No. 21-634

In the Supreme Court of the United States

ZACHARIAH BRIAN WRIGHT,
PETITIONER,

v.

STATE OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

REPLY BRIEF FOR THE PETITIONER

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I. Indiana Fails To Blunt Either Split

1. Indiana attempts to explain away the first split as reflecting only the lower court's "case-specific factual inquiries and judgment" in applying a "totality-of-the-circumstances" test. BIO 9-10. That will not do. Petitioner agrees that courts should look to the totality of the circumstances—and they do. But the courts sharply disagree, as petitioner describes, about the legal relevance of a defendant's reasons for seeking to self-represent. The court below held that Wright's invocation, which was clear by the time of his *Faretta* hearing (held nearly two years before trial), became equivocal *only* because of the reason he invoked the right—his dissatisfaction with current counsel. Pet. App. 31a. That reason was not just relevant; it was decisive. Indeed, the court below considered no other circumstances. See *ibid.*

Indiana challenges petitioner's 1-3-15 split on two grounds. First, it claims that three of the twenty-one cited cases do not support it. BIO 9-10. Even if correct, that would mean at least a 1-3-12 split remains—one deep enough to warrant this Court's review. But Indiana misreads all three cases. And, since it presumably chose these three because it considered them strongest, they show how much Indiana must strain.

Indiana's first case, *Tamplin* v. *Muniz*, 894 F.3d 1076 (9th Cir. 2018), does not "merely h[o]ld that trial counsel was ineffective for failing to raise a *Faretta* claim at all." BIO 9. Indeed, that description is nonsensical. The existence of "trial counsel" presupposes either denial of a *Faretta* claim or failure

to invoke one. And the former was true in *Tamplin*. The trial "court denied [Tamplin's] request to represent himself and reappointed [a] public defender." 894 F.3d at 1081. Tamplin's habeas claim was that "his appointed *appellate* counsel was ineffective for failing to raise his *Faretta* claim." *Id.* at 1082 (emphasis added). Despite AEDPA's very deferential standard of review, see 28 U.S.C. § 2254(d)(1), (2), the habeas court of appeals held that the state courts' rejection of Tamplin's request as equivocal *because he preferred counsel he could not afford* was "clearly contrary to *Faretta*." 894 F.3d at 1084.

Indiana's second case fares just as badly. Indiana attacks petitioner's reading of *State* v. *Stallings*, 476 P.3d 905 (N.M. 2020) because "far from illustrating when a court may *reject* self-representation, the court * * * upheld a trial court's decision to *permit* self-representation." BIO 9. That is beside the point. The New Mexico Supreme Court upheld the trial court's decision to allow self-representation even when the defendant preferred unavailable counsel. It held "there is no issue of vagueness or equivocation where, as here, a defendant asserts the right to self-representation as his or her second choice." 476 P.3d at 918. Whether it reached that holding in affirming or reversing the lower court is irrelevant. The holding, not the result, matters. And the holding conflicts with Indiana's rule.

Finally, Indiana challenges another AEDPA case, *Freeman* v. *Pierce*, 878 F.3d 580 (7th Cir. 2017), because it "ha[s] to do with the significance of a

prospective pro se defendant's request for *standby* counsel." BIO 9-10. That description is partly correct. The State did argue, among other reasons, that the defendant's invocation was equivocal because he requested stand-by counsel. The Seventh Circuit quickly rejected that argument—"A request to proceed pro se that is accompanied by a request to appoint stand-by counsel does not make th[e pro-se] request equivocal." 878 F.3d. at 588. It then moved on to the State's next argument: that the defendant's request was equivocal because it "was based on [the defendant's] dissatisfaction with [counsel]," *ibid.* It categorically rejected that *independent* argument too. "Dissatisfaction with counsel," it held, "does not make a self-representation request equivocal[.] *Faretta* forecloses such an argument." *Ibid.* The Seventh Circuit could scarcely have made its conflict with Indiana more explicit.

Indiana next tries a different tack. It argues that petitioner's "remaining cited cases demonstrate nothing but a fact-dependent totality-of-the-circumstances approach." BIO 10. Indiana challenges petitioner's reading of only three of its sixteen remaining cases, BIO 10-11, however, and it misreads all three.

