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Comparative Legal Traditions

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The Efficacy of Pro Se Criminal Defense and Mandatory Defense Provisions

I. Introduction

As Abraham Lincoln once said, “he who represents himself has a fool for a client.”¹

While this adage seems harsh upon first glance, further investigation reveals the truth of the matter - human beings are emotional and fallible. The common law legal system, which is built upon years of complicated precedent and judicial interpretation, does not willingly lend itself to the pro se defendant. This fact was made clear in *Gideon v. Wainwright*², which was decided in 1963. As Clarence Earl Gideon appeared before a Florida state court without an attorney, he requested that the court appoint one for him. However, his request was denied, and he was left to defend himself. As expected, this resulted in his conviction. Upon appeal, the Supreme Court of the United States interpreted the Sixth Amendment to the United States Constitution as providing for the appointment of counsel for indigent defendants in all criminal cases.

This paper seeks to examine the effects of pro se defendants on the criminal justice system of the United States, as well as explore possible avenues for U.S. implementation of a mandatory defense principle, as seen in the several criminal codes of Bosnia and Herzegovina. In Part II of this paper, the current standing of the United States right to counsel is critically analyzed. Part III provides a detailed overview of the current mandatory defense principles found

¹ Abraham Lincoln

² *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963)

in the following criminal codes: Criminal Procedure Code of Bosnia and Herzegovina; Federation of Bosnia and Herzegovina Criminal Procedure Code; Criminal Procedure Code of Brcko District of Bosnia and Herzegovina; and Criminal Procedure Code of Republika Srpska. Part IV of this paper compares similar mandatory defense principles from around the European Union to those of Bosnia and Herzegovina. In Part V, this paper suggests possible avenues for United States implementation of a mandatory defense principle, while maintaining the integrity of the landmark decision in *Faretta v. California*, such as requiring the appointment of standby counsel in cases with statutorily mandated punishments of more than 10 years of incarceration, as well as giving appointed counsel more authority concerning trial strategy, procedural and evidentiary decisions, and other highly technical aspects of the criminal adjudication process.

While the Sixth Amendment does provide for the appointment of counsel in all criminal cases, this right may be waived by the defendant if a judge deems that the waiver was made competently and intelligently. In some cases, it is this determination that presents an issue. While the ability of each defendant to waive this right to the appointment of counsel must be preserved, such a waiver is detrimental in certain circumstances, such as a murder trial or other litigation which revolves around complicated pleadings and intricate rules. A pro se defendant may believe that self-representation is in their best interest, however, the same can have negative ramifications for the legal process, as well as for the defendant, such as unnecessary delays, the lowering of pleading standards, and possible conviction.³ This idea is communicated further by Alan R. Felthous. He states, “Subjecting defendants to trial who are incompetent to waive counsel and to defend themselves pro se is tantamount to trying them while they are

³ Len Niehoff, “Here Comes the Pro Se Plaintiff”, *Lessons, Litigants, Logic*, 13 (Summer 2006).

incompetent.”⁴ The trouble lies in the ability of the defendant to waive their right to counsel so long as a determination of competency is made. In certain situations, the assistance of counsel is necessary, regardless of whether such a conclusion is met by the criminal defendant.

In the civil law system of Bosnia and Herzegovina, as well as in other civil law systems, the appointment of counsel is required in certain situations, regardless of the wishes of the criminal defendant. Under the criminal procedure codes for such jurisdictions, this is referred to as the mandatory defense principle. This procedural safeguard requires that counsel be appointed to criminal defendants facing certain charges. In requiring the appointment of counsel, the civil law system is avoiding the negative effects of pro se defendants on the criminal justice system, while also protecting the rights of the accused and ensuring an adequate defense against criminal charges. The adoption of the mandatory defense principle in the common law system of the United States would benefit both the criminal defendants, as well as the legal system as a whole, by ensuring a smooth legal process, free of delays and unnecessary convictions.

II. Right to Counsel in the United States

The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.”⁵ It is this final protection

⁴ Felthous, Alan R. "The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez." *Mental and Physical Disability Law Reporter* 18, no. 1 (1994): 105-12.

⁵ U.S. Const. amend. VI

awarded by the Sixth Amendment which is at issue in *Gideon v. Wainwright*. Prior to this landmark decision, the Sixth Amendment was interpreted to only apply to criminal defendants whom could demonstrate indigent status. Further, the appointment of counsel was viewed as an issue to be decided by each jurisdiction, as opposed to a Constitutional right.⁶ This assertion was challenged by *Gideon v. Wainwright*.

