RESTORING KENTUCKY ATTORNEYS' RIGHT TO REPRESENTATION AFTER *COMMONWEALTH V. AYERS*

Kylie King[*]

I. INTRODUCTION

In the case *Commonwealth v. Ayers*,[1] the Kentucky Supreme Court decided that "experienced criminal trial attorneys" are not afforded the same rights to representation as other individuals, simply because of their jobs. William Ayers was a Kentucky criminal defense attorney who was indicted on five counts of failure to file his tax returns.[2] The day before his trial was set to begin, Ayers requested a continuance in order to retain private counsel, which was denied by the trial court.[3] However, the trial court judge failed to conduct a *Faretta* hearing[4] before or at any time during the proceedings.[5] After Ayers was found guilty at the trial court level, the Kentucky Court of Appeals reversed his conviction on the basis that a *Faretta* hearing was not conducted.[6] The Kentucky Supreme Court then granted discretionary review solely over whether the trial court's failure to conduct a *Faretta* hearing required the conviction to be set aside and a new trial be ordered.[7]

The Kentucky Supreme Court then proceeded to issue a ruling like none before: Ayers was not entitled to a *Faretta* hearing, because he was engaging in a form of hybrid representation with himself.[8] The court held that because Ayers was an attorney, he was never without the benefits of counsel and that this constituted a form of hybrid representation.[9] However, the court did not stop there. The court then ruled that "criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or

---

* University of Louisville Brandeis School of Law, 2019 J.D. Candidate. A special thank you to my mother, Valerie King, for *all* that she has done for me and the example she has set for me. Thank you to my family for their support and love. Last, but not least, thank you to Jacob Goodin for being by my side every step of the way. 1 Peter 3:8.

[1] 435 S.W.3d 625 (Ky. 2013).

[2] *Id.* at 626.

[3] *Id.*

[4] A *Faretta* hearing is a pretrial hearing conducted by a trial court when a defendant elects to proceed pro se to ensure that the defendant's choice to forego the benefits of counsel was made knowingly and voluntarily. *See* Faretta v. California, 422 U.S. 806 (1975).

[5] *Ayers*, 435 S.W.3d at 626.

[6] *Id.*

[7] *Id.* at 626.

[8] *Id.* at 626–27.

[9] *Id.*

inquiry prior to representing themselves."[10] In the Commonwealth of Kentucky, it now seems that one person counts as two for the sake of hybrid representation.[11] Furthermore, if someone is an "experienced criminal trial attorney,"[12] that person is out of luck when it comes to *Faretta* hearings and does not get to establish that they truly knowingly and voluntarily desire to represent themselves.[13]

The second section of this Note will explore the background of *Faretta* hearings and their requirements, along with a brief history of hybrid representation. Next, this Note will analyze the meaning of the *Ayers* ruling and the flaws within, along with a discussion of the implications the *Ayers* decision poses if it were to remain in effect in the Commonwealth of Kentucky. Finally, the fourth section of this Note will contain a resolution proposing that the Kentucky legislature draft statutes to ensure two people, both a defendant and an attorney, are required in cases of hybrid representation and that *Faretta* hearings are required for all individuals, regardless of their profession.

II. BACKGROUND

This Section will first look at the origin of the *Faretta* hearing and subsequent decisions that have applied *Faretta* in order to clarify the requirements of a *Faretta* hearing. Next, this Section will discuss Kentucky's application of *Faretta* and the standards applied within the Commonwealth. The concept of hybrid representation will then be defined and examined, including a brief discussion of Kentucky's views and application of hybrid representation, as well. Finally, this Section will look at how *Faretta* and hybrid representation were applied in *Ayers*.

A. Faretta Standard

The history of the *Faretta* hearing begins with the Sixth Amendment to the United States Constitution, which states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[14] While guaranteed by the Sixth Amendment, the right to counsel was not always considered fundamental.[15] The Supreme Court originally

---

[10] *Id.* at 629.
[11] *See id.*
[12] *Id.* at 629.
[13] *See id.*
[14] U.S. CONST. amend. XI.
[15] *See generally* Betts v. Brady, 316 U.S. 455 (1942).

ruled in *Betts v. Brady*[16] that it was "unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."[17] It was not until *Gideon v. Wainwright*[18] that the Supreme Court overruled *Betts*, finding that "the right to representation by counsel is one of the fundamental rights essential to a fair trial, and therefore is enforceable against the states under Fourteenth Amendment incorporation principles."[19] However, while *Gideon* determined the Sixth Amendment right to counsel was enforceable against the states, it made no determination about whether one was constitutionally guaranteed the right to refuse the assistance of counsel.[20]

This question was answered in *Faretta v. California*,[21] where the issue before the Court was "whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so."[22] In *Faretta*, a defendant was charged with grand theft and the superior court judge presiding over the case appointed a public defender to represent him in the matter.[23] Faretta, well before the date of the trial, requested that he be allowed to represent himself.[24] The judge questioned Faretta about his desire to represent himself and Faretta responded that he "had once represented himself in a criminal prosecution" and "he had a high school education."[25] The reasoning Faretta gave for not wanting to be represented by a public defender was that "he believed that that office was 'very loaded down with . . . a heavy case load.'"[26]

In response, the judge informed Faretta that he believed "'[he] was making a mistake' and emphasized that in further proceedings Faretta would receive no special favors."[27] The judge then allowed Faretta to waive his assistance of counsel; however, he emphasized that he may reverse this decision if "it later appeared that Faretta was unable adequately to represent

