

Magistrate Judge Brian A. Tsuchida

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff

v.

SCHUYLER PYATTE BARBEAU,

Defendant.

NO. MJ15-542JPD

GOVERNMENT’S SUBMISSION
REGARDING *FARETTA*

The United States of America, by and through Annette Hayes, United States Attorney for the Western District of Washington, and Thomas M. Woods, Assistant United States Attorney for said District, respectfully submits this memorandum regarding *Faretta*.

At the initial appearance, Barbeau indicated that he might wish to proceed *pro se*. The Court should inquire at the detention hearing whether Barbeau wishes to proceed with the assistance of counsel or instead represent himself. If he wishes to represent himself, the Court should conduct a *Faretta* inquiry.

While a defendant has the constitutional right to self-representation, the decision to waive the right to counsel is valid only if it is “timely, not for the purposes of delay, unequivocal, and knowing and intelligent.” *United States v. Keen*, 96 F.3d 425, 427

1 (9th Cir. 1996), *amended by* 104 F.3d 1111 (9th Cir. 1997); *Faretta v. California*, 422
2 U.S. 806, 835 (1975). In order to establish that a defendant has knowingly and
3 intelligently waived his right to counsel, the Ninth Circuit requires that the defendant be
4 made aware of the “three elements of self-representation: ‘[I]t must be established that
5 the defendant was ‘aware of the nature of the charges against him, the possible penalties,
6 and the dangers and disadvantages of self-representation.’” *Keen*, 96 F.3d at 427-28
7 (quoting *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994)).

8 As an initial matter, the United States notes that a model inquiry for federal judges
9 is set forth in 1 Bench Book for United States District Judges § 1.02 (5th ed. 2007).
10 While other circuits have required federal judges to follow this meticulous litany, *United*
11 *States v. McDowell*, 814 F.2d 245, 249-52 (6th Cir. 1987), the Ninth Circuit has opted for
12 a more fluid approach, *Keen*, 96 F.3d at 427.

13 Nonetheless, the United States suggests that the Court follow the model inquiry set
14 forth in the Bench Book and supplement the inquiry, if necessary, to ensure that the
15 following topics are covered with the defendant.

16 **A. Defendant’s Waiver of Counsel is Unequivocal**

17 The defendant must unequivocally state on the record that he is aware that he has a
18 constitutional right to be represented by counsel, but that he desires to waive that right
19 and proceed *pro se*.

20 **B. Defendant’s Background and Experience**

- 21 1. The defendant’s educational background.
 - 22 2. The defendant’s work experience.
 - 23 3. The defendant’s training in the law and knowledge of the legal
24 system, including whether he has ever studied law.
 - 25 4. The defendant’s prior experience with the legal system (as party,
26 juror, or witness).
 - 27 5. The defendant’s physical and mental health.
- 28

1 6. Whether any threats or promises have been made by anyone to
2 influence the defendant's decision.

3 **C. The Nature of the Charges**

4 The defendant is charged in the Complaint with unlawful possession of an
5 unregistered firearm, in violation of Title 26, United States Code, Sections 5861(d) and
6 5845(a)(3).

7 The elements of this offense are as follows:

8 First, the defendant knowingly possessed a short-barreled rifle; and

9 Second, that firearm was not registered to the defendant in the National Firearms
10 Registration and Transfer Record.

11 **D. The Complaint**

12 The Court should inquire as to whether the defendant has been provided with a
13 copy of the Complaint, has read the Complaint, and understands the charge contained
14 therein.

15 **E. The Possible Penalties**

16 The maximum statutory penalty for the offense is as follows: imprisonment for up
17 to ten years, a fine of up to \$10,000, a period of supervision following release from
18 prison of up to three years, and a special assessment of one hundred dollars.

19 The defendant should be advised that once released from prison, he will serve a
20 term of supervised release, which should be explained to the defendant.

21 The defendant should be advised that they are advisory Sentencing Guidelines that
22 may have an effect on his sentence if he is found guilty.

23 The defendant should be advised that under the Sentencing Guidelines, parole has
24 been abolished and that the defendant will serve virtually all of his sentence in prison.

25 **F. The Dangers and Disadvantages of Self-Representation**

26 The Ninth Circuit also has provided some guidance as to the areas that the Court
27 should cover in explaining the dangers and disadvantages of self-representation. As the
28

1 Court stated in *United States v. Hayes*, 231 F.3d 1132, 1138 (9th Cir. 2000):

2 We do not intend to set forth what would be a minimum explanation
3 to meet the “dangers and disadvantages” demands of *Faretta*.
4 Having said this, we believe that the necessary explanation need not
5 be lengthy or pedantic; it should not be as complex and rigid as is
6 now required in the taking of a guilty plea. There is no required
7 formula. For example, and for the sole purpose of giving guidance
8 to the district courts, we believe that the following illustrative
9 discussion comports with *Faretta*’s requirements:

10 The court will now tell you about some of the dangers and
11 disadvantages of representing yourself. You will have to abide by
12 the same rules in court as lawyers do. Even if you make mistakes,
13 you will be given no special privileges or benefits, and the judge will
14 not help you. The government is represented by a trained, skilled
15 prosecutor who is experienced in criminal law and court procedures.
16 Unlike the prosecutor you will face in this case, you will be exposed
17 to the dangers and disadvantages of not knowing the complexities of
18 jury selection, what constitutes a permissible opening statement to
19 the jury, what is admissible evidence, what is appropriate direct and
20 cross examination of witnesses, what motions you must make and
21 when to make them during the trial to permit you to make post-trial
22 motions and protect your rights on appeal, and what constitutes
23 appropriate closing argument to the jury.

24 The United States also requests that the Court review the following matters:

- 25 1. The defendant’s familiarity with the Federal Rules of Evidence. The
26 defendant should be advised that the Federal Rules of Evidence will
27 govern what evidence may or may not be introduced at trial and that
28 the defendant must abide by those rules in representing himself.
2. The defendant’s familiarity with the Federal Rules of Criminal
Procedure. The defendant should be advised that these rules govern
the way in which a criminal action is tried in federal court.
3. The defendant should be vigorously warned about the dangers of
self-representation including limited access to investigators, law
books and other legal resources.
4. The defendant should be advised that he must meet the standards of
a practicing attorney in dealing with courtroom procedures and in
conducting himself in the courtroom.

- 1 5. The defendant should be advised that he would be required to
2 prepare jury instructions and he should be warned of the complicated
3 nature of those instructions in a conspiracy, fraud and money
4 laundering case.
- 5 6. The Court should fully advise the defendant of the benefits of being
6 represented by an attorney.
- 7 7. The Court should also question the defendant's ability to act as his
8 own attorney.

9 DATED: December 8, 2015

10 Respectfully submitted,

11 ANNETTE L. HAYES
12 United States Attorney

13 /s/ Thomas M. Woods

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on December 8, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants.

/s/ Salee Porter
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