OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SALVADOR MARTINEZ, Petitioner v. COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

CASE NO: 98-7809 C-1

PLACE: Washington, D.C.

DATE: Tuesday, November 9, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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SALVADOR MARTINEZ, :

Petitioner :

v. : No. 98-7809

COURT OF APPEAL OF CALIFORNIA, :

FOURTH APPELLATE DISTRICT. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, November 9, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

RONALD D. MAINES, ESQ., Washington, D.C.; on behalf of the Petitioner.

ROBERT M. FOSTER, ESQ., Supervising Deputy Attorney General, San Diego, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 98-7809.

The spectators are admonished. Do not talk until you get out of the courtroom. The Court remains in session.

We'll hear argument now in No. 97 -- 98-7809, Salvador Martinez v. the Court of Appeals of California in the Fourth Appellate District.

Mr. Maines.

ORAL ARGUMENT OF RONALD D. MAINES

ON BEHALF OF THE PETITIONER

MR. MAINES: Mr. Chief Justice, and may it please the Court:

I would like to begin by making a preliminary observation, which I think is important because it bears on the overall tenor of the case, although I don't think that it affects the proper, ultimate decision of the case. That is, that Mr. Martinez did represent himself at his trial. He did not, so far as the record reflects, engage in any untoward antics. It didn't appear that he was unruly or vitriolic or attempted to espouse a particular political position or anything like that. He was simply defending himself as a lawyer, retained or court-

appointed, would have attempted to do.

I mention this at the outset to, in some sense I hope, blunt the strong suggestion in the briefs of the respondent and its amici that by this Court's determining that an appellant, such as Martinez, has a right to self-representation on direct appeal, it opens up a pandora's box for all manner of -- of absurdness to ensue.

QUESTION: What is the constitutional basis for your claimed right of self-representation on appeal? What provision do you rely on?

MR. MAINES: Justice O'Connor, it's -- it's the Due Process Clause. And admittedly, it's a little bit of an intricate argument, and I'd like to --

QUESTION: It's not the Sixth Amendment you rely on.

MR. MAINES: It is not the Sixth Amendment, no.

QUESTION: And it's not the Equal Protection Clause.

MR. MAINES: It is not the Equal Protection Clause.

QUESTION: So, due process you fall back on.

MR. MAINES: That's correct.

QUESTION: Could you spell that out a little bit?

MR. MAINES: I will.

There have been a series of decisions over the years, over the decades by this Court involving the right to counsel, which I urge is the basic, generic right that's in play in this case, the right to represent one's interests in an adversary setting, criminal setting.

The Court in its decisions over the years has said that there is a particular set or range or spectrum of points, stages along the way where the liberty interest of the defendant is particularly significant. It begins at arraignment. It ends at the point of direct appeal. And thus it is that the Court can find, as it did in Evitts v. Lucey, that a defendant, a criminal defendant, has a right to an attorney, a constitutional right to an attorney, on direct appeal in a State court proceeding. It doesn't derive from the Sixth Amendment. It derives from the Due Process Clause.

QUESTION: Well, in a sense, I thought Evitts perhaps derived from the Equal Protection Clause, that an indigent defendant have -- should have the same right to an effective appeal as -- as a non-indigent defendant. And since the non-indigent defendant will have an attorney, the indigent ought to be provided with one.

MR. MAINES: Evitts, indeed, traced the -- the rationale for the right to counsel, but it was very careful to explain that the right to counsel had a

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rationale which really partook of both clauses, Equal Protection and Due Process. The Court was clear in Evitts to make that point.

QUESTION: And now -- but you -- you say for your claim, it doesn't depend on equal protection at all; it depends on the due process strand, or whatever you want to call it, of that decision and others.

MR. MAINES: That's correct. That's correct.

And here's -- here's how the argument goes, lest there be any confusion about it. There -- there is this set of cases which the Court has delineated in which the Court has said at this stage, at this stage, at this stage, from arraignment through direct appeal, appeal as of right, we deem these to be critical stages in the evolution of -- of a criminal prosecution. It doesn't end at the trial, but it doesn't go on and on either. It stops at direct appeal.

Thus, for example, the Court has ruled that in discretionary appeals, a defendant is not entitled to a -- a lawyer. A -- an in -- in forma pauperis party is not entitled to a lawyer on discretionary appeals. The Court has drawn the line between direct appeals of right and discretionary appeals, such as cases that might come before this Court.