---

[16] 316 U.S. 455 (1942).
[17] *Id.* at 471.
[18] 372 U.S. 335 (1963).
[19] John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: an Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 491 (1996).
[20] *Id.* at 492.
[21] 422 U.S. 806 (1975).
[22] *Id.* at 807.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 807–08.

himself."[28] Before the trial began, the judge sua sponte held a hearing and questioned Faretta extensively about "hearsay and state laws governing the challenge of potential jurors" in order to determine "Faretta's ability to conduct his own defense."[29] In light of Faretta's responses and demeanor, the judge ruled both that "Faretta had not made an intelligent and knowing waiver of his right to assistance of counsel,"[30] and Faretta also "had no constitutional right to conduct his own defense."[31] The judge reappointed the public defender, denied Faretta's request to act as co-counsel, and only allowed Faretta to conducted his defense through the appointed lawyer.[32] Faretta was convicted and appealed the decision.[33]

In reviewing the decision, the Supreme Court ruled "the Sixth Amendment, when naturally read, implies a right of self-representation,"[34] emphasizing the difference in holding that "every defendant, rich or poor has the right to assistance of counsel"[35] from a state compelling "a defendant to accept a lawyer he does not want."[36] However, from a technical standpoint, the Court determined that a defendant does "relinquish[] . . . benefits associated with the right to counsel" when electing to go pro se.[37] Because of this, the defendant is held responsible for the "personal consequences of a conviction."[38] Therefore, the defendant must "knowingly and intelligently" make this waiver.[39] Additionally, he "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish 'he knows what he is doing and his choice is made with his eyes open.'"[40]

When making its decision, the Supreme Court acknowledged that Faretta was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will" when he made his decision to proceed pro se.[41] Furthermore, "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."[42]

---

[28] *Id.* at 808.
[29] *Id.*
[30] *Id.* at 809.
[31] *Id.* at 810.
[32] *Id.* at 810–11.
[33] *Id.* at 811.
[34] *Id.* at 821.
[35] *Id.* at 833.
[36] *Id.*
[37] *Id.* at 835.
[38] *Id.* at 834.
[39] *Id.*
[40] *Id.* at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).
[41] *Id.*
[42] *Id.* at 836.

B. Subsequent Decisions Applying Faretta

The fatal flaw within the *Faretta* decision was that the Court, while acknowledging the right to self-representation and stating the need for the defendant to make a "knowing and intelligent" waiver, left the door wide open for confusion as to what a hearing of this nature should include.[43] The case did not proceed into more detail or allow for discussion of what is required of a *Faretta* hearing.[44] Decisions following *Faretta* have shed more light on what a sufficient *Faretta* hearing should entail and what factors courts consider when determining if a waiver was made knowingly and intelligently.

In *Iowa v. Tovar*,[45] the Supreme Court ruled that the "information a defendant must have to waive counsel intelligently will 'depend . . . upon the particular facts and circumstances surrounding [the] case.'"[46] When explaining the case-specific factors, the *Tovar* Court stated that "the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding" should all be considered.[47] However, the *Tovar* Court still recognized that the Supreme Court "has not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel."[48]

There are certain circuit courts that have created different lines of questioning to administer to those who elect to proceed pro se.[49] In some circuits, a three-factor test is used, where the defendant must be made aware of (1) the nature of the charges against him, (2) the possible penalties, and (3) the advantages and disadvantages of self-representation, in order to knowingly and intelligently waive the right to counsel.[50]

Other circuit courts are not as formal,[51] with their consideration focusing less on whether the judge "made a searching inquiry into the defendant's understanding of the Sixth Amendment waiver," and more on whether "the defendant understood the risk of self-representation."[52] In *United States v.*

---

[43] *See generally id.*
[44] *See generally id.*
[45] 541 U.S. 77 (2004).
[46] *Id.* at 92 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[47] *Id.* at 88.
[48] *Id.*
[49] *Right to Counsel*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 571, 619 (2017).
[50] United States v. Booker, 684 F.3d 421, 425–26, 426 n.5 (3d Cir. 2012); United States v. Smith, 413 F.3d 1253, 1279 (10th Cir. 2005).
[51] *Right to Counsel*, *supra* note 49, at 584.
[52] *Id.*

Singleton,[53] the court held this determination can be made by examining the record for conduct of the defendant, after making his *Faretta* waiver, that is sufficient to indicate that the defendant did indeed desire to continue to proceed pro se.[54] Additionally, in *McCormick v. Adams*,[55] the court ruled there need not be a specific inquiry on the record to determine whether a waiver was knowing and intelligent.[56] Instead, the court stated a review of the background, experience, and conduct of the accused, along with the particular facts and circumstances, can be enough to gather whether a defendant made a knowing and voluntary waiver of his right to counsel.[57]

There are, notably, some decisions where courts have decided the lack of a *Faretta* hearing was "not sufficient to warrant reversal, particularly if the trial record otherwise demonstrates that the defendant made a knowing and intelligent waiver."[58] In *United States v. Benefield*,[59] the defendant, Lonnie Benefield, dismissed his attorney before the trial and requested new counsel.[60] This request was granted; however, once the new counsel was obtained, Benefield "objected to representation by counsel, and this time insisted that he be allowed to proceed *pro se*."[61] The court initially refused, but after Benefield filed a motion and an affidavit insisting upon self-representation, the court allowed him to proceed pro se.[62] Benefield continued to change his mind repeatedly on whether to proceed pro se throughout the course of the trial, but his final choice was to defend himself.[63] The court found in this instance, his "repeated and emphatic demands to represent himself clearly supported the voluntary nature of his decision"[64] and while his "choice may not have been wise, it was knowing, voluntary, and intelligent."[65]

