Both C&D

Answer is B.

Actor, Lane Smith, also appeared in My Cousin Vinny as D.A. Jim Trotter, III. Also, he once played a judge on the hit T.V. show, The Practice and President Richard Nixon in The Final Days. He died in 2005. (Source: IMBD.com).

372 U.S. 335
83 S.Ct. 792
9 L.Ed.2d 799
Clarence Earl GIDEON, Petitioner,
v.
Louie L. WAINWRIGHT, Director, Division of Corrections.
No. 155.
Argued Jan. 15, 1963.
Decided March 18, 1963.

[Syllabus from 336 intentionally omitted]

Abe Fortas, Washington, D.C., for petitioner.

Bruce R. Jacob, Tallahassee, Fla., for respondent.

J. Lee Rankin, New York City, for American Civil Liberties Union, amicus curiae, by special leave of Court.

George D. Mentz, Montgomery, Ala., for State of Alabama, amicus curiae.

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Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under

[Amicus Curiae intentionally omitted]

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Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

'The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

'The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.'

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument 'emphasizing his innocence to the charge contained in the Information filed in this case.' The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petitioner attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights 'guaranteed by the Constitution and the Bill of Rights by the United States Government.'1 Treating the petition for habeas corpus as properly before it, the State Supreme Court, 'upon consideration thereof' but without an opinion, denied all relief. Since 1942, when Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, was decided by a divided

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Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.2 To give this problem another review here, we granted certiorari. 370 U.S. 908, 82 S.Ct. 1259, 8 L.Ed.2d 403. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: 'Should this Court's holding in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, be reconsidered?'

I.

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

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Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

'Asserted denial (of due process) is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.' 316 U.S., at 462, 62 S.Ct., at 1256, 86 L.Ed. 1595.

Treating due process as 'a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

II.

The Sixth Amendment provides, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' We have con-

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strued this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.3 Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down 'no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.' 316 U.S., at 465, 62 S.Ct., at 1257, 86 L.Ed. 1595. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in Betts set out and considered '(r)elevant data on the subject * * * afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the states to the present date.' 316 U.S., at 465, 62 S.Ct., at 1257. On the basis of this historical data the Court concluded that 'appointment of counsel is not a fundamental right, essential to a fair trial.' 316 U.S. at 471, 62 S.Ct., at 1261. It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, 'made obligatory upon the states by the Fourteenth Amendment'. Plainly, had the

Court concluded that appointment of counsel for an indigent criminal defendant was 'a fundamental right, essential to a fair trial,' it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

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We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232 (1884), the Fourteenth Amendment 'embraced' those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," even though they had been 'specifically dealt with in another part of the Federal Constitution.' 287 U.S., at 67, 53 S.Ct., at 63, 77 L.Ed. 158. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.4 For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that

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private property shall not be taken for public use without just compensation,5 the Fourth Amendment's prohibition of unreasonable searches and seizures,6 and the Eighth's ban on cruel and unusual punishment.7 On the other hand, this Court in Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that 'immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states' and that guarantees 'in their origin * * * effective against the federal government alone' had by prior cases 'been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption.' 302 U.S., at 324—325, 326, 58 S.Ct., at 152.

We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that 'the right to the aid of

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counsel is of this fundamental character.' Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932). While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

'We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.' Grosjean v. American Press Co., 297 U.S. 233, 243—244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936).

And again in 1938 this Court said:

'(The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done." Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), and Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the Betts Court, when faced with the contention that 'one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state,' conceded that '(e)xpressions in the opinions of this court lend color to the argument * * *' 316 U.S., at 462—463, 62 S.Ct., at 1256, 86 L.Ed. 1595. The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right,

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essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

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heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 68—69, 53 S.Ct., at 64, 77 L.Ed. 158.

The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was 'an anachronism when handed down' and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

Mr. Justice DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the

States the privileges, protections, and safeguards granted by the Bill of Rights.

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Justice Field, the first, Justice Harlan, and probably Justice Brewer, took that position in O'Neil v. Vermont, 144 U.S. 323, 362—363, 370—371, 12 S.Ct. 693, 708, 711, 36 L.Ed. 450, as did Justices Black, Douglas, Murphy and Rutledge in Adamson v. California, 332 U.S. 46, 71—72, 124, 67 S.Ct. 1672, 1683, 1686, 91 L.Ed. 1903. And see Poe v. Ullman, 367 U.S. 467, 515—522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the Slaughter-House Cases, 16 Wall. 36, 118—119, 122, 21 L.Ed. 394, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92, 23 L.Ed. 678.1 Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. 2 Mr. Justice Jackson shared that view.3

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But that view has not prevailed4 and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

Mr. Justice CLARK, concurring in the result.

In Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1948) this Court found no special circumstances requiring the appointment of counsel but stated that 'if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps.' Id., at 674, 68 S.Ct., at 780. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment.1 At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that 'the due process clause * * * requires counsel for all persons charged with serious crimes * * *.' Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S.Ct. 184, 186, 93 L.Ed. 127 (1948). Finally, in Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), we said that '(w)hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.' Id., at 55, 82 S.Ct., at 159.

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That the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). It is equally clear from the above cases, all decided after Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, 2 as we noted that:

'Obviously Fourteenth Amendment cases dealing with state action have no application here, but if

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they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here * * * would be as invalid under those cases as it would be in cases of a capital nature.' 361 U.S., at 246—247, 80 S.Ct., at 304, 4 L.Ed.2d 268.

I must conclude here, as in Kinsella, supra, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted3—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

I agree that Betts v. Brady should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that Betts v. Brady represented 'an abrupt break with its own well-considered precedents.' Ante, p. 344. In 1932, in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, a capital case, this Court declared that under the particular facts there presented—'the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility * * * and above all that they stood in deadly peril of their lives' (287 U.S., at 71, 53 S.Ct., at 65)—the state court had a duty to assign counsel for

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the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an after-thought; they were repeatedly emphasized, see 287 U.S., at 52, 57—58, 71, 53 S.Ct., at 58, 59—60, 65 and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided Betts v. Brady, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, but to have imposed these requirements on the States would indeed have been 'an abrupt break' with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in Powell v. Alabama, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in Powell and in Betts, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the Betts decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases.1 Such dicta continued to appear in subsequent decisions,2 and any lingering doubts were finally eliminated by the holding of Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114.

In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after Betts, there were cases in which the Court

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found special circumstances to be lacking, but usually by a sharply divided vote.3 However, no such decision has been cited to us, and I have found none, after Quicksall v. Michigan, 339 U.S. 660, 70 S.Ct. 910, 94 L.Ed. 1188 decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the 'complexity' of the legal questions presented, although those questions were often of only routine difficulty.4 The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line

responsibility for the enforcement of constitutional rights.5 To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

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In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be 'implicit in the concept of ordered liberty'6 and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. Roth v. United States, 354 U.S. 476, 496—508, 77 S.Ct. 1304, 1315—1321, 1 L.Ed.2d 1498 (separate opinion of this writer). In what is done today I do not understand the Court to depart from the principles laid down in Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, or to embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

1. Later in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, 'I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights.'