QUESTION: But the Court has never said that

it's a constitutional right to a direct appeal.

MR. MAINES: That's correct, Justice Ginsburg, absolutely.

QUESTION: So, there's quite a sharp distinction between a trial which surely is a constitutional right and an appeal which isn't.

MR. MAINES: There is that distinction, but it's not a distinction that matters for our argument in this case because the right that we're talking about is -- is a -- a right to counsel or not to counsel or to represent oneself, which I maintain is all part and parcel of the same right. And in the right to counsel context, the Court has said that the trial setting and the direct appeal setting are at least that similar. They're -- they're at least that similar that in both cases a defendant gets a lawyer if he wants one.

QUESTION: Mr. Maines, we're now almost 10 minutes into your argument, and we've gotten to where the right -- you've established the right to counsel. But of course, what you have to establish here is the right to represent oneself. So, maybe if you could shift over to why the right to counsel should be followed by a right to represent oneself on appeal.

MR. MAINES: That's exactly right. Thank you, Mr. Chief Justice.

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The next step in the argument, therefore, is that if we accept that there is a constitutional right to counsel on direct appeal, then by implication there is the right to represent oneself on direct appeal. Now, some of you may be wondering about that implication, and so let me try to flesh it out a little bit.

First of all, there is precedent in this Court, of course, for the notion that the right to counsel entails or comprehends the right to represent oneself. In fact, that's one of the oft-quoted passages in Faretta v. California, and I'll read the pertinent couple of sentences. The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused position before the law.

QUESTION: Now, that -- that's quite true and I don't think you will find the Court is doubtful at all of the Faretta ruling where we've said you have a right to counsel at -- rather a right to represent oneself at trial. But it seems to me you've got several distinctions that -- that you've got to tackle.

At trial, you've got the government, in effect, coming after the defendant. The government has to prove its case beyond a reasonable doubt, and all the defendant has to do is just sit there and make the government prove

its case, which, you know, it may have some tactical decisions to it, but it certainly does not necessarily require the skill of a lawyer.

On appeal, a judgment of conviction, the scales are reversed. The -- the appellant carries the burden on appeal, and he's got to make, presumably, legal points to -- to a court, to an appellate court that hears an argument for maybe 15 or 20 minutes. And to -- I think you should tell us why those facts don't make any difference from Faretta in your argument.

MR. MAINES: They don't make a difference, Mr. Chief Justice, because they're the wrong facts to be looking at. If you think about the nature of a trial, a trial is -- a criminal trial is a very complex proceeding. In a sense it's much more complex than the standard appeal from a conviction in a criminal trial. There's rules of evidence. There's -- there's cross-examining witnesses. There are rules of procedure. I -- I should think that many lawyers would much rather litigate an appeal than they would a trial. I certainly would.

QUESTION: That's certainly true, but how many laymen would rather litigate a -- an appeal than a --

MR. MAINES: But -- but if -- if what we're asking what is -- what is the -- what is the -- how do we quantify the -- the folly or the lack of wisdom of a

defendant who wants to represent himself at trial versus one who wants to represent himself on direct appeal, I don't think it's -- it's necessarily self-evident that he's --

QUESTION: Well, except with -- with a trial, the decisions have to be made. There has to be one person in control. On appeal, I suppose, under the California system at least, the defendant can file his own brief pro se. I assume that is the rule. That's what happened here. And then there can be another -- we can accommodate the counsel at the appellate stage. We -- we can accommodate two participants. You can't do that at trial.

MR. MAINES: You can except that, under one of this Court's rulings, the defendant on appeal has to forebear to a decision by the appellate counsel to not advance a position that the -- that the defendant is interested in pressing.

QUESTION: But under the California system we're looking at, I take it the defendant can file his own -- his own brief in tandem, or am I wrong about that?

MR. MAINES: No, he can.

QUESTION: He can?

QUESTION: So, he can say, I disagree with this, this. I want to advance this, and we can accommodate that. But you can't accommodate that at trial.

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QUESTION: But if I understand your position, if you lose, they may -- they could take that right away. If you don't have a right to represent yourself, California could adopt a rule, say, we'll take lawyer's briefs and not take pro se briefs, I think.

MR. MAINES: I -- I suppose that they could, but I think the -- the critical question is that given the structure of the Court's precedents in this area -- and this, Mr. Chief Justice, is really getting to the core point here. Given the structure of -- of the Court's precedents, the question becomes whether there is anything that offends due process, Justice O'Connor, anything that offends due process and the notion that under Faretta I have a right to represent myself on appeal. Faretta --

QUESTION: Well, but Faretta doesn't extend to appellate representation.