King v. Bobby[66] is another notable example of a court refusing to overrule a case for a lack of a formal waiver hearing. In *King*, the court found that while the defendant "did not straightforwardly assert his right to self-

---

[53] 107 F.3d 1091 (4th Cir. 1997).
[54] *Id.* at 1097.
[55] 621 F.3d 970 (9th Cir. 2010).
[56] *Id.* at 979 (citing United States v. Kimmel, 672 F.2d 720, 722 (1982)).
[57] *Id.* (citing United States v. Kimmel, 672 F.2d 720, 722 (1982)).
[58] *Right to Counsel*, *supra* note 49, at 590.
[59] 942 F.2d 60 (1st Cir. 1991).
[60] *Id.* at 65.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 65–66.
[64] *Id.* at 66.
[65] *Id.*
[66] 433 F.3d 483 (6th Cir. 2006).

representation, and even told the trial court twice that he did not wish to represent himself,"[67] because he rejected all of the attorneys given to him, the defendant "necessarily chose self-representation."[68] The court instructed the defendant that his options were to either allow his attorney to keep representing him, hire another attorney, or represent himself.[69] Additionally, at his plea hearing, the defendant waived his right to counsel orally, in writing, and through his conduct; therefore, the court found his waiver was acceptable.[70]

Finally, in *United States v. Hughes*,[71] the court found that although there was no formal hearing, the defendant's waiver of his right to counsel was valid because of his conduct.[72] The defendant Hughes had a month to find a new attorney after his attorney withdrew; he failed to do so and requested to proceed pro se, instead of asking for a continuance.[73] The night before his trial began, the defendant requested a continuance to obtain counsel.[74] The court found that this behavior, coupled with Hughes's experience as an attorney, allowed for an appropriate finding of a waiver of counsel.[75] The court held to its precedent, noting that in prior decisions, it stated that "the right to make a knowing and intelligent waiver of the right to counsel does not grant the defendant a license to play a cat and mouse game with the court."[76] The court stated that "a defendant may waive his right to counsel by his conduct, particularly when that conduct consists of tactics designed to delay the proceedings."[77]

C. Kentucky Application of Faretta

In Kentucky, the right to proceed pro se has been recognized in several cases.[78] *Tinsley v. Commonwealth*[79] recognized Kentucky's requirement to hold a *Faretta* hearing when a defendant desires to proceed pro se and what

---

[67] *Id.* at 492.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] 191 F.3d 1317 (10th Cir. 1999).
[72] *Id.* at 1323–24.
[73] *Id.* at 1324.
[74] *Id.*
[75] *Id.* at 1323.
[76] *Id.*
[77] *Id.*
[78] Grady v. Commonwealth, 325 S.W.3d 333, 342 (Ky. 2010); Depp v. Commonwealth, 278 S.W.3d 615, 617–19 (Ky. 2009).
[79] 185 S.W.3d 668, 674–75 (Ky. Ct. App. 2006).

that hearing should entail.[80] In Kentucky, a trial court has an affirmative duty to hold a *Faretta* hearing when the accused desires to proceed pro se or make a limited waiver of rights.[81] The trial court is required to first conduct a hearing "in which the defendant testifies as to whether the waiver is voluntary, knowing, and intelligent."[82] The trial court then must warn the defendant as to the nature of the rights the defendant is choosing to relinquish.[83] Finally, the trial court is required to make a finding as to whether the waiver is voluntary, knowing, and intelligent, and the finding must be on the record.[84] The "failure to comply with these requirements constitutes a 'structural' error to which harmless error analysis is inapplicable."[85] Kentucky case law regarding *Faretta* hearings has historically been strict and rigid,[86] prioritizing the protection of the rights of the accused.

D. Hybrid Representation

Hybrid representation is a system of representation where "a defendant decides that he and his counsel—either assigned or retained—together will take an active, verbal part in the defense at trial."[87] In this form of representation, there is a "notion that the accused will generally make the decision as to the tasks to be performed by each."[88] This differs from an accused having stand-by or advisory counsel.[89] Stand-by or advisory counsel is given "upon appointment by the trial court" and "gives technical advice to the *pro se* defendant if he requests it."[90] Additionally, stand-by or advisory counsel "takes over the defense if the accused gives up or constructively waives his *pro se* right."[91]

As previously mentioned, the Court in *Faretta* ruled that the Sixth Amendment implied a right of self-representation.[92] The issue of hybrid representation was left untouched by *Faretta*, along with the notion that an

---

[80] *Id.* at 674–75 (citing Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004)).
[81] *Hill*, 125 S.W.3d at 226.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Tinsley*, 185 S.W.3d at 674–75 (citing *Hill*, 125 S.W.3d at 228).
[86] *See id.* at 668; *Hill*, 125 S.W.3d at 221.
[87] *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 VAL. U. L. REV. 329, 329 (1978) [hereinafter *The Accused as Co-Counsel*].
[88] *Id.*
[89] *Id.* at 330.
[90] *Id.*
[91] *Id.*
[92] Faretta v. California, 422 U.S. 806, 821 (1975).

implicit right to this form of representation could be found within the Sixth Amendment, as well.[93] *McKaskle v. Wiggins*[94] was the first Supreme Court case to recognize hybrid representation.[95] The Supreme Court ruled that "once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced."[96] However, *McKaskle* did hold that hybrid representation is not a right, stating, "*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was allowed."[97]