The Sixth Amendment to the Constitution is made applicable to the states through the Fourteenth Amendment to the Constitution, which states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷ It is through this amendment that the appointment of counsel for criminal defendants is established as a Constitutional right. As such, *Gideon v. Wainwright* required that all criminal defendants, regardless of their ability to prove indigent status, be provided with counsel to assist in their defense, unless otherwise waived competently and intelligently.⁸ However, the United States is not alone in the appointment of counsel for criminal defendants. Similar provisions which call for the appointment of counsel can be found in the criminal codes of Bosnia and Herzegovina, as well as Portugal.

While *Gideon v. Wainwright* established the right of criminal defendants to have counsel appointed for them, the right to waive that protection was established by *Faretta v. California*. In this case, the defendant was charged with grand theft and requested that the court permit him to

⁶ *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252 (1942)

⁷ U.S. Const. amend. XIV

⁸ *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963)

proceed pro se. However, the court, finding that the defendant was not capable of defending himself, denied his request. While the defendant in this case did not successfully convince the court to allow him to act pro se, this case established the right of defendants to waive their right to counsel. Further, this case established that for a defendant to waive his right to the assistance of counsel, they must do so intelligently and knowingly. These safeguards protect incompetent criminal defendants from harming themselves in their attempt at self-representation, while also preserving the rights of those more sophisticated defendants to spearhead their own defense in a pro se manner.

As stated by Alan R. Felthous, “In *Faretta v. California*, the Supreme Court held that the Sixth Amendment provides a criminal defendant with an independent constitutional right of self-representation without counsel when he or she elects to do so ‘voluntarily and intelligently’.”⁹ While the right to self-representation is important and must be preserved, it is the uncertain and arbitrary language that is cause for some alarm. A determination of “knowingly” and “intelligently” is all that stands between a criminal defendant and the right to incompetently defend themselves in court, which could have disastrous effects. Without the assistance of an attorney, it is unlikely that a pro se defendant will achieve the same level of success that can be expected of a member of the bar.¹⁰ Factors such as the education level of the defendant and the policies of the individual jurisdiction concerning the treatment of pro se defendants act either in favor of the defendant, or more commonly, against the pro se defendant.

⁹ Felthous, Alan R. "The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez." *Mental and Physical Disability Law Reporter* 18, no. 1 (1994): 105-12.

¹⁰ "The Jailed Pro Se Defendant and the Right to Prepare a Defense" *The Yale Law Journal* 86, no. 292 (1976): 292-316.

To further hinder the pro se criminal defendant in the legal system of the United States, it is unlikely that a criminal defendant, whether incarcerated or otherwise, whom has waived their right to counsel, will have access to the plethora of resources at the disposal of practicing attorneys. As highlighted by The Yale Law Journal, “when a pro se, untrained in law and inexperienced in trial procedure, is forced to defend himself without having had an opportunity to prepare, a trial that is a farce and mockery of justice will almost certainly result.”¹¹ It is this mockery of the criminal justice system, as well as the undue risk of injustice, that the adoption of a mandatory defense principle would help to alleviate.

There are several examples from the common law system of the United States which demonstrate the failure of a pro se defendant to represent themselves adequately in court. The first of which is Ted Bundy, a notorious serial killer whom refused to accept the help of appointed counsel and insisted on representing himself. While Ted Bundy was not technically a pro se defendant, as his appointed counsel was not permitted to withdraw, his murder trial provides a valuable example of a defendant taking charge of their own defense. As a law school dropout, Ted Bundy believed himself capable of effectively navigating the criminal justice system. This ill held belief ultimately resulted in his conviction and subsequent sentencing to death. Ted Bundy’s representation of himself included stunts and grandstanding, allowing him to make a mockery of the court proceedings and waste the time, energy, and resources of the court.

¹² This kind of behavior could be avoided by the United States adoption of the mandatory defense principles promulgated in the criminal procedure codes of Bosnia and Herzegovina.

¹¹ *Id.*

¹² Gabrielle Bruney, “Ted Bundy Acting As His Own Lawyer Made For a Sadistic Show During His Murder Trials” *Esquire* (2016).

Another example of the failure of a pro se defendant to secure a favorable outcome for themselves is John Allen Mohammad, who was convicted of the murder of six people in 2002 and sentenced to death by a jury of his peers. Upon appeal, this sentence was upheld.¹³ While it is difficult to claim with certainty that the result of John Allen Mohammad's case would be different had he made use of appointed counsel, the grammatical errors of his defense and lack of legal sophistication certainly did not help his cause. While the right to self-representation is constitutionally protected, the question still remains: is allowing criminal defendants to do so in all cases, regardless of the severity of the possible punishment, in the best interest of justice?