MR. MAINES: It -- it doesn't, but the logic of Faretta -- but the logic of Faretta is important. If under Faretta I have the right to represent myself in the trial, is there anything arbitrary then in the -- in the claim that at an equally critical stage, i.e., direct appeal, I don't have the right to represent myself?

QUESTION: Well, but it -- it doesn't have to be arbitrary. It's -- it's sufficient to -- to refuse your claim, I think, if one were to say, yes, you do have that

right under Faretta, but there are enough differences between appeal and trial so that we simply don't think the Constitution carries it over.

MR. MAINES: And I concede that if -- if you can coherently argue, based on the pattern of this Court's precedents, that there is such a series of differences between the two stages, then our argument doesn't work.

QUESTION: Mr. Maines, why isn't this a difference? The defendant in a criminal trial where he has a right to a jury is being judged by his peers. He says, I want to be in control. I want to face that jury. But on appeal he's facing three law-steeped judges, not his peers where the facts are out of the case, where credibility is out of the case, where the only thing is the law. And, if we're being practical about it, in many, if not most, of these cases, there is no eye-to-eye confrontation at all. There's just a brief.

So, I don't understand how it comes to a great constitutional issue if the only difference is that your client is getting something more, that is, he could put in his own brief and in addition, he gets the lawyer's brief.

Now, it might be another case if California says, no, we won't accept the pro se brief in addition.

But the case that we have now, I don't understand why there isn't a very significant difference

between the trial where the defendant says, I want to speak to that decision maker, and the appeal where there are three judges steeped in the law and the only thing that matters is the law.

MR. MAINES: Suppose the defendant's motivation is that he doesn't want to run the risk of getting a bad court-appointed lawyer. Suppose the defendant is Johnny Cochran. He finds himself in California State court. He wants to defend himself because he thinks that he can do a better job of that than -- than any other lawyer can --

QUESTION: What happened to all the money he made?

MR. MAINES: -- court-appointed or otherwise. Pardon me?

QUESTION: What happened to all the money he made?

(Laughter.)

QUESTION: Johnny is indigent at this point?

(Laughter.)

QUESTION: This is such an unrealistic hypothetical.

MR. MAINES: Then let me -- let me give you this hypothetical, Justice Scalia. Suppose the -- the individual in question is a distinguished appellate litigator and he believes that he can represent his case

much better than any court-appointed lawyer can. Court-appointed lawyers are overburdened. They're not paid enough. They don't have a passion for the case. But this distinguished appellate litigator, who has fallen on bad times and finds himself now convicted in California State court, wishes to represent himself on appeal.

QUESTION: Well, if he's a member of the bar, he -- he could represent himself without any special constitutional dispensation, I would think.

MR. MAINES: Well, he could, but let's say that he's not a member of the bar.

QUESTION: Well, then he wouldn't be a distinguished appellate --

(Laughter.)

MR. MAINES: I was simply trying to pose to -- to us a hypothetical in which one could reasonably have a motivation that doesn't necessarily focus on the fact that at the trial level I'm the defendant and I want eye-to-eye contract with the judge or with the jury. I don't -- I don't -- that's why I'm trying to --

QUESTION: Aren't we supposed to be dealing with the generality of cases? And so, let's take this -- this case. I don't understand any advantage that a defendant would have when the only questions are legal questions, when there isn't that appeal to one's peers. I just don't

see why there isn't a sharp distinction between the trial and the appeal.

MR. MAINES: Why should our -- our view on what the advantages may or may not be determine whether the defendant has the opportunity to do that if it's a --

QUESTION: It seems to me it goes to a -- a systemic judgment about what -- what the -- the limits of fundamental fairness are. It's highly relevant --

MR. MAINES: It -- it does --

QUESTION: -- for that judgment I would suppose.

MR. MAINES: It does absolutely. It does absolutely, but it's the same perspective that motivated a couple of previous cases of -- of the Court in which the Court determined that the State's view of systemic fairness didn't fly. For example -- and yet, reasonable men and women could very easily have said, yes, this looks like a basically fair system. I -- I don't dispute that California's system looks like a basically fair system.