E. Hybrid Representation in Kentucky

In Kentucky, the right to hybrid representation is recognized both statutorily and through case law. The Kentucky constitution recognizes a right to hybrid representation in Section 11, stating, "[i]n all criminal prosecutions the accused has the right to be heard by himself and counsel . . . ."[98] This constitutional assertion was clarified in the case *Wake v. Barker*,[99] where the Supreme Court of Kentucky ruled that hybrid representation was acceptable, determining that Kentucky is a minority jurisdiction when it comes to this form of representation.[100] The court ruled that a criminal defendant has a "right to make a limited waiver of counsel and accept representation in certain matters."[101] According to the court in *Wake*, there is "no valid basis" for interpreting the words "by himself and counsel" "as meaning the only right guaranteed is to appear with counsel."[102] Therefore, Kentucky courts have interpreted the Kentucky constitution to allow for hybrid representation, as well.[103]

The Kentucky case *Hill v. Commonwealth*[104] provides a more recent example of Kentucky's acceptance of hybrid representation. This court

---

[93] *See generally id.*
[94] 465 U.S. 168 (1984).
[95] *Id.*
[96] *Id.* at 183.
[97] *Id.*
[98] KY. CONST. §11.
[99] 514 S.W.2d 692 (Ky. 1974).
[100] *Id.* at 695–96.
[101] Commonwealth v. Ayers, 435 S.W.3d 625, 628 (Ky. 2013) (citing *Wake*, 514 S.W.2d 692 (Ky. 1974)).
[102] *Wake*, 514 S.W.2d at 695.
[103] *See id.* at 695–96.
[104] 125 S.W.3d 221 (Ky. 2004).

recognized that the right to hybrid representation in Kentucky originated in *Wake v. Barker*.[105] In addition, the court explicitly ruled that a *Faretta* hearing is required when a defendant engages in hybrid representation, because the defendant is operating on a limited waiver of counsel.[106] Moreover, the court ruled that a failure to conduct a *Faretta* hearing under the circumstances of hybrid representation is a "structural error," requiring the case to be reversed and remanded for a new trial.[107]

F. Ayers and the Principles of Faretta and Hybrid Representation

The decision to permit hybrid representation is left to the states and jurisdictional discretion, as federal law does not give a defendant the right to hybrid representation, but does not expressly prohibit it.[108] Consequently, it was noted that the *Ayers* case was decided "primarily under [the] Kentucky Constitution."[109] This allowed the court to utilize what it considered to be "greater constitutional latitude than if [the Kentucky Supreme Court] were strictly beholden to a federal directive."[110] In the *Ayers* opinion, the Kentucky Supreme Court recognized that, although it is within the minority jurisdictions that allow hybrid representation,[111] its holding that "criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or inquiry prior to representing themselves" is contrary to the decisions of other states that recognize hybrid representation.[112] In fact, it is even contrary to Kentucky's own decisions relating to hybrid representation.[113] The previously mentioned case, *Hill v. Commonwealth*,[114] established both that a *Faretta* hearing is required in cases of hybrid representation, and failure to conduct a *Faretta* hearing is a "structural error" that requires the case to be reversed and remanded for a new trial.[115] Generally, in jurisdictions that do allow hybrid representation, "the court must still obtain a valid waiver of counsel from the defendant."[116] However,

---

[105] *Id.* at 225.

[106] *Id.* at 226–27.

[107] *Id.* at 228–29.

[108] *See* Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55 (2003).

[109] Commonwealth v. Ayers, 435 S.W.3d 625, 628 (Ky. 2013).

[110] *Id.*

[111] *Id.* at 627–28.

[112] *Id.* at 629.

[113] *See* Commonwealth v. Hill, 125 S.W.3d 221, 226–29 (Ky. 2004).

[114] 125 S.W.3d 221 (Ky. 2004).

[115] *Id.* at 226–29.

[116] Decker, *supra* note 19, at 540; *see also id.* n.330 (citing United States v. Kimmel, 674 F.2d 720,

broad discretion is granted to the trial court, and the judges as well, in deciding whether or not hybrid representation is allowable, along with what procedures should be implemented with its use.[117]

In the *Ayers* case, the court stated that the defendant in the case was engaging in a form of hybrid representation, because he was himself an attorney and the defendant, thus, was never without the benefits of counsel.[118] The court then concluded Ayers was not required to have a *Faretta* hearing, because a *Faretta* hearing is only necessary when a defendant is making the "decision to forego benefits associated with the rights to counsel."[119] Contrary to precedent previously established in Kentucky, a few Kentucky cases and Sixth Circuit cases held that a formal *Faretta* hearing may not always be required in cases of hybrid representation, because the individual was never without the advice of an attorney.[120] However, the question presents itself as to whether the same logic is applicable when the individual is playing both the role of the attorney and the defendant.

III. ANALYSIS

This Analysis Section will first discuss whether or not the court, in the *Ayers* decision, provided any guidance as to who an "experienced criminal trial attorney is."[121] Next, this Section will consider whether one single individual can truly engage in hybrid representation. Then, this Analysis will examine whether heightened legal knowledge should allow a court to forgo a *Faretta* hearing all together. Finally, this Analysis will conclude with a discussion of the implications of the *Ayers* decision on Kentucky law.

A. *"Experienced Criminal Trial Attorney"*

Before inspecting the other problematic legal aspects of this case, it is necessary to analyze what the court means by its use of the phrase "experienced criminal trial attorney."[122] While the phrase, when taken as a whole, may seem understandable, the court gave absolutely no guidance as

---

721 (9th Cir. 1982)).

[117] Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J. L. & SOC. POL'Y 130, 170 n.244 (2011).

[118] Commonwealth v. Ayers, 435 S.W.3d 625, 628 (Ky. 2013).

[119] *Id.* at 627 (quoting United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996)).