2. Of the many such cases to reach this Court, recent examples are Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500 (1960); Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167 (1957). Illustrative cases in the state courts are Artrip v. State, 41 Ala.App. 492, 136 So.2d 574 (Ct.App.Ala.1962); Shaffer v. Warden, 211 Md. 635, 126 A.2d 573 (1956). For examples of commentary, see Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 De Paul L.Rev. 213 (1959); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused, 30 U. of Chi.L.Rev. 1 (1962); The Right to Counsel, 45 Minn.L.Rev. 693 (1961).

3. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

4. E.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925) (speech and press); Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938) (speech and press); Staub v. City of Baxley, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302 (1958) (speech); Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936) (press); Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940) (religion); De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937) (assembly); Shelton v. Tucker, 364 U.S. 479, 486, 488, 81 S.Ct. 247, 251, 252, 5 L.Ed.2d 231 (1960) (association); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296, 81 S.Ct. 1333, 1335, 6 L.Ed.2d 301 (1961) (association); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680 (1963) (speech, assembly, petition for redress of grievances).

5. E.g., Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 235 241, 17 S.Ct. 581, 584—586, 41 L.Ed. 979 (1897); Smyth v. Ames, 169 U.S. 466, 522—526, 18 S.Ct. 418, 424—426, 42 L.Ed. 819 (1898).

6. E.g., Wolf v. Colorado, 338 U.S. 25, 27—28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949); Elkins v. United States, 364 U.S. 206, 213, 80 S.Ct. 1437, 1441, 4 L.Ed.2d 1669 (1960); Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

7. Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

1. Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. See Slaughter-House Cases, supra, 16 Wall. at 118—119, 21 L.Ed. 394; O'Neil v. Vermont, supra, 144 U.S. at 363, 12 S.Ct. 708, 36 L.Ed. 450. Justices Harlan and Brewer accepted the same theory in the O'Neil case (see id., at 370—371, 12 S.Ct. at 711), though Justice Harlan indicated that all 'persons,' not merely 'citizens,' were given this protection. Ibid. In Twining v. New Jersey, 211 U.S. 78, 117, 29 S.Ct. 14, 27, 53 L.Ed. 97, Justice Harlan's position was made clear:
'In my judgment, immunity from self-incrimination is protected against hostile state action, not only by * * * (the Privileges and Immunities Clause), but (also) by * * * (the Due Process Clause).'
Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597.

2. See Roth v. United States, 354 U.S. 476, 501, 506, 77 S.Ct. 1304, 1317, 1320, 1 L.Ed.2d 1498; Smith v. California, 361 U.S. 147, 169, 80 S.Ct. 215, 227, 4 L.Ed.2d 205.

3. Beauharnais v. Illinois, 343 U.S. 250, 288, 72 S.Ct. 725, 746, 96 L.Ed. 919. Cf. the opinions of Justices Holmes and Brandeis in Gitlow v. New York, 268 U.S. 652, 672, 45 S.Ct. 625, 632, 69 L.Ed. 1138, and Whitney v. California, 274 U.S. 357, 372, 47 S.Ct. 641, 647, 71 L.Ed. 1095.

4. The cases are collected by Mr. Justice Black in Speiser v. Randall, 357 U.S. 513, 530, 78 S.Ct. 1332, 1552, 2 L.Ed.2d 1460. And see, Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274—276, 80 S.Ct. 1463, 1469—1470, 4 L.Ed.2d 1708.

1. It might, however, be said that there is such an implication in Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), a capital case in which counsel had been appointed but in which the petitioner claimed a denial of 'effective' assistance. The Court in affirming noted that '(h)ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction.' Id., at 445, 60 S.Ct. at 322. No 'special circumstances' were recited by the Court, but in citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), as authority for its dictum it appears that the Court did not rely solely on the capital nature of the offense.

2. Portents of today's decision may be found as well in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961). In Griffin, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In Ferguson we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that '(o)ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel.' 365 U.S., at 596, 81 S.Ct., at 770.

3. See, e.g., Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188—189 (1962).

1. Avery v. Alabama, 308 U.S. 444, 445, 60 S.Ct. 321, 84 L.Ed. 377.

2. E.g., Bute v. Illinois, 333 U.S. 640, 674, 68 S.Ct. 763, 780, 92 L.Ed. 986; Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S.Ct. 184, 185, 93 L.Ed. 127.

3. E.g., Foster v. Illinois, 332 U.S. 134, 67 S.Ct. 1716, 91 L.Ed. 1955; Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986; Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683.

4. E.g., Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500; Chewning v. Cunningham, 368 U.S. 443, 82 S.Ct. 498, 7 L.Ed.2d 442.

5. See, e.g., Commonwealth ex rel. Simon v. Maroney, 405 Pa. 562, 176 A.2d 94 (1961); Shaffer v. Warden, 211 Md. 635, 126 A.2d 573 (1956); Henderson v. Bannan, 256 F.2d 363 (C.A.6th Cir. 1958).

6. Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.

LexisNexis

LEXSEE 743 SO. 2D 1160

VICTOR BARRETT and JEANETTE BARRETT, Appellants, v. CITY OF MARGATE, a municipal corporation, MITCHELL H. ANTON, ARTHUR J. BROSS, FRANK B. TALERICO, all as individuals and as City Commissioners of the CITY OF MARGATE, EUGENE M. STEINFELD, LEONARD B. GOLUB, ARNOLD FINKELSTEIN, LAWRENCE F. HORAK, and DONALD HEFLIN, all as individuals and/or as employees of the CITY OF MARGATE, Appellees.

CASE NO. 98-2948

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

743 So. 2d 1160; 1999 Fla. App. LEXIS 13744; 24 Fla. L. Weekly D 2398

October 20, 1999, Opinion Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied December 6, 1999. Released for Publication December 6, 1999.

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; J. Leonard Fleet, Judge; L.T. Case No. 96-2630-08.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants sought relief from the order of the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), dismissing with prejudice their third amended complaint as contrary to pleading standards.