I -- I don't dispute that the system that California pressed in Douglas v. California was a basically fair system. There, you'll recall, that -- that someone in Mr. Martinez' position who wanted to appeal, who sought a lawyer, would not get a lawyer until there was a screening of the record and -- and there was a sort of preliminary determination that -- that there, indeed,

was a non-frivolous issue to appeal.

QUESTION: But, Mr. Maines, that was -- Douglas was so equal protection driven, the idea that you could get a lawyer if you could afford it. And you don't have any equal protection component here.

MR. MAINES: We don't. We don't.

QUESTION: So, I think that that reduces very substantially any reliance that you can place on Douglas and Griffin, that line.

MR. MAINES: Well, I'm -- I'm simply trying to pose to you, Your Honor, a -- a situation where reasonable people can say, yes, looking at this thing systemically, it looks like a fair enough system. California's system looks like a fair enough system. But when -- when -- but those systems were not upheld because a right more fundamental was deemed to be in play, and that's what I'm arguing here.

The same thing happened in Faretta v. California.

QUESTION: Well, Faretta -- Faretta had elements that, it seems to me, this case does not have. Two of them that occur to me are -- are these.

Number one, part of the Faretta exposition, part of the Court's reasoning in Faretta paid very close attention to the particular items comprehended within the

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Sixth Amendment. And the Court said these are -- these are opportunities or rights for -- for individual action by a defendant. A -- a very personal locus was found for these items. And you don't have any textual basis like that here.

The second difference that strikes me -- and I'm less sure of this, so you -- you may correct me if I'm wrong, but I recall the -- the recitation of historical practice in -- in Justice Stewart's opinion. And at least as I recall it, there is nothing that -- that would extend to a historical practice bearing on an appellate right as opposed to a trial right. And when we come up with our notions of what counts for or against fundamental fairness, one of the things we -- we look at is -- is historical evolution. So, that would seem to count against your position.

MR. MAINES: We do.

QUESTION: Could you comment on those two points?

MR. MAINES: I will. On the second question, appeals are a relatively modern innovation in the criminal justice system in the United States, at least appeals as a commonplace matter. And there simply isn't any colonial or British history that sheds a whole lot of light on the issue. It's -- it's not there, or it's -- or it's --

QUESTION: So, I take it the consequence of that is that in -- in fashioning, in effect, due process solutions, the -- the courts, if anything -- this Court, if anything, is -- is freer than perhaps it -- it felt itself to be in Faretta.

MR. MAINES: It -- it is -- it is freer. I take your point.

I think it's important to -- to make one other point, though, in response to your question, and that is that it seems to be fairly well accepted today that the -- Faretta's analysis of the historical roots of the right in question was open to considerable debate. The --

QUESTION: If we made a mistake in Faretta, we should make another mistake here?

(Laughter.)

MR. MAINES: No. No. I'm -- I'm -- I'm not suggesting that, Mr. Chief Justice. I'm -- I'm simply saying that the most important thing to look -- look at in the Faretta case is its logic, and the logic of Faretta was -- really, even when you think about the text that the Court was relying on Faretta, the logic of Faretta was if one has a right to an attorney, that carries with it a correlative right to represent oneself.

I would like to reserve the remainder of my time.

QUESTION: Very well, Mr. Maines.

Mr. Foster, we'll hear from you.

ORAL ARGUMENT OF ROBERT M. FOSTER

ON BEHALF OF THE RESPONDENT

MR. FOSTER: Mr. Chief Justice, may it please the Court:

This Court has repeatedly held that the Constitution does not require a State to grant convicted criminal defendants an appeal as a matter of right. Of course, if a State chooses to set up a post-conviction criminal appellate system, that system must comport with due process and equal protection.

QUESTION: Now, California does allow a pro se appellant to file a brief in addition to that filed by the attorney?

MR. FOSTER: Your Honor, I wanted to correct the impression of this Court. Some of the California courts of appeal allow the pro -- the convicted individual to file directly a pro se supplemental brief. Some of the courts will not allow the direct filing, but what those other courts will do was allow what, in effect, is an indirect filing, which is we've seen the court return the document to the prisoner, saying any correspondence must come through counsel. Counsel then submits the document to the court and they will accept it that way.

Additionally, all --

QUESTION: That's not essential as far as you're concerned.

MR. FOSTER: No, Your Honor. I think that that is simply a process that California has developed that is not constitutionally required.

But, Justice Kennedy, to finish up the -- the picture so you understand, all of the California courts will accept pro se habeas petitions from the inmate. Because one of the topics that can always be entertained is ineffective assistance of appellate counsel, either directly or indirectly, all the California appellate courts will hear from the pro se -- or the -- the individual who wants to be pro se but is not being allowed to be pro se.