[120] Peters v. Chandler, 292 F. App'x 453, 457–58 (6th Cir. 2008) (unpublished); Peters v. Commonwealth, No. 97-SC-000316-MR (Ky., Feb. 19, 1998) (unpublished).

[121] *Ayers*, 435 S.W.3d at 629.

[122] *Id.* at 626.

to what these words truly mean. This case rests upon three heavily weighed, descriptive adjectives which are left undefined, and thus, unable to be applied to a future ruling: (1) experienced, (2) criminal, and (3) trial.[123]

The only shred of insight the court gives into what these words may mean, and who they may apply to, lies within its description of Ayers himself.[124] The court states that Ayers had "practiced criminal defense law in the Commonwealth for over fifteen years."[125] Additionally, Ayers was said to be a "well-known criminal defense attorney who regularly practiced in the very court in which he was tried and convicted."[126] Furthermore, evidence of Ayers' appearances as counsel in criminal cases were submitted in the form of "over two-hundred pages of records from the Administrative Office of the Courts. . . ."[127]

Utilizing these unhelpful descriptions, it is clear that there are still many unanswered questions. In starting with the word "experienced," it would appear that the court is considering the length of time Ayers practiced, coupled with records that he had practiced in the court in which he was tried, as an indicator that Ayers was "experienced" for the purposes of this case.[128] However, the court fails to recognize the various kinds of "experience" that attorneys may have and the inapplicability of said "experiences" when attempting to represent themselves as a defendant in the state of Kentucky. The profession of law, even when restricted to a specific practice area, is full of such diversity that one must consider much more than just the number of years an individual has practiced in order to evaluate their experiences as an attorney. Several factors could be considered when determining experience, including how many cases an attorney has had, whether the attorney practices in state or federal court, whether the attorney does prosecution or defense work, and even whether the attorney has practiced in military or civilian courts.

The word "criminal"[129] may be the most straightforward of the three; however, it poses its own set of issues. There are several facets of criminal law including drugs, juveniles, families, abuse and neglect, domestic violence, traffic violations, and forgery crimes to simply name a few.[130]

---

[123] *See generally id.*
[124] *Id.* at 626–27.
[125] *Id.* at 626.
[126] *Id.* at 626–27.
[127] *Id.* at 627.
[128] *Id.* at 626–27.
[129] *Id.*
[130] Charles Montaldo, *Common Criminal Offenses Defined*, THOUGHTCO., https://www.thoughtco.com/common-criminal-offenses-970823 (last updated Aug. 13, 2018).

Depending on an attorney's past work regiment and what the attorney was charged with, it may be unlikely that their experience as a "criminal" attorney could be of use to them when attempting to defend themselves against their specific charge. Additionally, the use of the word "criminal" in this context excludes all attorneys who work in civil courts, seemingly allowing for attorneys who have worked on civil cases to still be entitled to a *Faretta* hearing, while those who have worked on criminal cases are not. This creates an unfair distinction, affording similarly situated attorneys a set of rights not available to others merely due to their practice area.

Finally, the term "trial" is incredibly misleading. In today's legal environment, 97% of federal convictions[131] and 95% of state convictions[132] are determined through the use of a guilty plea. Confirming this notion, the National Center for State Courts recently found that for most states, jury trials amounted to only 1%-2% of criminal dispositions.[133] While an attorney may consider himself or herself a trial attorney, the number of trials the attorney has actually litigated could be relatively few, raising questions as to whether an attorney whose clients regularly plead guilty is truly a trial attorney. Furthermore, the extent of an attorney's involvement in a trial is not always clear and cannot be evidenced solely by the appearance of their name on trial-related documents. Several attorneys could work on documents in preparation for, and even attend a trial, but only participate in preliminary or post-conviction proceedings.

Therefore, upon a deeper examination of the language of the holding, the only thing clear about the phrase "experienced criminal trial attorney" is that the court failed to properly define its true meaning.[134] Additionally, the court created a standard that clearly grants a different set of rights to an attorney solely dependent upon the particular attorney's area of practice.[135] The standard is inapplicable due to its lack of definition and unfair due to its discriminatory application.

---

[131] Mark A. Motivans, *Federal Justice Statistics, 2012 - Statistical Tables*, U.S. DEP'T OF JUST. 1, 17 (Jan. 22, 2015), https://www.bjs.gov/content/pub/pdf/fjs12st.pdf.

[132] Matthew R. Durose, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, U.S. DEP'T OF JUST. tbl.4.1 (July 1, 2007), https://www.bjs.gov/content/pub/html/scscf04/tables/scs04401tab.cfm.

[133] *See* Ct. Stats. Project, *2016 Gen. Jurisdiction Criminal Jury Trials and Rates*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal (last visited Oct. 17, 2018).

[134] *See generally* Commonwealth v. Ayers, 435 S.W.3d 625 (Ky. 2013).

[135] *Id.* at 629.