Although *State* v. *Jordan* looked to the totality of the circumstances, it held that the lower "court *improperly* concluded * * * that the defendant's expression of his request as an alternative to the appointment of new counsel constituted vacillation thereby rendering equivocal his assertion of the right to self-representation." 44 A.3d 794, 809 (Conn. 2012)

(emphasis added). That factor, in other words, could not count. In *Buhl* v. *Cooksey*, the Third Circuit expressly rejected Indiana's approach: "[A] defendant's constitutional right of self-representation is not automatically negated by his/her motivation for asserting it," which was "defendant's dissatisfaction with counsel." 233 F.3d 783, 794 (2000). And in *United States* v. *Gonzalez-Arias*, the First Circuit held that defendant's invocation was unequivocal even though (1) he said that "he 'd[id] not want to represent [himself],' and [(2)] he never said * * * that he 'would waive his right to counsel'" because he agreed to discharge his lawyers, with whom he was dissatisfied, after the judge explained they would remain as standby counsel. 946 F.3d 17, 37-38 (2019) (cleaned up). In other words, the defendant's reason for wanting to fire counsel did not bear on even an implied invocation of his right of self-representation. Presumably Indiana picked these three cases because it thought they would best muddy the conflict. But all three strongly support that conflict and Indiana wisely does not challenge any of the other cases, whose support is just as clear.

Throughout its discussion, Indiana suggests that bright-line rules and totality-of-the-circumstance tests are mutually exclusive. That is mistaken. This Court has often held that bright-line rules about the legal relevance of particular circumstances are necessary to guide the larger inquiry. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 812 (1996) (holding that "actual motivations" for a police stop are not part of the reasonableness inquiry under the Fourth Amendment); *Stansbury* v. *California*, 511 U.S. 318,

323 (1994) (holding that the "subjective views harbored by * * * the interrogating officers" are not part of the custody inquiry under *Miranda* v. *Arizona*, 384 U.S. 436 (1966)).

Indiana finally offers its oddest argument: that since "most appellate [courts]" affirm trial courts' *Faretta* determinations, the Indiana Supreme Court's affirmation "is unsurprising" and thus presumably does not warrant review. BIO 11-12. Under this logic, this Court would never review many important types of cases, including those involving the Fourth, Fifth, and Eighth Amendments. But it does review them. Taken to its logical conclusion, moreover, this reasoning would argue against this Court *ever* granting certiorari since the federal courts of appeals overturn relatively few district court decisions.[1] That would leave this Court with precious little to do.

2. Indiana next mounts four arguments against the second question presented. First, it distinguishes *Barnes* v. *State*, 29 So. 3d 1010 (Fla. 2010), and *State* v. *Reddish*, 859 A.2d 1173 (N.J. 2004), as involving standby counsel, which this case does not. BIO 12.

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[1] For the year ending June 30, 2021, for example, the district courts terminated 353,351 cases. U.S. Courts, *Federal Court Management Statistics*, tbl. N/A, https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2021/06/30-1. In that same period, only 29,234 were terminated on the merits in the courts of appeals. *Id*. tbl. B-5, https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/06/30. Of these, 22,320 were affirmed, enforced, or dismissed and only 3,169 were reversed or remanded. *Ibid*. A further 3,602 were terminated through disposition of a certificate of appealability, which largely upholds the district court's judgment. *Ibid*.

That is true but irrelevant. Petitioner is not, *pace* Indiana, "worrie[d] that some state courts 'override the right of self-representation in high penalty cases by sometimes requiring the trial court to appoint standby counsel,'" BIO 12 (selectively quoting Pet. 22). That practice is uncontroversial. Instead, the petition highlighted that "New Jersey and Florida override the right of self-representation in high-penalty cases by sometimes requiring the trial court to appoint standby counsel *who can present mitigating evidence against a defendant's wishes and even take over the defense*." Pet. 22 (emphasis added). The part Indiana omits makes all the difference. When standby counsel override the choices of defendants, they instead act as actual counsel, abridging the defendant's right to self-representation. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984) ("*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if * * * disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel."). New Jersey and Florida have undermined defendants' *Faretta* rights by allowing standby counsel to make tactical decisions and present evidence in critical parts of the trial, contrary to the will of the defendants.