California's system is very straightforward. If you want an appeal, you have a lawyer. If you can't afford one, we will appoint one for you at taxpayer expense.

Frankly, I think that petitioner has conceded his case away this morning when he said to you you have to accept that trials are the same as appeals. And he agrees that if you don't accept that hypothesis, his case falls.

Well, as Chief Justice Rehnquist wrote in Ross, there are major, fundamental differences between an appeal

and a trial. At trial, you still have the presumption of innocence. You have the right to a jury. You have a right to confrontation. You have a right to venue and vicinage. You have a right to --

QUESTION: May I ask you on that -- on that point? Do you think the pro se litigant who represented himself on a Faretta trial would have a constitutional right to file a notice of appeal?

MR. FOSTER: I would assume so, Your Honor. At that point, he is in charge of the case, and there's a statutory right in California to file the notice. So, I don't see what the impediment would be. Perhaps --

QUESTION: I don't think there is an impediment, but I'm just -- what if the State passed a rule saying only lawyers can file notices of appeal? Would that be a valid -- would that be constitutional?

MR. FOSTER: I think -- I think that would be more difficult, Your Honor, because filing the notice of appeal in California is little more than saying, I want an appeal and signing your name. California has a policy of liberally construing any correspondence from an inmate as a notice of appeal. And literally, I have seen cases where it simply is written on 8 and a half by 11 paper and it says, I want an appeal, and that's been sufficient.

QUESTION: So -- so, you would agree that the -

-the defendant appearing pro se would have a constitutional right to file a notice of appeal even if California adopted a rule saying only -- it will only be filed by lawyers.

MR. FOSTER: Well, I think the filing of the notice appeal is different -- is different from what we're talking about, the skills you need to --

QUESTION: Well, it may be.

MR. FOSTER: -- conduct an appeal.

QUESTION: I'm just trying to understand your position. I know you say he has no such right after the appeal has been filed.

MR. FOSTER: Right.

QUESTION: Does his right to self-representation go at least through the right to file a notice of appeal?

MR. FOSTER: Because in California the notice of appeal must be filed in the trial court, not the appellate court, I would -- I would presume that that would be part of the trial process, Your Honor. And the Faretta right would govern that.

QUESTION: And then my second question is, if he then gets an appeal and they find an appellate lawyer from your appellate section. The appellate lawyer says I'm going to file an Anders brief because I don't think there's any merit to your appeal, would the pro se

litigant then have a constitutional right to file his own brief?

MR. FOSTER: Well, I'm not sure what his constitutional -- in Anders you said, you give him the right to -- him or her the right to file a pro se supplemental brief. This Court has never discussed the underpinnings for that requirement and as you --

QUESTION: And I understand. I'm -- really, what I'm asking you is, are there constitutional underpinnings that would give, in that limited circumstance at least, the pro se defendant the right to file a brief in the California Supreme Court?

MR. FOSTER: A supplemental -- you're talking about in the Anders/Wende --

QUESTION: After -- he's told -- he either gets the Anders brief or he's told by the appointed lawyer, I don't think you've got a case here. And the -- the --

MR. FOSTER: No, I don't --

QUESTION: -- pro se defendant isn't convinced. He wants to file a brief. So, even there he would have no right.

MR. FOSTER: I don't think it's a constitutional right, Your Honor, but --

QUESTION: Well, but that's --

MR. FOSTER: -- this Court has said in Anders -

-

QUESTION: I understand.

MR. FOSTER: -- you will do it. And as you know from the argument last month in our Wende case --

QUESTION: Right.

MR. FOSTER: -- that -- that you wanted -- I think your expression, Your Honor, was to give them the best shot so we allow that filing, both under California procedure.

QUESTION: But my question is, was the -- does the Constitution require you to give him that shot?

MR. FOSTER: I don't think it does, Your Honor. I think as a practical matter we do.

QUESTION: Yes, I understand.

MR. FOSTER: And that -- that takes care of the -- the idea of still giving him a methodology to get to the court. But I think --

QUESTION: What -- what happens practically if the counsel has a fundamental objection to the attorney that's appointed?

MR. FOSTER: I'm sorry. If the prisoner?

QUESTION: If the counsel has? The prisoner.