OVERVIEW: Appellants appeared pro se before the trial court. Appellants' initial complaint failed to set forth a short and plain statement of the ultimate facts showing entitlement to relief. Accordingly, the trial court granted leave to amend on two separate occasions and attempted to provide appellants with some direction regarding acceptable pleading standards. In spite of the trial court's admonition that the action would not survive past the pleadings stage if the complaint was not substantially edited, the appellants' pleadings never improved. Finding the appellants' third and final amended complaint to be manuscript in size and contrary to pleading standards, the trial court dismissed the third amended complaint with prejudice. On appeal, the court held that the complaint and subsequent amendments failed to comply with even the most minimal standards of pleading. The trial court provided the appellants with appropriate direction and reasonable opportunities to cure the deficiencies in their pleadings.

OUTCOME: Affirmed; appellants' convoluted, narrative style pleading, coupled with refusal to comply with the trial court's directives or pleading rules, demonstrated need for the rule that a complaint be stated in short and plain language, and exemplifies the potential for abuse of the judicial process when the rule is not enforced.

CORE TERMS: pro se, rules of procedure, rule of pleading, judicial process, small claims, cause of action, refusal to comply, tribunal, concise, amend

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Civil Procedure > Parties > Self-Representation > Pleading Standards

[HN1] In the history of jurisprudence, pro se litigants have frequently been granted leniency in technical matters. Dismissing an action with prejudice due to defective pleading is not proper unless the plaintiff has been given an opportunity to amend. Notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for

all citizens, pro se litigants are not immune from the rules of procedure.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Civil Procedure > Parties > Self-Representation > Pleading Standards
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
[HN2] The Rules of Civil Procedure are adopted to establish an orderly and efficient judicial procedure to handle cases. An individual is entitled to represent himself or herself in a civil proceeding but he or she must not proceed without regard for the rules of procedure. Although our courts have been uniformly liberal in permitting pro se procedure, it can reach a point that it is an abuse of the judicial process, properly subjecting the complaint to a dismissal with prejudice.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Parties > Self-Representation > Pleading Standards
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
[HN3] Although there is no magical number of amendments which are allowed, dismissal of a complaint that is before the court on a third attempt at proper pleading is generally not an abuse of discretion.

Civil Procedure > Parties > Self-Representation > General Overview
Legal Ethics > Judicial Conduct
[HN4] The court cannot assist the pro se litigant to the detriment of the opposing party or to the point that the impartiality of the tribunal can be called into question.

Civil Procedure > Pleading & Practice > Pleadings > General Overview
[HN5] It is a cardinal rule of pleading that a complaint be stated simply, in short and plain language. The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged.

Civil Procedure > Pleading & Practice > Pleadings > General Overview
Civil Procedure > Parties > Self-Representation > Pleading Standards
[HN6] The complaint, whether filed by an attorney or pro se litigant, must set forth factual assertions that can be supported by evidence which gives rise to legal liability. It is insufficient to plead opinions, theories, legal conclusions or argument. Furthermore, the assertions are to be stated simply and succinctly.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Dismissals > General Overview
[HN7] While it would be improper to dismiss a complaint for failure to state a cause of action solely because it failed to state the claim in short and plain statements, it is not improper to dismiss a complaint, with prejudice, for repeated refusal to comply with the rules of pleading.

COUNSEL: Victor Barrett and Jeanette Barrett, Margate, pro se.

Michael T. Burke and Scott D. Alexander of Johnson, Anselmo, Murdoch, Burke & George, P.A., Fort Lauderdale, for Appellees-City of Margate, Mitchell H. Anton, Arthur J. Bross, Frank B. Talerico, Leonard B. Golub and Eugene M. Steinfeld.

Jonathan M. Matzner and Robert H. Schwartz of Adorno & Zeder P.A., Fort Lauderdale, for Appellees-Arnold Finkelstein, Lawrence F. Horak and Donald Heflin.

JUDGES: BLANC, PETER D., Associate Judge. KLEIN and TAYLOR, JJ., concur.

OPINION BY: PETER D. BLANC

OPINION

[*1161] BLANC, PETER D., Associate Judge.

The appellants challenge the circuit court's dismissal with prejudice of their third amended complaint. The appellants appeared pro se before the trial court. The appellants' initial complaint failed to adhere to *Florida Rule of Civil Procedure 1.110*, which requires that pleadings set forth a short and plain statement of the ultimate facts showing entitlement to relief. Accordingly, [**2] the trial court granted appellants leave to amend their pleadings on two separate occasions and attempted to provide appellants with some direction regarding acceptable pleading standards. In spite of the trial court's ultimate admonition to the appellants that their action would not survive past the pleadings stage [*1162] if the complaint was not substantially edited to set forth a "short concise statement of the facts upon which you rely to

establish the various theories," the appellants' pleadings never improved. Finding the appellants' third and final amended complaint to be "manuscript in size" and "contrary" to the pleading standards that the court had previously explained, the trial court dismissed the third amended complaint with prejudice.

[HN1] In the history of jurisprudence, pro se litigants have frequently been granted leniency in technical matters. See *Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)*. Dismissing an action with prejudice due to defective pleading is not proper unless the plaintiff has been given an opportunity to amend. See *Kairalla v. John D. & Catherine T. MacArthur Found., 534 So. 2d 774, 775 (Fla. 4th DCA 1988)* [**3] (citations omitted). Notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for all citizens, pro se litigants are not immune from the rules of procedure.

[HN2] The Rules of Civil Procedure are adopted to establish an orderly and efficient judicial procedure to handle cases. An individual is entitled to represent himself or herself in a civil proceeding but he or she must not proceed without regard for the rules of procedure. Although our courts have been uniformly liberal in permitting pro se procedure, it can reach a point that it is an abuse of the judicial process, properly subjecting the complaint to a dismissal with prejudice.

[HN3] *Thomas v. Pridgen, 549 So. 2d 1195, 1196-97 (Fla. 1st DCA 1989)*. Although there is no magical number of amendments which are allowed, dismissal of a complaint that is before the court on a third attempt at proper pleading is generally not an abuse of discretion. See *Kohn v. City of Miami Beach, 611 So. 2d 538, 539 (Fla. 3d DCA 1992)*.

The appellants contend that the trial judge "should have apprised the pro se litigants as to the [**4] extent of their weak points," suggesting that the Court had the option to "assist the indigent, pro se, litigants." However, [HN4] the court cannot assist the pro se litigant to the detriment of the opposing party or to the point that the impartiality of the tribunal can be called into question. The Florida Rules of Judicial Conduct expressly dictate that "[a] judge shall perform his duties without bias or prejudice." Fla. Code Jud. Conduct, Canon 3B(5). Furthermore, the commentary to Canon 3B(5) states that "[a] judge must be alert to avoid behavior that may be perceived as prejudicial." Even in small claims court, a tribunal that purposefully operates pursuant to a more relaxed set of procedural rules in order to provide every citizen a fair opportunity to have his or her day in court, the presiding judge is not allowed to act in a way that could be construed as more favorable to one party. The rules of small claims court direct that a judge may assist an unrepresented party with the courtroom decorum and the order and presentation of material evidence, but caution that "the court shall not act as an advocate for a party." *Fla. Sm. Cl. R. 7.140(e)*.