In an analysis of pro se defendants by Douglas Mossman and Neal Dunseith, it was discovered that of the 54 self-represented individuals sampled, 39 defendants were found guilty at trial. Only four of the sampled pro se defendants were successful in securing an acquittal and another three pro se defendants successfully had their cases dismissed. Another five self-represented individuals were convicted of lesser offenses than originally charged. One sample case resulted in a verdict of not guilty by reason of insanity and two more cases resulted in a hung jury. While the sample size of this study is miniscule compared to the innumerable amount of pro se defendants currently navigating the criminal justice system of the United States, the same still provides a small window into the efficacy of self-representation. A staggering 72% of the sampled pro se defendants were found guilty at trial.¹⁴ While a number of reasons were cited by the pro se defendants as the motivation behind their choice of self-representation, the end result was often the same – criminal conviction. As a country so deeply rooted in equality and justice, the ease of which criminal defendants are permitted to waive their right to counsel calls

¹³ *Muhammad v. Commonwealth*, 269 Va. 451, 619 S.E.2d 16 (2005).

¹⁴ Douglas Mossman, "A Fool for a Client: Portrayal of 49 Pro Se Criminal Defendants" *The Journal of the American Academy of Psychiatry and the Law* (2001).

into question the due process afforded to those whom make such a decision. A solution to such a high number of pro se convictions can be found in the mandatory defense principle employed by many civil law jurisdictions, as well as the European Convention on Human Rights.

III. Mandatory Defense Principles of Bosnia and Herzegovina

The mandatory defense principle of Bosnia and Herzegovina, which is echoed across the country's several criminal procedure codes, requires that all criminal defendants accused of offenses for which the punishment includes a long period of incarceration be appointed counsel for assistance with their defense. This requirement is communicated by clear and definite language, which includes terms such as *must* and *shall*.¹⁵ By requiring appointed counsel for more severe accusations, the legal system is protecting criminal defendants from conviction due to their own lack of legal sophistication.

The mandatory defense principle can be found in Article 45 of the Criminal Procedure Code of Bosnia and Herzegovina. This provision states, "After an indictment has been brought for a criminal offense for which a prison sentence of ten (10) years or more may be pronounced, the accused must have a defense attorney at the time of the delivery of the indictment."¹⁶ This language allows for criminal defendants to have appointed counsel at their disposal if the charges brought against them are severe enough to carry a significant punishment. In requiring the presence of appointed counsel, the legal system in Bosnia and Herzegovina is insulating the criminal defendant from the power of the court, while also ensuring that they receive a fair trial. The provision further states, "If the suspect, or the accused in the case of a mandatory defense, does not retain a defense attorney himself, or if the persons referred to in Article 39, Paragraph 3,

¹⁵ Bosnia and Herzegovina Criminal Procedure Code §45

¹⁶ *Id.*

of this Code do not retain a defense attorney, the preliminary proceeding judge, preliminary hearing judge, the judge or the Presiding judge shall appoint him a defense attorney in the proceedings.”¹⁷ While this provision reflects the right to appointed counsel enjoyed by criminal defendants in the United States, there is a significant difference. This mandatory defense principle uses the term shall, communicating that the appointment of a defense attorney is required by law, similar to the requirements set forth by *Gideon v. Wainwright*. Further, the mandatory defense provision does not make mention of a right to waive such an appointment of counsel. The application of such a provision is clearly in the best interest of justice, as it facilitates a legal process free from undue burden and delay. A similar provision can also be found in Article 59 of the Federation of Bosnia and Herzegovina Criminal Procedure Code,¹⁸ as well as Article 45 of the Criminal Procedure Code of Brcko District of Bosnia and Herzegovina,¹⁹ and Article 53 of the Criminal Procedure Code of Republika Srpska.²⁰ The language used in each of these criminal procedure codes is relatively uniform, all providing the same protections for the accused.