QUESTION: Pardon me. Yes, the prisoner has a fundamental objection to the counsel who's appointed. He said, I'll take someone but not this one. Does he -- does

he have a right to -- to have at least one other choice?

MR. FOSTER: No, Your Honor. As you said in Schlappey, the constitutional doesn't give you the right to a meaningful relationship with the counsel who's appointed.

Of course, if you could show the deterioration of the attorney-client relationship to the point where counsel was not able to adequately represent the client, you could have what California calls a Marsden motion for a change in the appointment of counsel. So, the mechanism exists. And, indeed, I'm told by the clerk of the California Supreme Court that issue is pending in front of them right now in a death penalty case.

QUESTION: Well, that issue could crop up in trial too, could it not?

MR. FOSTER: Oh, absolutely, Your Honor. It's exactly the parallel of the trial situation where there's a breakdown in the attorney-client relationship. And in a trial, it's probably more critical than it is on appeal because, as Justice Ginsburg talks about, we're working off of a cold record. There isn't -- there isn't the situation where the defendant wants to look the jury in the eye and tell them why he shouldn't -- he or she shouldn't be convicted. There are all those trial rights which are markedly different from what we get into on

appeal.

But -- I'm sorry, Your Honor. I thought you started to ask a question.

You have said in Ross and earlier in Schwab that there are fundamental differences in appeal. The presumptions are different. Appeal, as you well know, is a very intricate, difficult area. You're worried about problems of mootness, rightness --

QUESTION: Are there any -- is there any empirical evidence from any of the -- I gather there are some States and circuits that have said, you do have a right of self-representation on appeal. Is there any evidence of what's happened in those places?

MR. FOSTER: I have been unable to find any empirical data talking about what has happened in those situations, Your Honor.

QUESTION: And do they often in trials -- I know they appoint standby counsel. So, it ends up that you have the lawyer and you also have a person representing himself. Would that be like a -- be necessary or happen on appeal?

MR. FOSTER: I don't think so, Your Honor. I think that what we've said is that when we've appointed counsel, we entrust to the counsel certain obligations, certain ethical obligations, certain legal obligations.

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And the presumption after Evitts and some of the others is that counsel will present those arguments he or she believes have a chance of prevailing. And, indeed, you have an ethical obligation not to present those kind of frivolous arguments.

QUESTION: Mr. Foster --

MR. FOSTER: Yes.

QUESTION: -- just to clarify that equal protection is not in this picture, which I think Mr. Maines conceded, suppose we have a very well-to-do defendant who wants to represent himself on appeal. Does that defendant, nonetheless, have to have a lawyer?

MR. FOSTER: Yes, Your Honor. California's position is if you want an appeal, you must have a lawyer. If you can't afford one, we will pay for it with taxpayer expense. But the recognition, as we've been saying, is that appeals are difficult and complex, and we want counsel on both sides because out of vigorous advocacy comes justice.

And, indeed, this Court I think has embraced that concept by the fact that Mr. Maines is here today instead of Mr. Martinez. Granted, you're a discretionary court, but this Court has traditionally refused to allow pro se individuals to brief and argue the case. I think the rationale is clear. You want vigorous, appropriate

advocacy on both sides.

And that isn't -- and while Mr. Maines is correct, his client was not disruptive at trial, if you've had a chance to look at the transcript of the trial, he injected all kinds of irrelevant material into the trial. He had the jury find out about his prior convictions which might not have had to happen had he not taken the stand. At one point when the police officer, who simply showed up and took the report of the crime -- he starts asking him if he's ever been investigated or if he's ever been arrested and has he ever heard about the code of silence.

QUESTION: How -- how much of that information should guide our decision in this case, Mr. -- where we're presumably laying down a general rule?

MR. FOSTER: Oh, no, Your Honor. I was simply offering that as background for the larger picture. I don't think you have to look at that all.

I think you simply say that appeals are not required by the Constitution. They're a creation of statute. Due process and equal protection apply. In this case, counsel says it is an entirely a due process argument, and due process always emphasizes at its core the fairness between the State and the individual.

QUESTION: May I throw out this -- this suggestion for your consideration?

MR. FOSTER: Your Honor.

QUESTION: I suppose one of the things that's at stake in Faretta is a sort of a feeling of autonomy, that the individual citizen ought to be able to do something stupid if he wants to. And it seems to me most defendants who represent themselves are being very, very stupid.

MR. FOSTER: Yes, Your Honor.

QUESTION: So, I kind of agree with your basic principle.