In Florida, every cause of action, [**5] whether derived from statute or common law, is comprised of necessary elements which must be proven for the plaintiff to prevail. [HN5] It is a cardinal rule of pleading that a complaint be stated simply, in short and plain language. See *Fla. R. Civ. P. 1.110(b)*. The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged. See *Messana v. Maule Indus., Inc., 50 So. 2d 874, 876 (Fla. 1951)* (a complainant must "plead a factual matter sufficient to apprise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect."). [HN6] The complaint, whether filed by an attorney or pro se litigant, must set [*1163] forth factual assertions that can be supported by evidence which gives rise to legal liability. It is insufficient to plead opinions, theories, legal conclusions or argument. Furthermore, the assertions are to be stated simply and succinctly. See *Seaboard Air Line Ry. v. Rentz, 60 Fla. 429, 54 So. 13 (Fla. 1910)* (pleadings should present precise points that are certain, clear and concise). [HN7] While it would be improper [**6] to dismiss a complaint for failure to state a cause of action solely because it failed to state the claim in short and plain statements, it is not improper to dismiss a complaint, with prejudice, for repeated refusal to comply with the rules of pleading. See *Thomas, 549 So. 2d at 1197*; see also *Fla. R. Civ. P 1.110*.

The initial complaint and two subsequently amended complaints in the instant case clearly fail to comply with even the most minimal standards of pleading as required by the Florida Rules of Civil Procedure. It is not permissible for any litigant to submit a disorganized assortment of allegations and argument in hope that a legal premise will materialize on its own. The trial court provided the appellants with appropriate direction and reasonable opportunities to cure the deficiencies in their pleadings. The appellants' convoluted, verbose, narrative style pleading, coupled with their refusal to comply with either the trial court's directives or the mandate of *Florida Rule of Civil Procedure 1.110(b)*, clearly demonstrates the need for the rule and exemplifies the potential for abuse of the judicial process when the rule is not enforced. Accordingly, [**7] we affirm the trial court's order dismissing the case with prejudice and awarding costs to the defendants.

AFFIRMED.

KLEIN and TAYLOR, JJ., concur.

Lane Smith (I) More at IMDbPro »

Photos (see all 3 | slideshow | add photos)

Videos (see all 12)

Overview

Date of Birth: 29 April 1936, Memphis, Tennessee, USA more

Date of Death: 13 June 2005, Northridge, California, USA more

Trivia: Studied drama for two years at what is now named Carnegie Mellon University... more

STARmeter: **Up 2%** in popularity this week. See why on IMDbPro.

Awards: Nominated for Golden Globe. more

NewsDesk: (4 articles)
ABC Is Bringing Back 'V'
(From Screen Rant, 11 February 2009, 8:20 AM, PST)
Sitges 2008: Monsieur Cok Trailer
(From Twitch, 7 October 2008, 1:12 PM, PDT)

US TV Schedule: Sat, Feb. 21 5:30 PM TNT My Cousin Vinny more

Filmography

Jump to filmography as: **Actor**, **Self**

Actor:

2000s
1990s
1980s
1970s
1960s

1. "Out of Order" (2003) TV mini-series .... Frank
2. "Judging Amy" .... Mr. Radford (1 episode, 2002)
   - People of the Lie (2002) TV episode .... Mr. Radford
3. "The Practice" .... Judge H. Finkel (1 episode, 2001)
   - The Candidate (2001) TV episode .... Judge H. Finkel
4. WW 3 (2001) (TV) .... John Sullivan
   ... aka WWIII (USA)
   ... aka Winds of Terror (USA: video title)
5. "DAG" .... Agent Baxter (1 episode, 2001)
   - The Triangle Report (2001) TV episode .... Agent Baxter
6. The Legend of Bagger Vance (2000) .... Grantland Rice
7. "Bull" .... Russell Dantly (1 episode)
   - Amen (????) TV episode .... Russell Dantly
8. "King of the Hill" .... Charlie Fortner / ... (3 episodes, 2000)
   - Flush with Power (2000) TV episode (voice) .... Hashaway
   - Meet the Propaniacs (2000) TV episode (voice) .... Charlie Fortner
   - Hanky Panky: Part 1 (2000) TV episode (voice)
9. The Caprice (2000)
10. Inherit the Wind (1999) (TV) .... Reverend Jeremiah Brown
11. "Walker, Texas Ranger" .... Reverend Thornton Powers (1 episode, 1999)
    ... aka Walker (Australia)
    - Power Angels (1999) TV episode .... Reverend Thornton Powers
12. The Hi-Lo Country (1998) .... Steve Shaw
    ... aka Hi-Lo Country - Im Land der letzten Cowboys (Germany: TV title)
13. "Legacy" (3 episodes, 1998)
    - Episode #1.4 (1998) TV episode
    - Tango (1998) TV episode
    - The Gift (1998) TV episode
14. Why Do Fools Fall in Love (1998) .... Ezra Grahme
15. Getting Personal (1998) .... Dr. Maddie
    ... aka The Mysterious Death of Kelly Lawman (USA: video title)
16. "From the Earth to the Moon" (1998) TV mini-series .... Emmett Seaborn
17. "The Outer Limits" .... Dr. Malcolm Boussard (1 episode, 1998)
    ... aka The New Outer Limits (USA: promotional title)
    - Glyphic (1998) TV episode .... Dr. Malcolm Boussard
18. Alien Nation: The Udara Legacy (1997) (TV) .... Senator Silverthorne
19. "Lois & Clark: The New Adventures of Superman" .... Perry White (84 episodes, 1993-1997)
    ... aka Lois & Clark
    ... aka The New Adventures of Superman (UK)
    - Toy Story (1997) TV episode .... Perry White
    - Voice from the Past (1997) TV episode .... Perry White
    - Shadow of a Doubt (1997) TV episode .... Perry White
    - Faster Than a Speeding Vixen (1997) TV episode .... Perry White
    - AKA Superman (1997) TV episode .... Perry White
    (79 more)
20. "Clueless" .... Dan Hafner (1 episode, 1996)