The first protection afforded by the mandatory defense principles of the various criminal procedure codes of Bosnia and Herzegovina concerns the rights of those whom are mute, deaf, or suspected of a crime for which the punishment includes incarceration for a long period of time. This section of the provision requires that a defense attorney be appointed at the time of the first questioning. This varies greatly from the right to counsel of the United States. The sixth amendment to the United States Constitution has been interpreted to allow for a defense attorney to be appointed for an indigent criminal defendant upon their first court appearance. While the

¹⁷ *Id.*

¹⁸ Federation of Bosnia and Herzegovina Criminal Procedure Code §59

¹⁹ Criminal Procedure Code of Brcko District of Bosnia and Herzegovina §45

²⁰ Criminal Procedure Code of Republika Srpska §53

accused may request an attorney during their first questioning, the presence of an attorney is not an automatic right prescribed by the law. The next protection ensured by the mandatory defense provisions of Bosnia and Herzegovina requires that the accused be afforded a defense attorney during the pre-trial custody phase of the legal process. This provision, similar to the previous, is quite different from the criminal procedure of the United States. A criminal defendant is only appointed a defense attorney after being charged with a crime in court. However, in Bosnia and Herzegovina, the accused is permitted an appointed attorney prior to the formal charging process. This allows the accused and their appointed attorney to begin defense preparations earlier in the legal process.

The next provision in the mandatory defense statutes of Bosnia and Herzegovina discusses the procedure following formal indictment. It is required that a criminal defendant have appointed counsel, if they have not retained counsel of their own, after a formal indictment has been brought against them if the prescribed punishment for that crime is ten or more years of incarceration. The United States does not have a functional equivalent of this provision in place. While the United States, through the sixth amendment, provides for appointed counsel to indigent defendants, there is no requirement that the criminal defendant accept the help of appointed counsel. However, in Bosnia and Herzegovina, the law requires that criminal defendants have defense counsel if they face charges which carry more than ten years of incarceration as a punishment. It is this provision, specifically, that would most greatly benefit the legal system of the United States, if adopted. This provision would prevent the pro se defendant's ignorance of the law from hindering the criminal justice process.

The next provision of the mandatory defense principle in place in Bosnia and Herzegovina is the right to appointed counsel after conviction if the prison sentence prescribed

by law is a long period of time. This provision allows for criminal defendants to still benefit from their appointed defense counsel during the appeal process. In the United States, the right to appointed counsel ends at conviction. However, in Bosnia and Herzegovina, criminal defendants are given the right to counsel from initial questioning through the end of the legal process, whether that ends with conviction or an appeal, should the prescribed sentence qualify the defendant for the prolonged use of the appointed counsel. In the United States, the appeals process is often laborious and expensive. This avenue is not readily available to indigent defendants. However, if a similar mandatory defense provision were to be adopted by the United States, criminal defendants, especially those whom qualify as indigent, would be permitted to pursue their causes to the full extent possible. Not only would this ensure due process and access to justice under the law, but the application of such a provision could lower wrongful conviction rates in the United States.

Another protection afforded to criminal defendants by the criminal procedure codes of Bosnia and Herzegovina is concerned with mental condition. Similar to the United States, the assistance of appointed counsel is required for criminal defendants that are deemed to be mentally ill or unable to defend themselves in a court of law. However, this provision in Bosnia and Herzegovina also requires that counsel be appointed if the case in question is particularly complex, if the appointment of an attorney is in the best interest of justice, as well as other factors, which are not enumerated by the procedural code. This broad language allows room for interpretation of the provision, indirectly expanding the protections offered by the same.

The final two provisions of the mandatory defense procedures of Bosnia and Herzegovina discuss the right of the criminal defendant to choose their appointed counsel from a list of attorneys provided by the court. Further, these provisions allow for an appointed attorney to opt

out of the defense of a criminal defendant. This procedure differs greatly from that of the United States. If a criminal defendant is without an attorney and counsel is appointed for them by the court, no consideration or weight is given to the defendant's preferences. In the United States, criminal defendants can be assigned an appointed private attorney, whom is paid on a case by case basis, or the defendant can be assigned a public defender, whom receives a government salary. Both types of attorneys, public defenders and appointed private counsel, satisfy the defendant's right to counsel. Considering the demand for appointed counsel and the resources of the legal system, these two provisions of the mandatory defense principle of Bosnia and Herzegovina should not be incorporated into the criminal procedure code of the United States. Their adoption could jeopardize the integrity of the defense provided by appointed counsel or place an undue burden on the legal system.