But isn't there at least arguably an interest for the defendant who's been convicted by a government that he hates and thinks they're oppressing the people of his -- his particular category, whatever they might be, that he doesn't trust the system to appoint and pay for the person who has to speak for him in a forum that he basically wants to challenge? And there's some sort of an autonomy interest that even would apply on appeal.

MR. FOSTER: Well, I think there are a number of answers, Your Honor.

First, if he doesn't trust the system, he's not going to trust the court. So, it seems to me that it's a distrust of the whole process. And allowing personal access or not allowing it doesn't improve on that.

Secondly, it seems to me it's still not constitutionally required because we're giving him access.

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In the prison law library cases, you talked that the point was access to the court system. And we're giving him that. We're giving an attorney to act as a -- a sword not a shield.

The other point is, to be addressed, that no one is having an attorney forced upon them because the only way this happens is if the defendant initiates the appeal. The defendant doesn't want anything else to do with legal system, doesn't file the notice of appeal.

QUESTION: No, but he wants to have -- you know, he wants to have enough to do with it at least to try for an appeal, but he just doesn't want to have -- have everybody on his side actually paid for by his adversary. That's his real concern, everybody who's working --

MR. FOSTER: The idea that if this is a government lawyer, even though he or she says they're operating for me, they're really -- well, first, I don't think that's a --

QUESTION: And I'm sure a lot of defendants feel that way too.

MR. FOSTER: Well, but I think that's a trial concern as well, Your Honor. I don't see that there's anything different --

QUESTION: But we match it in the trial concern by saying, well, you can represent yourself if you want to

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do that, be that -- you know, not have confidence in the system.

MR. FOSTER: I don't think that's a matter of constitutional dimension, Your Honor.

If, however, this Court felt it was of critical need, then what Justice Kennedy was talking about earlier, which -- which would be to the pro se brief, would take care of that as well. And California, I think we said earlier, allows it one way or the other. That material will be presented to the court of appeal.

QUESTION: Another way of thinking about Justice Stevens' concern is that we essentially are in a regime of personal rights and personal rights can be waived --

MR. FOSTER: Yes.

QUESTION: -- for the jury trial. I suppose the way you're getting around that here is to say there is no right to an appeal without counsel, so there's nothing being waived here. You --

MR. FOSTER: Yes, Your Honor.

QUESTION: -- almost -- the way we define it going in solves that problem.

MR. FOSTER: The way you set it up. Yes, Your Honor.

And additionally, we're saying to the defendant, if you -- if you want an appeal in California, you have to

abide by the rules that California has set down, so long as those rules meet due process/equal protection. Some of those rules have to do with standing. Some of those have to do with mootness. Some of those have to do with length of argument. And in California, one of those is you have an attorney.

And I think the whole point of the Due Process Clause was to emphasize fairness between the State and individual. And in all of the cases up until now, it has been the individual saying, I want a lawyer. I need a lawyer to be able to fight the State given its might, given its wealth of resources. And what we're --

QUESTION: Mr. Foster, are there any statistics from the California courts of appeals as to how many criminal appeals are -- are -- in how many criminal appeals oral argument is granted?

MR. FOSTER: No, Your Honor. I was unable to find any. And it varies widely from court to court. For example, our Fourth Appellate District, Division 2, has --

QUESTION: That's Los Angeles?

MR. FOSTER: I'm sorry. No. That's San Bernardino/Riverside, Your Honor.

That court has gone to a system of tentative appellate opinions which are sent out a week in advance of

oral argument, as a result of which, the number of cases seeking oral argument has dropped dramatically.

Other courts dislike that approach and do a traditional situation.

So, in terms of the number, I have never seen any data. I've practiced with the Attorney General's office for over 25 years, and I don't think I've ever seen anything correlating oral argument numbers.

My personal feeling is -- is I would think it's somewhere between a third and a half end up with oral argument.

QUESTION: Are there any States which either permit or require the appellant, the criminal defendant, him or herself to be present? I know they do it in England in the high court. You see the defendant there.

MR. FOSTER: I know of no State that requires it. Of course, in some of your opinions, you've made it clear that the courts have discretion whether or not to do it or not.

I think it's important too to remember if we're -- we need to look at the State cases because in the Federal cases that we've seen so far are all governed by 28 U.S.C. 1654 -- that's quoted in -- in the beginning of our brief -- which came out of the Judiciary Act of 1789 basically saying you have a right to proceed in pro se

within the regulations and -- and rules of a particular court. So that when we look to some of these Federal cases that have talked about a right to -- to be in pro se, it has to be put against the backdrop of that code section which -- which dates from the earliest days of -- of our -- of our country.

