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Recent Developments: Harris v. State: Trial Court Cannot Order Public Defender's Office to Appoint Standby Counsel at pro se Defendant's Request

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Harris v. State

In *Harris v. State*, 344 Md. 497, 687 A.2d 970, the Court of Appeals of Maryland reversed the lower court's decision that authorized a trial court to order the Public Defender's Office to appoint standby counsel for a defendant who willingly waived his right to counsel. Although it acknowledged that the trial court retains such power in specific instances, the court of appeals held that this case did not warrant a showing of the requisite factual background to allow such action. In so holding, the court offered a narrow precedent limiting the ability of a defendant to invoke the assistance of counsel.

Defendant Bruce Wayne Koenig ("Koenig") was charged with the murder of his parents, and subsequently faced the death penalty or life in prison without parole. Although informed of the seriousness of the charges against him, Koenig willingly waived his Sixth Amendment right to assistance of counsel due to disagreements with the initial attorney appointed to him by the State. Koenig later requested the assistance of standby counsel to help formulate his defense.

In response to this request, the trial court ordered the Public Defender's Office ("OPD") to appoint standby counsel. The OPD appealed to the court of special appeals, and argued that the trial court lacked the requisite statutory authority to order such action. In response to the inter-

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mediate appellate court's affirmance of the trial court's action, the OPD petitioned for certiorari from the court of appeals.

The court of appeals began its analysis by examining the statutory basis for the OPD's argument. The OPD asserted that the trial court misinterpreted Article 27A of the Maryland Code, which provides for the constitutional guarantees of a defendant's right to counsel. *Harris v. State*, 344 Md. 497, 508, 687 A.2d 970, 975. The court agreed with the underlying message of the statute, and acknowledged the right to representation under the Sixth Amendment. *Id.* at 504, 687 A.2d at 973. The court limited this broad interpretation, however, by citing *Faretta v. State*, 422 U.S. 806 (1975). In *Faretta v. State*, the Supreme Court held that a criminal defendant is entitled to "a choice between representation by counsel and . . . self-representation," but not both. *Harris* at 505, 687 A.2d at 973-74 (quoting *Farretta*, 422 U.S. at 825).

Based on this premise, the

court of appeals rejected the argument that Koenig was entitled to a type of "hybrid" representation. *Id.* at 505, 687 A.2d at 974. For support, the court referred extensively to *Parren v. State*, 309 Md. 260, 523 A.2d 597 (1987). In *Parren*, the court of appeals held that "[t]he [two] rights are mutually exclusive, and the defendant cannot assert both simultaneously." *Harris* at 505, 687 A.2d at 974 (quoting *Parren*, 309 Md. at 264, 523 A.2d at 599). In justifying its position, the court of appeals pointed out that such a hybrid relationship is merely the availability of counsel to provide assistance to the pro se defendant, and is therefore not seen as "representation." *Id.* at 511, 687 A.2d at 977. Since such assistance failed to fall into one of the two mutually exclusive categories of constitutionally protected representation (representation by counsel and representation pro se), the court determined that there was no underlying basis for a hybrid right to exist. *Id.* at 511, 687 A.2d at 977.

Next, the court focused on determining whether Koenig validly waived his constitutional right to representation. *Id.* at 505, 687 A.2d at 974. The court recognized that in certain instances, it is within the discretion of the trial court to appoint standby counsel. *Id.* at 506, 687 A.2d 974. Distinguishing the facts of the instant case from previous decisions that upheld court orders

for standby counsel, the court of appeals concluded that the trial court forced the OPD to serve as standby counsel for a defendant who knowingly and willingly waived his right to counsel. *Id.* at 508, 687 A.2d at 975.

The court referred to the Public Defender Act that outlines the duties of the OPD, and presented in detail several sections of Article 27A, indicating that the OPD is expected to provide the constitutional guarantee of representation, in conjunction with "related necessary services." *Id.* at 508-09, 687 A.2d at 975-76. The OPD argued that when examined in the context of *Parren*, defendant's informed and willing waiver of counsel, within the context of Maryland Rule 4-214, negates any right the defendant would otherwise have to such representation. *Id.* at 510, 687 A.2d at 976. The court concluded that this reasoning retracted the right of the trial court to order the OPD to appoint standby counsel. *Id.* at 511, 687 A.2d at 977.

To ensure the validity of the decision, however, the court examined an instance where representation should be provided by the OPD despite the lack of constitutional entitlement. *Id.* at 511, 687 A.2d at 977. The court acknowledged that a defendant addressing a pretrial procedure often requires the assistance of counsel. *Id.* at 512, 687 A.2d at 977 (citing *Webster v. State*, 299 Md. 581, 474 A.2d 1305 (1984)). Although the Sixth Amendment does not specifically authorize this

service, the Public Defender Act provides for such assistance in order to promote fairness to the defendant in such a critical stage of the proceedings. *Id.* at 511-12, 687 A.2d at 977.

The court of appeals distinguished the instant case from *Webster*, however, by indicating that such representation is expressly provided for the defendant in the Public Defender Act in "all stages of the proceedings." *Id.* at 513, n.11, 687 A.2d at 977. In the instant case, the fact that Koenig knowingly and willingly waived his right to counsel prohibits the OPD from being forced to provide standby assistance. *Id.* at 514, 687 A.2d at 978. Although the State argued that the phrase "related necessary services" should apply to such representation, the court rejected the State's interpretation of the statute and determined that the OPD's contention was indeed correct. *Id.*

Harris v. State presents a hurdle for future pro se defendants. Although a defendant is entitled to self representation, there will always be a moment when assistance would be beneficial to one who is unfamiliar with the technicalities of the law. If a person chooses to assume responsibility for his representation by willingly and knowingly discharging counsel, he essentially relinquishes all rights to court-appointed assistance should the OPD refuse to provide standby assistance. Therefore, the possibility is created that a defendant may retain counsel with whom he

does not completely agree out of fear that potential obstacles could defeat his case completely. This decision narrows the options of defendants in criminal cases, and forces the legal world to carefully scrutinize the phrase "effective assistance of counsel."