IV. Similar Mandatory Defense Principles in the European Union

An equivalent mandatory defense principle can be found in the Criminal Procedure Code of Portugal, which discusses compulsory assistance.²¹ This statutory section requires that counsel be appointed and present with criminal defendants starting at the first instance of interrogation following an arrest or detainment. Further, this code section states that counsel must be appointed for all criminal defendants which meet certain prerequisites, such as mental infirmity which limits criminal liability, physical impairment, including visual, speaking, and hearing, or is under the age of 21. Under this same section of the Portuguese criminal procedure code, the assistance of appointed counsel is required in the instance of an appeal. More

²¹ Criminal Procedure Code of Portugal §64

importantly, the appointment and assistance of counsel is mandatory if a criminal defendant does not have an attorney to assist with their defense.

Another mandatory defense principle on par with those found in Bosnia and Herzegovina can be found in the Criminal Code of Serbia, section 74.²² This code section requires that counsel be appointed if a criminal defendant is deaf, blind, or otherwise impaired, as well as if a criminal defendant is incapable of effectively defending themselves. Further, the assistance of counsel is mandatory if the statutorily prescribed punishment is more than eight (8) years of incarceration.²³ This provision is similar to the requirements found in the criminal codes of Bosnia and Herzegovina, which hold that appointed counsel is mandatory when the punishment for a crime is ten (10) or more years of incarceration.

V. United States Implementation of a Mandatory Defense

There are several ways in which the United States legal system can adopt and apply a mandatory defense principle similar to that of Bosnia and Herzegovina, such as a strict application of mandatory defense, a hybrid system, or simply placing attorneys in an advisory role. The benefits of the application of a mandatory defense principle would impact both the criminal justice system, as well as criminal defendants. In requiring that counsel is appointed to defendants facing certain charges or a more severe punishment, the legal system can rid itself of frivolous or ostentatious defenses, undue delays, and lower pleading standards. This reduces the strain on legal resources, which are already stretched thin. By requiring the appointment of counsel in certain situations, the court could avoid unnecessary hearings and the filing of insufficient pleadings. The application of a mandatory defense would benefit defendants by

²² Criminal Procedure Code of Serbia §74

²³ *Id.*

requiring, at the very least, the oversight of counsel during the defense process. By narrowing the parameters which allow for defendants to waive the appointment of counsel, the legal system would ensure that defendants are insulated from mistakes which may be prejudicial to their defense. Further, by denying the ability of criminal defendants facing certain charges to waive their right to appointed counsel, it is likely that there would be a corresponding decrease in unnecessary or unwarranted convictions. The following options present a graduated approach to the application of the mandatory defense principle, the first being the strictest application and the final option allowing for the most freedom concerning pro se defendants.

The first way in which the United States could adopt and apply the mandatory defense principle of Bosnia and Herzegovina to the criminal justice system would require appointed counsel to be in full control of the defense process. The application of such a statute would appear as if the defendant had never waived their right to counsel and fully relinquished control of their defense to a qualified attorney, appointed by the court. The legal process would proceed per usual, with legal standards remaining in place. However, the application of such a strict mandatory defense provision would likely result in claims of constitutional violations. If such a provision were to be employed by the United States, it would require a renewed interpretation of the sixth amendment and the right to self-representation, as established in *Faretta v. California*.

Another possible application of the mandatory defense principle of Bosnia and Herzegovina to the criminal defense system of the United States would take the form of a hybrid system. In this system, a defendant would be permitted to take a more involved role in their defense. However, appointed counsel would still be involved in the criminal defense process, with the ability to control pleadings and strategies. Such a system would allow criminal defendants to play an active role in their defense, which is cited as a motivation behind a

significant number of pro se defendants' decisions to act as their own representative. A hybrid system would effectively protect the criminal defendant from their own ignorance of the law while also respecting the time and resources of the court.

A final option, which preserves the right of defendants to act as their own representative, would require the establishment of legal centers. These centers would act to facilitate a smoother legal process for pro se defendants by offering pleading workshops or advisory meetings. The court could require that a defendant make use of the legal center's resources, as opposed to the defendant acting in a pro se manner with no knowledge of the law or required procedures. This option allows criminal defendants that are opposed to appointed counsel to act as their own representative in court, while still insulating both the defendant and the legal system from undue delay and injustice. Similar centers exist in the United States, for example Legal Aid of East Tennessee, however, these centers act in a representative capacity for defendants. The suggested centers would allow for self-representation, as guaranteed under the sixth amendment and affirmed with *Faretta v. California*, while still operating under the supervision of an attorney.