B. One Man as Two for the Purposes of Hybrid Representation

There appears to be no other cases in the United States that have ruled that one man can act as two for purposes of hybrid representation, exemplifying that this is a case of first impression. In cases from other jurisdictions that allow hybrid representation, two people are included in the meaning of hybrid representation—the individual acting as the defendant and the individual acting as the attorney.[136] Looking outside of the legal world, the word "hybrid," when used as an adjective, means "something . . . that has two different types of components performing essentially the same function."[137] The court in *Ayers* attempted to establish that Ayers is in fact engaging in some form of hybrid representation, because he "was not exercising his right to proceed without a lawyer," as a typical pro se defendant might be considered to have done, because "as an attorney, Ayers never forwent the benefits of counsel."[138]

The idea of hybrid representation, returning to the original definition mentioned previously, is not that one individual is capable of performing two roles, but that one individual with his "assigned or retained [counsel] *together*" will take an active part in the trial.[139] It is intended to be "concurrent representation by counsel for an accused and the accused appearing *pro se*."[140] In a true form of hybrid representation, "the accused and an attorney essentially function as 'co-counsel.'"[141] It is emphasized that "this model involves actual assistance of the attorney in the trial process."[142] Additionally, in cases involving hybrid representation "legal assistance is both sought by and available to the defendant."[143]

These definitions are demonstrative that the role of an attorney within hybrid representation is played by another individual—not the individual acting as the defendant.[144] While Ayers may have legal knowledge, many of

---

[136] These cases even include where courts ruled that a *Faretta* hearing was not required to ensure hybrid representation was acceptable because the court ruled that the individual was never without the advice of his attorney. *See* United States v. Cromer, 389 F.3d 662, 680–83 (6th Cir. 2004); Metcalf v. State, 629 So.2d 558, 566 (Miss. 1993); People v. Lindsey, 308 N.E.2d 111, 115 (Ill. App. Ct. 1974); Phillips v. State, 604 S.W.2d 904, 908 (Tex. Crim. App. 1979).

[137] *Hybrid*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/hybrid (last visited Oct. 17, 2018).

[138] *Ayers*, 435 S.W.3d at 627.

[139] *See The Accused as Co-Counsel*, *supra* note 87, at 329 (emphasis added).

[140] Colquitt, *supra* note 108, at 56.

[141] *Id.* at 56–57.

[142] *Id.* at 74.

[143] *Id.* at 109.

[144] *See generally id.* at 109–10.

the benefits associated with hybrid representation, such as division of labor while still having autonomy over certain parts of the trial, "increase[] access to justice, preparation for self-represented litigants of documents, . . . clarifying of the presentation of issues to the court, and reduction of *pro se* errors,"[145] were not available to Ayers as he was acting on his own throughout the trial. Legal assistance was clearly not available to Ayers, because he was denied the opportunity to retain counsel when he expressly requested it before the trial began.[146] Furthermore, he was not afforded any of the benefits that a typical defendant engaged in hybrid representation would have involving a lighter work load, assistance in preparation, and additional development of legal theories.[147]

An attempt to assert that Ayers had the benefit of legal assistance would truly be both frivolous and illogical. If anything, Ayers acted as a pro se defendant with what could be considered heightened legal knowledge, but not as a defendant engaged in a form of hybrid representation. Consequently, using hybrid representation as a basis for not considering Ayers' lack of *Faretta* hearing to be a procedural error is flawed. There was only one individual involved in Ayers' representation, and that was Ayers himself.[148] Ayers was, in fact, forgoing the benefits of counsel throughout the course of the trial because he had no representation;[149] therefore, his lack of counsel assistance, coupled with the fact that he was afforded no *Faretta* hearing, should have caused the trial to be reversed and remanded.

C. Heightened Legal Knowledge

Within the *Ayers* opinion, the court acknowledged that its holding conflicted with other jurisdictions, but still ruled that "instead of reducing a standard for a *Faretta* inquiry down to an unrecognizable level, . . . criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or inquiry prior to representing themselves."[150] In other jurisdictions, defendants who are attorneys or may have "enhanced legal knowledge" are still entitled to a *Faretta* hearing.[151] However, the court may do so in a way which is not as rigorous as when approaching an individual

---

[145] Goldschmidt, *supra* note 117, at 171–72.
[146] Commonwealth v. Ayers, 435 S.W.3d 625, 626 (Ky. 2013).
[147] Goldschmidt, *supra* note 117, at 171–72.
[148] *See generally Ayers*, 435 S.W.3d at 626.
[149] *See generally id.* at 626–28.
[150] *Id.* at 629.
[151] *Id.* (citations omitted).

that has no legal knowledge whatsoever.[152] That being said, from a federal standpoint, as established in *Faretta*, a waiver still must be made "voluntarily and intelligently" despite whether or not the defendant has experience as an attorney.[153]

As previously mentioned, the Supreme Court in *Iowa v. Tovar*[154] stated that "the information a defendant must possess in order to make an intelligent election, the decisions indicate, will depend upon a range of case specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."[155] When dealing with cases where attorneys are representing themselves pro se, other jurisdictions have ruled that "the defendant's status as an attorney may be considered by the court in determining whether a valid waiver was made in absence of a complete *Faretta* inquiry."[156] In *United States v. Campbell*,[157] the court stated that "if there is some 'affirmative acquiescence' in the arrangements at trial, the burden falls on [the defendant] to show that his 'acquiescence was not sufficiently understanding and intelligent to amount to an effective waiver.'"[158]

The case *Neal v. Texas*[159] presented an instance where an attorney, who did not have a formal *Faretta* hearing, was found to have constitutionally waived his right to counsel in a manner that satisfied the "knowing and intelligent" requirements.[160] In this case, the attorney actually submitted a written motion to proceed pro se, and due to his experience as an attorney, the court stated that he was clearly aware of the dangers of self-representation; therefore, his waiver was made knowingly and intelligently.[161] Additionally, in *United States v. Maldonado-Rivera*,[162] the defendant, who was also an attorney, was found to have constitutionally waived his right to counsel in accordance with *Faretta* without a formal hearing but through findings on the record.[163] Maldonado made clear on the

---

[152] *See generally* United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990); Neal v. Texas, 870 F.2d 312 (5th Cir. 1989); United States v. Campbell, 874 F.2d 838 (1st Cir. 1989); Butler v. State, 767 So. 2d 534 (Fla. Dist. Ct. App. 2000).