One of concerns, which we raised in the brief, is the implications of what happens if you accept petitioner's argument. And there are a number of them that we are particularly concerned with, one of which is how -- assuming there's a constitutional right to go pro se on appeal, how would you obtain a valid waiver from a prison inmate of that right?

Because in Faretta you talked about the fact that the judge can look at that individual, can gauge facial expressions, tone, inflection, to make sure that that individual can make a knowing, voluntary, and intelligent waiver. How do you do that with an individual who is incarcerated perhaps 700 or 800 miles away from the prison? We're dealing with a constitutional right. I think that is a major hurdle that -- that would immediately face the courts.

The other problem that I think you would immediately come to is you're going to have to revisit all of your cases dealing with rights to legal materials in

prisons because in those cases, you were talking about that the access to the library needed to be primarily for habeas. And you specifically note that the individual will have the briefs from the earlier State appeal so, in large manner, filing the Federal habeas will not be difficult.

But if that individual, who's in the prison, has a constitutional right to conduct his or her direct appeal, aren't you going to have then provide them with far wider and more expensive materials than we do now? Could you handle an appeal without LEXIS or NEXIS or Westlaw? I think that the idea -- what you will have to revisit is staggering.

We also are very concerned with -- in California in order to comply with the Antiterrorism and Effective Death Penalty Act, which you've had on -- on calendar this term, California, of course, is trying to qualify, as most of the States are, for the fast track proceedings. And one of the requirements in California is that the counsel who files the brief in a death penalty case has to file the companion habeas within 90 days. Well, first off, imagine -- we're all concerned with the delay in death penalty cases. What happens to the delay with a pro se death penalty appellant?

Number two, what do we do for the habeas?

Because most of that habeas material is based on matters outside the record involving investigation by counsel, involving runners, involving private investigators. We are deeply concerned about the consequences of the potential that petitioner argues.

One of his underlying premises is that the right of -- the right to assistance of counsel carries with it the right to the opposite, that is, the right togo in pro se. And I think in Singer you said no. And you looked at components of the Sixth Amendment. You looked at public trial, and you said no. You have a right to a public trial, but you can't waive that and force a closed trial.

You looked venue and vicinage, and you said, yes, you have that right, but you can't waive that and force the trial to be moot.

And you looked at confrontation, and you said, yes, you have a right to confrontation, but you don't have the opposite of that and to force the government to try and prosecute you with affidavits only.

I think the point of all of this is, is that there are significant differences between trial and appeal. This court has repeatedly recognized them. Those differences fully justify the system that California has instituted, which is counsel on both sides of the appeal to vigorously argue it, to make sure that appeal is not a

hollow, meaningless ritual but is something important within our system.

Unless the Court has any other questions, I would submit.

QUESTION: Thank you, Mr. Foster.

Mr. Maines, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF RONALD D. MAINES

ON BEHALF OF THE PETITIONER

MR. MAINES: Almost any two categories can be distinguished if we -- if we look at them in the right way, can be differentiated. And I don't dispute that there are ways to differentiate the appeal stage from the trial stage. Indeed, they are different by definition. I maintain, notwithstanding Mr. -- Mr. Foster's arguments, that the differences which he has pointed out are not the significant ones for us to be focusing on in this case. And, therefore, that the thrust of his argument, which is that there is decisional difference between trial and appeal is not the key issue here.

Also, I think it is important to rebut his claim that our approach here is that the -- the right to something, a constitutional right, if waived implies the opposite of that right. I'm -- I'm -- I am not make that argument. The right to counsel is not the opposite of the right to represent oneself. They are two sides of the

same coin. They're not opposite rights. It's -- it's completely different from the situations that he was positing. So, I think that's a false -- a false argument. I don't think that holds up.

I believe that if the Court takes a look at the pattern of its precedents, if at -- if it considers the stages at which it has determined that the right to counsel occurs at a critical stage, and if the Court embraces the notion squarely set forth in Faretta v. California, that the right to counsel encompasses a correlative right to self-representation, that the result that we seek here follows straightforwardedly if the Court has determined to make sure that there's coherence in its precedents.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Maines.

The case is submitted.

(Whereupon, at 11:49 a.m., the case in the above-entitled matter was submitted.)

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BY: Ilona M. May
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