- Romeo and Cher (1996) TV episode .... Dan Hafner

21. The War at Home (1996) (uncredited)
22. "Dweebs" (1 episode, 1995)
    - The Cyrano Show (1995) TV episode
23. The Scout (1994) .... Ron Wilson
24. "Murphy Brown" .... Danger Duke (1 episode, 1994)
    - Where Have You Gone, Joe DiMaggio? (1994) TV episode (voice) .... Danger Duke
25. The Flight of the Dove (1994) .... Stephen Hahn
    ... aka The Spy Within
26. Son in Law (1993) .... Walter Warner
27. The Distinguished Gentleman (1992) .... Dick Dodge
28. The Mighty Ducks (1992) .... Coach Jack Reilly
    ... aka Champions (Australia) (UK)
    ... aka The Mighty Ducks Are the Champions (UK: video box title)
29. Duplicates (1992) (TV) .... Mr. Fryman
30. My Cousin Vinny (1992) .... D.A. Jim Trotter, III
31. False Arrest (1991) (TV) .... Martin Busey
32. "Good & Evil" (1991) TV series .... Harlan Shell (unknown episodes)
33. "Good Sports" .... R.J. Rappaport (2 episodes, 1991)
    - The Return of Nick (1991) TV episode .... R.J. Rappaport
    - Pros and Ex-Cons (1991) TV episode .... R.J. Rappaport
34. Blind Vengeance (1990) (TV) .... Col. Blanchard
35. Air America (1990) .... Senator Davenport
36. Challenger (1990) (TV) .... Larry Mulloy
37. Race for Glory (1989) .... Joe Gifford
38. The Final Days (1989) (TV) .... Richard Nixon
39. Night Game (1989) .... Witty
40. "Murder, She Wrote" .... Pol. Chief Miles Underwood (1 episode, 1989)
    - The Search for Peter Kerry (1989) TV episode .... Pol. Chief Miles Underwood
41. Killer Instinct (1988) (TV) .... Dr. Butler
    ... aka Deadly Observation (USA: video title)
42. "In the Heat of the Night" .... Sonny Mims (1 episode, 1988)
    - Road Kill (1988) TV episode .... Sonny Mims
43. Prison (1988) .... Warden Eaton Sharpe
44. Weeds (1987) .... Claude
45. A Place to Call Home (1987) (TV) .... Sam
46. Native Son (1986) .... Britton
47. "Kay O'Brien" .... Doctor Robert Moffitt (13 episodes, 1986)
    - Behind Closed Doors (1986) TV episode .... Doctor Robert Moffitt
    - Dollars and Sense (1986) TV episode .... Doctor Robert Moffitt
    - Princess of the City (1986) TV episode .... Doctor Robert Moffitt
    - Lesson Learned (1986) TV episode .... Doctor Robert Moffitt
    - A Foreign Concept (1986) TV episode .... Doctor Robert Moffitt
    (8 more)
48. "Alfred Hitchcock Presents" .... Robert Warren (1 episode, 1986)
    - Happy Birthday (1986) TV episode .... Robert Warren
49. "If Tomorrow Comes" (1986) TV mini-series .... Warden Brannigan
50. Dress Gray (1986) (TV) .... Col. King
51. "The Twilight Zone" .... Professor Joseph Fitzgerald (segment 'Profile in Silver') (1 episode, 1986)
    ... aka The New Twilight Zone (Australia)
    - Profile in Silver/Button, Button (1986) TV episode .... Professor Joseph Fitzgerald (segment 'Profile in Silver')
52. "Amazing Stories" .... Dr. Caruso (1 episode, 1986)
    ... aka Steven Spielberg's Amazing Stories (USA: complete title)
    - Dorothy and Ben (1986) TV episode .... Dr. Caruso
53. Bridge Across Time (1985) (TV) .... Anson Whitfield
    ... aka Arizona Ripper
    ... aka Terror at London Bridge
54. Beverly Hills Cowgirl Blues (1985) (TV) .... Captain Max Rosenberg
    ... aka Beverly Hills Connection (Australia: video title)
55. "Hill Street Blues" .... Mike (1 episode, 1985)
    - El Capitan (1985) TV episode .... Mike
56. "V" .... Nathan Bates (9 episodes, 1984-1985)
    ... aka V: The Series
    - The Betrayal (1985) TV episode .... Nathan Bates
    - The Hero (1985) TV episode .... Nathan Bates
    - The Conversion (1985) TV episode .... Nathan Bates
    - Reflections in Terror (1984) TV episode .... Nathan Bates
    - The Dissident (1984) TV episode .... Nathan Bates
    (4 more)
57. Places in the Heart (1984) .... Albert Denby
58. Red Dawn (1984) .... Mayor Bates
59. Purple Hearts (1984) .... Cmdr. Markel
60. Something About Amelia (1984) (TV) .... Officer Dealy
61. "Chiefs" (1983) TV mini-series .... Hoss Spence
    ... aka Once Upon a Murder (UK)
62. Special Bulletin (1983) (TV) .... Morton Sanders
63. The Member of the Wedding (1982) (TV) .... Mr. Addams
64. Frances (1982) .... Dr. Symington
65. "Quincy M.E." .... Dr. Paul Flynn (1 episode, 1982)
    ... aka Quincy (International: English title: informal title)

- Science for Sale (1982) TV episode .... Dr. Paul Flynn

66. "Lou Grant" .... Dr. Lawrence (1 episode, 1982)
    - Unthinkable (1982) TV episode .... Dr. Lawrence
67. Thou Shalt Not Kill (1982) (TV) .... Clarence Blake
68. Prime Suspect (1982) (TV) .... Tom Keating
69. "Hart to Hart" .... Roy Hamlin (1 episode, 1981)
    - Hart, Line, and Sinker (1981) TV episode .... Roy Hamlin
70. Dark Night of the Scarecrow (1981) (TV) .... Harless Hocker
71. "Dallas" .... Prosecutor (1 episode, 1981)
    - Gone But Not Forgotten (1981) TV episode .... Prosecutor
72. Prince of the City (1981) .... Tug Barnes
73. Mark, I Love You (1980) (TV) .... Don Payer
74. The Georgia Peaches (1980) (TV) .... Randolph Dukane
    ... aka Follow That Car
75. A Rumor of War (1980) (TV) .... Sgt. William Holgren
76. Resurrection (1980) .... Don
77. Honeysuckle Rose (1980) .... Brag, Cotton's manager
    ... aka On the Road Again (USA: reissue title)
78. On the Nickel (1980) .... Preacher
79. Gideon's Trumpet (1980) (TV) .... Fred Turner
80. City in Fear (1980) (TV) .... Brian

C

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America ex rel. Clifford SMITH, Petitioner-Appellant,
v.
M. J. PAVICH, Supervisor, Peoria Work Release Center, and the Illinois Attorney General, Respondents-Appellees.
No. 77-1408.

Argued Dec. 2, 1977.
Decided Jan. 4, 1978.