While the current criminal procedure of the United States, as well as the Constitution, affords ample protection and rights for those accused of crimes, the adoption of a mandatory defense principle, such as that in practice in Bosnia and Herzegovina, would expand the protection of criminal defendants, while protecting the interests of the state. While some criminal defendants cite a general distrust of attorney's, especially those paid by the state, as the motivating factor behind their decision to proceed pro se, a mandatory defense principle would require such individuals to make use of an appointed attorney. The use of a court appointed attorney would, in turn, prevent the criminal defendant's ignorance of the law and disillusionment with government negatively impact their defense and last chance at freedom.

The application of a mandatory defense principle would also prevent defendants, whom waived their right to appointed counsel during their initial trial, from citing such a waiver as erroneous on the part of the judge that made such a determination that the defendant was capable of their own defense. To that extent, the court in *McKaskle v. Wiggins*, stated, “A defendant who exercises his right to appear pro se cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.”²⁴ To avoid such an outcome, the application of a mandatory defense principle would ensure that criminal defendants are provided with a defense that satisfies their sixth amendment and fourteenth amendment rights.

Given the complicated nature of the United States legal system, as well as its relationship with long established Constitutional safeguards, the adoption of a mandatory defense provision would be difficult. However, if a hybrid system were to be adopted, such as that permitted by *Faretta v. California*,²⁵ criminal defendants would still have an opportunity to participate in their own defense, while also enjoying the protection of standby counsel. Further, the application of a hybrid system of mandatory defense would not offend the right to counsel or the alternative right to self-representation found in the sixth amendment. The court in *Faretta* stated, “a trial court may appoint ‘standby counsel’ to assist the pro se defendant in his defense.”²⁶ The appointment of such standby counsel would easily satisfy the requirements of a mandatory defense provision.

A mandatory defense provision, if adopted by the United States legal system, while being a hybrid system, would need to also maintain the parameters in place in Bosnia and Herzegovina, such as the requirement that counsel be appointed at the first instance of questioning. This would

²⁴ *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944 (1984)

²⁵ *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975)

²⁶ *Id.*

prevent criminal defendants from implicating themselves in a crime prior to being provided with appointed counsel. While the same protection can be found in the fifth amendment, as well as the Miranda warnings, a mandatory defense provision would add an extra layer of protection, further insulating the accused from the overreach of government actors. As well as requiring an attorney at the first instance of questioning, a mandatory defense provision, if adopted by the United States, would apply only to criminal defendants facing accusations or charges which carry a punishment of ten or more years of incarceration. By applying the mandatory defense provision only to those criminal defendants facing such serious charges, as well as applying the same to mentally ill defendants, the strain on the legal system, appointed private attorneys, and public defenders' officer would be lessened.

While the sixth amendment affords criminal defendants the right to counsel, regardless of their ability to prove indigent status, these protections still allow for some criminal defendants to fall through the cracks. Without a mandatory defense provision in the United States code of criminal procedure, savvy criminal defendants, such as Ted Bundy, are permitted to waive their right to counsel and make a mockery of the legal system, which results in a waste of judicial resources and time. Similarly, criminal defendants with a general distrust of the legal system, facing severe punishment for their crimes, are permitted to waive their right to counsel and ignorance of criminal procedure results in conviction. In some cases, conviction for these defendants can mean life in prison or capital punishment.

To avoid the negative consequences which face 72% of pro se criminal defendants,²⁷ the United States can adopt and apply a hybrid system of the mandatory defense provisions currently

²⁷ Mossman, A Fool for a Client

in place in Bosnia and Herzegovina. This system would allow criminal defendants to exercise some control over their own defense, while still enjoying the guidance and expertise of a trained attorney. Further, by employing such a hybrid system, defendants will be able to prepare a defense in concert with their appointed attorneys, making use of legal resources and texts. This will not only benefit the defendants by ensuring that proper form and prose are employed in their pleading, but this will also benefit the court by promoting uniformity. The court will also benefit from the lack of delay that is frequently experienced by pro se defendants. Moreover, the court will avoid the cumbersome process of having to lower pleading standards and explain the legal process to the pro se defendant.

To provide criminal defendants with due process to the full extent prescribed by law, the United States should adopt a mandatory defense principle and add the same to the code of criminal procedure. While some protections offered under the sixth amendment would overlap with such a provision, the mandatory defense would expand the rights of criminal defendants and benefit the criminal justice system. While this provision would not fully abolish the pro se criminal defendant, it would lessen the burden caused by self-representation and ignorance of the law. As currently written and employed, the mandatory defense provisions in the several codes of criminal procedure in effect in Bosnia and Herzegovina provide an excellent example of due process and the protection of life, liberty, and property so critical to the concept of justice held by the United States of America. To learn and grow from this framework would greatly benefit the legal system of the common law.