[153] Faretta v. California, 422 U.S. 806, 834–36 (2013).

[154] 541 U.S. 77 (2004).

[155] *Id.* at 89.

[156] *Butler*, 767 So. 2d at 537.

[157] 874 F.2d 838 (1st Cir. 1989).

[158] *Id.* at 847 (citing Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976)).

[159] 870 F.2d 312 (5th Cir. 1989).

[160] *Id.* at 313–14.

[161] *Id.*

[162] 922 F.2d 934 (2d Cir. 1990).

[163] *Id.* at 943–48.

record that he was a licensed attorney who was able to practice in the area where his case was being tried and one of the attorneys he had retained prior to trial "indicated in Maldonado's presence . . . that Maldonado was steadfast in his desire to represent himself at trial."[164]

Noticeably, the *Ayers* case differs greatly from these instances.[165] Ayers did not desire to represent himself; in fact, before the trial, Ayers stated that he felt incompetent to represent himself and notified the court that the attorney he had been in negotiations with to represent him at trial had not yet agreed to their terms.[166] He motioned for a continuance, but that motion was denied and the trial proceeded.[167] Additionally, other than a statement by the judge that the defendant was an "experienced criminal trial attorney and well-versed in evidence and court rules,"[168] there were no questions asked of Ayers, no evidence introduced at the trial court level that he was an experienced attorney, and no statements made by Ayers that he was comfortable or capable of representing himself in this matter.[169] While his conduct could arguably support a knowing and intelligent waiver, Ayers was not given a choice—the court forced his unwilling hand. He was required to represent himself, even though it was expressly stated that he did not desire to do so, nor did he feel comfortable.[170]

D. Implications of the Ayers Ruling

While attempting to set a narrow exception to the general rule requiring *Faretta* hearings for individuals engaging in hybrid representation or electing to proceed pro se, the Kentucky Supreme Court failed to explain what an "experienced criminal trial attorney"[171] is for the sake of this newly defined rule. In decisions after this case, should a similar fact pattern occur, the question arises as to what factors should be considered when making a

---

[164] *Id.* at 978.

[165] *See generally* Commonwealth v. Ayers, 435 S.W.3d 625 (Ky. 2013).

[166] *See* Commonwealth v. Ayers, 435 S.W.3d 62 (Ky. 2013), *petition for cert. filed*, 2014 WL 2213198 (U.S. May 22, 2014) (No. 13-1422) (Ayers "unequivocally told the trial court he was incompetent to represent himself and that he wanted to retain counsel pursuant to the Sixth Amendment of the United States Constitution."); *see also* Ayers v. Hall, 900 F.3d 829, 832 (6th Cir. 2018) ("Ayers asked for a continuance a day before his trial was scheduled to begin so that he could hire an attorney with whom he attested he was already in negotiations. . . .").

[167] *Ayers*, 435 S.W.3d at 626.

[168] *Id.*

[169] *See generally id.*

[170] *See* Ayers v. Hall, 900 F.3d 829, 832 (6th Cir. 2018); Commonwealth v. Ayers, 435 S.W.3d 62 (Ky. 2013), *petition for cert. filed*, 2014 WL 2213198 (U.S. May 22, 2014) (No. 13-1422).

[171] *Ayers*, 435 S.W.3d at 629.

determination as to whether one is to be considered an "experienced" attorney, or a "criminal" attorney, or a "trial attorney." The court has seemingly swapped one procedure for another—instead of deciding whether an individual has "knowingly and intelligently" waived the right to counsel,[172] the court must now decide whether an attorney can be considered an "experienced criminal trial attorney"[173] or not.

Additionally, the Supreme Court of Kentucky utilized Ayers' prior experience as an attorney as the sole factor in its determination that no *Faretta* hearing was required in this instance.[174] This differs from the other previously mentioned jurisdictions, where an attorney's prior experience can be considered, but is not the sole factor in concluding that a waiver was made "knowingly and intelligently."[175] While it may be weighed, the idea that an attorney's mere career choice would allow one to be excluded from a procedural requirement set forth by the United States Supreme Court should disturb all lawyers who practice in Kentucky.

Finally, the Kentucky Supreme Court in this case implies that because an individual is an attorney, they can be considered to be engaging in hybrid representation, even though they are but one individual.[176] This is yet another example of a change in the rules because of one's status as an attorney in Kentucky. In all previous cases relating to hybrid representation, not one has occurred where an individual has been effectively split into two in the way that the Kentucky Supreme Court did when discussing attorneys as defendants in the *Ayers* case.[177] While the ruling is understandable, the implications for attorneys' rights and how the Kentucky Supreme Court views an attorney when they are in the role of a defendant is alarming. This interferes both with attorneys' rights to a fair trial and due process of the law.

IV. RESOLUTION

To combat the negative effects *Commonwealth v. Ayers* could have in the future, Kentucky legislators should amend the Kentucky constitution to clarify the definition of hybrid representation and the requirements for a *Faretta* hearing.

---

[172] *See generally* Faretta v. California, 422 U.S. 806 (1975).

[173] *Ayers*, 435 S.W.3d at 629.

[174] *See generally id.* at 625.

[175] *See* United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990); United States v. Campbell, 874 F.2d 838 (1st Cir. 1989); Neal v. Texas, 870 F.2d 312 (5th Cir. 1989); Butler v. State, 767 So. 2d 534 (Fla. Dist. Ct. App. 2000).

[176] *Ayers*, 435 S.W.3d at 628–29.