Illinois prisoner sought habeas corpus relief on ground that he had been denied his constitutional right to effective assistance of counsel. The United States District Court for the Southern District of Illinois, Robert D. Morgan, J., denied relief, and petitioner appealed. The Court of Appeals, Sprecher, Circuit Judge, held that: (1) in view of state judge's lengthy interrogation and defendant's firm and repeated responses that he wished to represent himself and that he definitely did not want even standby counsel, it would be concluded that defendant knowingly and intelligently waived counsel; (2) a defendant who knowingly and intelligently waives his right to counsel cannot complain that his self-representation was ineffective and (3) since ultimate responsibility for a fair charge remains with the judge, he must exercise special care in his charge to protect rights of a defendant who engages in self-representation.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐ 1752

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)3 Waiver of Right to Counsel
110k1752 k. Validity and Sufficiency, Particular Cases. Most Cited Cases
(Formerly 110k641.4(4))
In view of state judge's lengthy interrogation and defendant's firm and repeated responses that he wished to represent himself, that he desired no legal assistance and that he definitely eschewed even standby counsel, it would be concluded that defendant knowingly and intelligently waived counsel. U.S.C.A.Const. Amends. 6, 14.

[2] Criminal Law 110 ⇐ 1975

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1975 k. Counsel of Defendant's Choice or Defendant Pro Se. Most Cited Cases
(Formerly 110k641.13(8))
A defendant who knowingly and intelligently waives his right to counsel cannot complain that his self-representation was ineffective. U.S.C.A.Const. Amends. 6, 14.

[3] Criminal Law 110 ⇐ 769

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 k. Duty of Judge in General. Most Cited Cases
Since ultimate responsibility for a fair charge remains with the trial judge, he must exercise special care in his charge to protect rights of a defendant who engages in self-representation. U.S.C.A.Const. Amends. 6, 14.

*34 Richard J. Hoskins, Chicago, Ill., for petitioner-appellant.
Gerri Papushkewych, Asst. Atty. Gen., Springfield, Ill., for respondents-appellees.

Before SPRECHER and TONE, Circuit Judges, and

GRANT, Senior District Judge.[FN*]

> FN* Senior District Judge Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

SPRECHER, Circuit Judge.

When a defendant is accorded his Sixth and Fourteenth Amendments' right to self-representation, may he thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel?"

I

The defendant [FN1] was indicted by an Illinois grand jury on July 13, 1973, for intimidation in violation of Ill.Rev.Stat. ch. 38, s 12-6, and for communicating with a witness in violation of Ill.Rev.Stat. ch. 38, s 32-4, by reason of having threatened to kill Joseph Scherff should he testify against the defendant in another pending criminal case. This case was tried before a jury with the defendant acting as his own attorney. On October 19, 1973, the jury was unable to reach a verdict and a mistrial was declared.

> FN1. Although Clifford Smith is the petitioner-appellant in this court, he is referred to in this opinion as the defendant for simplification.

On February 11, 1974, the state judge advised the defendant that the Public Defender of Peoria County had been appointed to represent him and asked the defendant if he wanted such representation. The defendant responded, "No, your Honor, I am representing myself. I represented myself in the preceding trial, which was a mistrial and I represent myself."

The following then took place:

The Court: You have, of course, a statutory and constitutional right to appear in Court and to represent yourself as your own Counsel, but the Court, also, has a duty to and, I think, a privilege, perhaps, of having an officer of the Court sitting at your elbow to advise you from time to time on things that you might ask that would be appropriate. Now, I have had an opportunity, since this case was assigned to me last week, to sit down and to read the entire transcript of testimony that you now have. You were still in the hospital until Thursday and I read it Wednesday night. My observation would be that as a layman untrained in the law you did a better than average job of representing yourself in that trial, but in comparison with an Attorney, you did a very poor job representing yourself. In other words, I felt that probably you put in 30 to 40 percent of the evidence that was bad for you in that trial, if I may express it that way. You did many things that young lawyers just out of law school do that we consider mistakes, you see, and if you had a competent lawyer sitting at your elbow saying, "Mr. Smith, stay away from that area, you are killing *35 yourself", you are going to come out better, even if you try the case yourself. He doesn't have to say a word to the Jury nor ask a single question of a witness. I would like to have someone there counselling you while you try your own case. I think I have a right to have a friend of the Court with whom I can deal, someone with a legal education. I have gone kind of through a telephone directory list of Attorneys in Peoria County that I know have had experience in representing Defendants in felony cases. These are not primarily the key attorneys that handle the bulk of our defense cases in Peoria County, because they are so darned busy I couldn't get them in here on short notice to handle the case. If you want one of them we would have to put your trial over until a future time. I am not saying you can't have any lawyer you want, but I have simply prepared a list and if you would like to have me just go through the list until I can find someone who would at least sit at your side, here, at the Counsel table and advise you, you are going to be better off, I'm going to be better off and the trial will go much more smoothly and give this lawyer a chance to read this previous record and, then, point out to

you, "Mr. Smith, you shouldn't have asked that question."I'm going to ask the State's Attorney, here, to give you this list and you look at it. If there is anyone you know that you don't want, cross it off. If there is anyone that you know that you could get along with, fine, we will see if we can get him over here on a rather short day to assist you.

A: Your Honor, I would invoke my constitutional right to defend myself without the assistance of any Counsel. It would take too long for them to get into the true background of this case and I feel, in fact, I know that there would be certain points that they would overlook. Now, I have had quite a bit of study in law. I stopped studying law 12 years ago, but as far as the last trial goes, what I brought out that some people thought would be prejudicial, immaterial to the issues, that was part of my strategy and it will be quite different this time, because I know what to bring out, now, and what will be irrelevant, what will be material to the issues and I could actually say, your Honor, that this trial wouldn't last over a half hour if all the witnesses weren't brought in here to testify, but the State is going to bring in witnesses and I have to contradict and rebut anything that he does, here.

The Court: I understand.

A: But I think that I'm versed enough in the law to defend myself.

The Court: Well, I am not challenging the point, but what you can try your own case, but the Court, I think, has a right to have an officer of the Court sitting at the Counsel table with whom he can communicate on technical problems and let him translate that to you in a way that you can understand it. I would like to have you take that list and if there are any there that you know that you don't want any part of in the Courtroom, just mark it out.

A: Like I say, your Honor, I really don't want anyone sitting with me.

The Court: You understand, do you, what you are charged with here, that it is a felony?

A: Yes, your Honor, I do.

The Court: And you understand that the nature of the charge is one of interfering with or attempting to intimidate a witness who would possibly appear and testify against you at another trial?

A: Yes, your Honor.

The Court: And you understand that this is a serious offense and it is a matter for which there could be a penitentiary or fine punishment in the event you were found guilty?

A: Yes, your Honor.

The Court: How much high school or college education did you have?

A: Well, your Honor, I am credited formally with two years of high school and, actually, I have also been credited with two years of college, that is by intelligence tests at various times.