[177] *Id.*

A. Hybrid Representation

The Kentucky constitution states, "[i]n all criminal prosecutions the accused has the right to be heard by himself *and* counsel."[178] It is this sentence that has been interpreted by case law to mean that the accused in Kentucky has a right to hybrid representation.[179]

The Kentucky legislature could elaborate on the meaning of this, draft a statute that specifically allows for hybrid representation, and then discuss how it should be governed. Other states recognize hybrid representation immediately within their constitutions by stating that the accused has "a right to be heard by himself or counsel, or both."[180] However, because the *Ayers* opinion is written in a way that implies that one individual can act as both counsel and the defendant for the sake of hybrid representation, it is likely that Kentucky would best be served by the addition of the word "both" to the constitution and a definition attached elaborating on what this might mean. The new Kentucky constitutional provision in Section 11 should read in pertinent part: "In all criminal prosecutions the accused has the right to be heard by himself, counsel, or both."

Additionally, a statute should be drafted which would include an elaboration on the definition of hybrid representation. This definition would ensure that when a defendant is engaged in hybrid representation, two parties would be involved at all times. Furthermore, the statute should emphasize that a *Faretta* hearing is required when a defendant is making this limited waiver of rights. The statute should read as follows:

> **Hybrid Representation.** Any accused individual may petition the court and request to be allowed to engage in hybrid representation.
>
> (1) Hybrid representation defined. Hybrid representation occurs when two *separate* individuals, an attorney *and* the accused, *both* participate *together* in aspects of the representation of the accused.
>
> (2) The ability for an accused to engage in hybrid representation will be allowed at the discretion of the judge.
>
> (3) If the accused requests to engage in hybrid representation, a judge *must* hold a *Faretta* hearing and explain to the accused the nature of hybrid

---

[178] KY. CONST. § 11 (emphasis added).

[179] Wake v. Barker, 514 S.W.2d 692, 695–96 (Ky. Ct. App. 1974) ("It is true that Section 11 of the Kentucky Constitution guarantees to a defendant the right to be heard 'by himself and counsel' but in view of the historical background of the constitutional guarantees of the right to counsel we think there is no valid basis for interpreting those words as meaning that the only right guaranteed is to appear with counsel."); Hill v. Commonwealth, 125 S.W.3d 221, 225–26 (Ky. 2004).

[180] TEX. CONST. art. I, § 10; *see also* MISS. CONST. art. III, § 26 ("[A] right to be heard by himself or counsel, or both . . . .").

representation and the limited waiver the accused is making of their rights.

By implementing this statute, the Kentucky state legislature would ensure that hybrid representation only occurs if there are two parties involved: the attorney and the defendant. These two parties would no longer be allowed to be the same individual for the purposes of hybrid representation.

B. Faretta Hearings

In addition to a statutory amendment relating to hybrid representation, the Kentucky legislature must draft a statute that ensures that *Faretta* hearings are required for all accused persons, despite their profession. This would serve to negate the decision made in the *Ayers* case and guarantee that all attorneys are entitled to a *Faretta* hearing. In understanding that attorneys do have more legal knowledge than other individuals, the statute should allow for some judicial discretion, while still ensuring the accused attorney is making a "knowing and intelligent waiver."[181] The language of *Hill v. Commonwealth*[182] is very informative and clearly establishes the standard for *Faretta* hearings in Kentucky. The following statute is largely based on this case:

> ***Faretta* Hearing.** A trial court must hold a *Faretta* hearing when an accused attempts to make an absolute or limited waiver of the right to counsel.[183]
>
> (1) The judge *must* make a finding on the record to ensure in every *Faretta* hearing that the waiver of the accused is:
>
> (a) Voluntary;
> (b) Knowing; *and*
> (c) Intelligent.[184]
>
> (2) The judge *must* warn the accused of the loss of rights associated with the waiver to counsel.[185] It is within the discretion of the judge to determine the level of information that must be given to the accused in order to fully inform them of the extent of the waiver of their rights.
>
> (3) Failure to comply with the previous requirements *will* result in a

---

[181] *See generally* Faretta v. California, 422 U.S. 806 (1975).
[182] 125 S.W.3d 221, 226 (Ky. 2004).
[183] *Id.* at 225–26.
[184] *Id.* at 226 (emphasis added).
[185] *Id.* (emphasis added).

structural error to which harmless error analysis is inapplicable.[186]

If the statute were drafted in this manner, it would guarantee that every accused person would receive a *Faretta* hearing and that every accused person would make a voluntary, knowing, and intelligent waiver of the right to counsel. However, the judge would have discretion as to the amount of information an accused would need to make an accurate waiver of counsel. Therefore, if the accused was an attorney, the judge could go into less detail relating to the rights that he or she is relinquishing, but still ensure that a *Faretta* hearing was conducted and the attorney's constitutional rights were protected. Furthermore, the refusal to allow for a harmless error analysis would force judges to fulfill the requirements of *Faretta* or suffer the consequences of a remanded case.

V. CONCLUSION

The Kentucky Supreme Court case, *Commonwealth v. Ayers*,[187] decided that "experienced criminal trial attorneys" no longer have a right to a *Faretta* hearing.[188] Additionally, the court found that for the sake of hybrid representation, one person can act as both the accused and the attorney.[189] This infringes on the rights of attorneys and incorrectly applies hybrid representation. The Kentucky legislature should draft statutes ensuring that all people are entitled to a *Faretta* hearing and hybrid representation always consists of two individuals.

---

[186] *Id.* at 228–29 (emphasis added).
[187] 435 S.W.3d 625 (Ky. 2013).
[188] *Id.* at 628–29.
[189] *Id.*