*36 The Court: What was your employment experience?

A: My employment experience was mostly machine operator, Caterpillar Tractor and other companies.

The Court: Did you take any special courses to become a machine operator, were you an apprentice?

A: I took a short course at Farmall, I operated some straight lathing, milling and center machines, I have operated boramatic machines for Caterpillar, I have taken their tests.

The Court: All right. You have no particular training in law, except your own study, is that correct?

A: Yes, that's I have had training in commercial law, typing, shorthand.

The Court: Where did you get that training?

A: I received that in the penitentiary, I have taken

courses in welding. I have also worked as a welder.

The Court: O.K.

A: Also, radio.blueprint reading.

The Court: At the outset and having read the record of the previous hearing, I will say that, as I say, as a layman you did a better than average job of representing yourself, but you didn't do as good a job as an Attorney and, again, would admonish you to at least have someone sitting at your elbow who need not take any part in trial except to advise you. Are you willing to accept this?

A: No, your Honor, as I say, I am more familiar with my case than any Attorney would be and it would take him too long.

The Court: I am thinking of the technical evidence problems, rather than doing anything else. All right. Are you now suffering from any kind of physical disability that would impair your ability to stand a three day trial, here, and represent yourself? I know that you were in the hospital last week, I heard that it had something to do with your heart. Now, what could you tell me something about that experience, what has been your physical condition and your physical experience over the last several weeks or months?

A: Well, I have had, you might say a mild heart attack two or three times, but that's something that I have had since 1968. With that condition I'm subject to dying at any time.

The Court: All right, now, do you feel, in your opinion, that you are physically able to withstand the tensions and problems involved in sitting through a trial and conducting the trial yourself in your own behalf at this time?

A: Yes, your Honor, I have done so before.

The Court: I understand, but you didn't just get out of the hospital before, but I'm asking now.

A: Yes, I had, your Honor.

The Court: Is the nature of your heart problem a coronary insufficiency, that is, the blood is not adequately circulating through your veins, what do you know of the nature of your heart problem, sir?

A: Yes, it is a deterioration of the heart, left side of the muscle, it is getting sufficient circulation, now, through medication.

The Court: Are you taking medication for it at the present time?

A: Yes, I have since 1968.

The Court: Now, you were under the care of a physician, I assume, last week when you were at the hospital?

A: Yes, your Honor.

The Court: Do you want me to get a written medical report from that doctor certified that in his professional opinion that you are physically able to stand trial?

A: No, your Honor, because he would not have returned me to the County Jail if he thought I wasn't physically able and he has made that statement before, and I do have a medical record where he has stated that before.

The Court: All right, now, returning to the County Jail for rest is a lot different than coming into Court and defending yourself in a felony suit, you understand that?

*37 A: I understand, but I have more tension

The Court: Do you want me to contact the doctor and find out from him if, in his opinion, you could withstand the strain of a trial? I don't want to do anything that is going to jeopardize your physical health.

A: No, your Honor, I think I can withstand the tension of the trial, there is more tension in the County

Jail than there is in the trial.

The Court: I will have to take your word for it, I have never been there except as a visitor. Are you suffering from any nervous or mental disorder at the present time, that you know of?

A: No, your Honor, and I would say that I have been examined by the foremost psychiatrist in the United States, Mr. John Goldsborough, and that he is a Neurosurgeon and a psychiatrist and I have no mental abnormality, no psychosis of any kind and my intelligence tests have been of high average. My Army intelligence tests have been very superior and they are to this day. I have records here to that effect.

The Court: O.K. Now, in light of all that I have said today and admonished you and we have discussed, I would still ask you, is it your desire to represent yourself in this case in a Jury trial?

A: Yes, your Honor, I invoke my right.

The Court: Has there been any threats or coercion or compulsion of any kind by anyone to get you to waive your right to an Attorney?

A: No, your Honor.

The Court: It is strictly your own free will and volition?

A: It is my own volition.

On the same day that the above discussion took place a jury was selected for the second trial, which took place on February 12 and 13, 1974. The defendant again represented himself but this time the jury found him guilty on both charges. The state judge sentenced the defendant for a term of not less than three nor more than ten years upon the greater offense of intimidation, following post-trial motions and a sentencing hearing at which the defendant was represented by court-appointed counsel.

Upon appeal to the Illinois Appellate Court, where the defendant was represented by court-appointed counsel, the court affirmed the judgment and sentence as to intimidation but reversed the judgment as to communicating with a witness, upon which no sentence had been imposed. People v. Smith, 33 Ill.App.3d 725, 338 N.E.2d 207 (1975).

On October 12, 1976, the defendant filed his pro se petition for writ of habeas corpus in the Southern District of Illinois, where it was denied by a decision and order entered on February 9, 1977. Through court-appointed counsel he has appealed, raising the issue of whether he was denied his constitutional right to the effective assistance of counsel and due process by (1) his claimed inadequate attempt to waive counsel, (2) his claimed inability to represent himself, and (3) the alleged failure of the trial court to intervene in the interests of justice and a fair trial.

II

The interrogation of the defendant by the state trial judge and the defendant's responses are reproduced in their virtual entirety in Part I inasmuch as they are substantially parallel to Faretta's responses in Faretta v. California, 422 U.S. 806, 807, 835-36, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975):

Questioning by the judge revealed that Faretta had once represented himself in a criminal prosecution, that he had a high school education and that he did not want to be represented by the public defender . . .

. . . Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free *38 will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure.

Here, the state trial judge went a step further and tried to persuade the defendant to accept a "standby counsel" as suggested in Faretta, 422 U.S. at 835, note 46, 95 S.Ct. 2525. The defendant responded that "I would invoke my constitutional right to defend myself without the assistance of any Counsel" and again, "Like I say, your Honor, I really don't want anyone sitting with me."The defendant here could also point to the earlier mistrial, where he represented himself. Defense counsel ordinarily consider it an achievement to win a hung jury. Finally, as the Supreme Court said in Faretta, the defendant's "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836, 95 S.Ct. at 2541.

[1] In view of the state judge's lengthy interrogation and the defendant's firm and repeated responses that he wished to represent himself, that he desired no legal assistance, and that he definitely eschewed even standby counsel, we must conclude that the defendant knowingly and intelligently waived counsel.

III

Once this barrier of competent and knowing waiver has been hurdled there is grave doubt whether the self-represented defendant can raise any further questions, such as the quality of his representation or the failure of the judge to intervene. Faretta itself gives a rather quick reply:

Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

422 U.S. at 835, n. 46, 95 S.Ct. at 2541.

It may be questioned, however, whether the facts of Faretta permitted a dispositive and final answer to the problem inasmuch as the Court only decided that a defendant had a constitutional right to self-representation. Nevertheless, the same broad approach was taken in Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), where the essential finding was the requirement that waiver of the right to the assistance of counsel be "intelligent and competent." There the Court added:

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to the federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence.

304 U.S. at 467-68, 58 S.Ct. at 1024.

Therefore, although Johnson v. Zerbst mandated that "(t)he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused," that case appears to sanction ending the inquiry once the waiver is determined to exist. Id. at 464, 58 S.Ct. at 1023.
Prior to Faretta many of the United States Courts of Appeals held that the right of self-representation was protected by the Bill of Rights.[FN2] Since the Judiciary Act of 1789, persons in federal courts have had the statutory right to "conduct their own cases personally." [FN3]Courts interpreting the constitutional or statutory right appear agreed *39 that once the defendant voluntarily and intelligently waives the right to assistance of counsel, "he will not later be heard to complain that his Sixth Amendment rights have been impaired." Watts v. United States, 273 F.2d 10, 12 (9th Cir.), cert. denied, 362 U.S. 982, 80 S.Ct. 1069, 4 L.Ed.2d 1017 (1960).[FN4]

FN2. Faretta v. California, 422 U.S. 806, 816-17, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

FN3.28 U.S.C. s 1654: "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."

FN4. Judge East said in United States v. Dujanovic, 486 F.2d 182, 186 (9th Cir. 1973):

Nothing whatsoever can thereafter occur during the pilotless journey which will evidence the state of mind of the accused or information at hand upon which he at that time intelligently waived his constitutional right of counsel.

In other contexts the Supreme Court has strongly condemned the idea that a trial is a "sporting event," with a "poker game" approach where gamesmanship is at a premium. Williams v. Florida, 399 U.S. 78, 82, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1969). See also, Brennan, The Criminal Prosecution: Sporting Event or Quest for the Truth?1963 Wash.U.L.Q. 279, 292. The opportunity for a defendant to engage in gamesmanship has greatly increased in recent years with the standard for effective representation having been raised in many circuits.

Most courts have rejected the old "farce and mockery" standard and have supplanted it with a higher standard. In this circuit, "(t)he criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975). The new, higher standards adopted by the several circuits are summarized in Rickenbacker v. Warden, 550 F.2d 62, 66 (2d Cir. 1976). Obviously, such standards cannot be applied to test the quality of the self-representative.

In Mayberry v. Pennsylvania, 400 U.S. 455, 462, 91 S.Ct. 499, 503, 27 L.Ed.2d 532 (1971), Mr. Justice Douglas noted that "(l)aymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes."In the present case, the state trial judge went to the extent of reading the entire transcript of the defendant's first trial and told the defendant that he had done "a very poor job representing yourself" even though "you did a better than average job of representing yourself in that trial."In other words, the defendant was told as frankly as possible that the best layman is likely to try a case more ineptly than the worst lawyer. The defendant's response was "what I brought out that some people thought would be prejudicial, immaterial to the issues, that was part of my strategy . . ."

The Chief Justice, dissenting in Faretta, said that "(t)he fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." 422 U.S. at 838, 95 S.Ct. at 2543. Mr. Justice Blackmun dissenting added that "(t)he procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself." Id. at 852,95 S.Ct. at 2550.

Given the absolute right of self-representation of Faretta, a residual right to insist upon a certain quality of that representation would result in unbearable appellate burdens, if not chaos. It would encourage every defendant to undertake his own defense for the manifold advantages it would give him: first, by appearing before the jury relatively undefended he would tend to gain the jury's sympathy; failing in that he could deliberately introduce confusion and hope that chance would work its way in his favor; and finally, if all else failed, he could seek review on the basis of his inept representation. He would have three different days in court at a minimum.

[2] The defendant here on appeal now asserts that

his inability to defend himself placed a duty upon the trial judge to intervene and, in effect, to carry on the defense. We agree with the court in United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975), decided before Faretta, which said:

*40 While the trial judge has a broad discretion with respect to his interrogation of witnesses, he must always be sensitive to his role as judge and the fact that in the eyes of the jury he "occupies a position of preeminence and special persuasiveness" and accordingly "be assiduous in performing his function as governor of the trial dispassionately, fairly and impartially". United States v. Cassiagnol, 420 F.2d 868, 879 (4 Cir. 1970), cert. denied, 397 U.S. 1044, 90 S.Ct. 1364, 25 L.Ed.2d 654, citing Pollard v. Fennell, 400 F.2d 421, 424 (4 Cir. 1968).

For the trial judge to assume the responsibility of examining witnesses for either party would change the judicial role from one of impartiality to one of advocacy. The fact that a defendant represents himself does not alter the judicial role nor does it impose any new obligation on the trial judge. The defendant under those circumstances must assume the responsibility for his inability to elicit testimony. As stated by this court in United States v. Dujanovic, supra, 486 F.2d at 188," . . . one of the penalties of the appellant's self-representation is that he is bound by his own acts and conduct and held to his record". A defendant representing himself cannot be heard to complain that his Sixth Amendment rights have been violated.

Footnote 46 of Faretta reinforces our conclusion that a defendant who knowingly and intelligently waives his right to counsel cannot complain that his self-representation was ineffective. Faretta v. California, 422 U.S. 806, 834-35, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[3] Nevertheless, we have examined the transcript of defendant's second trial. As the Illinois Appellate Court found, the defendant created no disruptive scenes and the trial was orderly. 338 N.E.2d at 208. As the prosecution pointed out, the trial judge assisted the defendant in the proper technique to lay a foundation for a prior statement (Tr. at 68); to impeach a prior statement (Tr. at 70); and to introduce a document into evidence (Tr. at 80). The trial court also attempted to advise the defendant outside the hearing of the jury to avoid eliciting damaging evidence (Tr. at 79-80). Before the jury the court attempted to limit by his rulings the defendant's repeated attempts to relitigate his former conviction (Tr. 123), which attempts were obviously damaging to the defendant. The transcript also reveals that the defendant thoroughly examined each witness, although his questions were not necessarily the ones a skilled practitioner might ask.[FN5]

> FN5. Unfortunately, we are advised by defendant's counsel on appeal that the record does not include the trial court's instructions to the jury in the second trial. The record includes a set of given instructions but presumably these were given at the first trial resulting in the hung jury. When the defendant represents himself, the trial judge ordinarily cannot expect much assistance from defense-tendered instructions in framing his charges; but, since the ultimate responsibility for a fair charge remains with the judge, he must exercise special care in his charge to protect the defendant's rights.

For these reasons the judgment of February 9, 1977, denying the defendant's petition for a writ of habeas corpus is affirmed.

AFFIRMED.

C.A.Ill. 1978.
U. S. ex rel. Smith v. Pavich
568 F.2d 33

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