They do so, moreover, because the penalty is serious. As *Barnes* explained:

> We also recognize that the death penalty "is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response

> to a given offense." Appointment of mitigation counsel in this case, where Barnes essentially refused to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty. This was proper in order to ensure that the severe and irrevocable penalty of death, if imposed, would be justified and not be imposed in an arbitrary or capricious manner.

29 So. 3d at 1025 (cleaned up); see *Reddish*, 859 A.2d at 1203-1204 (similar).

Second, Indiana seeks to further distinguish *Barnes* and *Reddish* by arguing that the lower court "did not address the role of standby counsel—rather, it affirmed rejection of self-representation *entirely* because 'Wright equivocated in his decision at trial.'" BIO 13 (quoting Pet. App. 30a) (emphasis added). For starters, the lower court's holding on equivocation was independent of its holding that a defendant's relatively low legal skills and criminal courtroom experience could make his waiver unintelligent in high penalty cases. These represented alternative holdings for affirmance. Next, that Indiana rejected Wright's request for "self-representation *entirely*" makes things worse. New Jersey and Florida curtail defendants' rights in high-penalty cases only in part. They allow defendants to represent themselves in some stages of the trial under some circumstances. Indiana does not.

What they deny retail, Indiana denies wholesale. That does not make Indiana different—only worse.

Third, the State argues that certain cases cited do not "'specifically address' whether the stakes may justify overriding a demand for self-representation." BIO 13 (quoting Pet. 24). Exactly. Those cases are relevant, as the petition explained, because they all hold that a court can *never*—whatever the stakes—"overrid[e] defendants' right to self-representation * * * because a lawyer can better represent the defendant." Pet. 24. Most courts of last resort never factor why a defendant wants to represent himself into their *Faretta* analysis; Indiana, Florida, and New Jersey do when the penalty is high.

Fourth, the State quibbles with petitioner's characterization of another four of the thirty-seven cases it cites as authority for the second split. See Pet. 24-25, nn.9-10. Two, *Torres* v. *United States*, 140 F.3d 392 (2d Cir. 1998), and *State* v. *Taylor*, 781 N.E.2d 72 (Ohio 2002), it argues, are distinguishable because the courts upheld the defendants' right to represent themselves. BIO 13. So true and so irrelevant. Again, the State is confusing the results of the cases with the legal standards they employed. The latter are relevant; the former not.

In *Torres*, the Second Circuit held that a court should "not inquire into the defendant's knowledge of the law, whether she will testify in her own defense, or how or why she will conduct her defense." 140 F.3d at 402. That it ultimately upheld her right to represent herself under that standard makes no difference. Likewise, in *Taylor*, a capital case, the Ohio Supreme

Court upheld the defendant's right to represent himself even though he claimed on appeal that "his decision * * * was not 'a good idea.'" 781 N.E.2d at 81. The court "agree[d]." *Ibid.* But it held his lack of legal skills and experience beside the point even when he was facing the death penalty. "The issue * * * is not whether appellant made a wise decision; rather, it is whether he fully understands and intelligently relinquishes his right." *Ibid.* (citation omitted).

Finch v. *State*, 542 S.W.3d 143 (Ark. 2018), Indiana claims, is inapposite because "the defendant refused to cooperate with mental evaluations and disrupted court proceedings." BIO 13. Again, that is correct but irrelevant. The court held with respect to whether defendant had waived his right to counsel intelligently both that "the circuit court's inquiry included irrelevant concerns, such as appellant's level of education and technical legal knowledge" and that "the court's stated basis for denying the request—'the seriousness of the offenses and the likelihood of [appellant] getting some serious time[] was invalid." 542 S.W.3d at 146. That places it in square conflict with Indiana. That it ultimately affirmed the circuit court's denial of Finch's right to represent himself on the separate grounds (1) "that appellant's request was not unequivocal and [(2)] that the trial court could have concluded that appellant had 'engaged in conduct that would prevent the fair and orderly exposition of the issues," *ibid.*, makes no difference.

The final case, *State* v. *Richards*, 456 N.W.2d 260 (Minn. 1990), Indiana argues, is inapposite because although it held the defendant's invocation to be

intelligent it nowhere indicated that "the trial court improperly relied on the potential [life] sentence." BIO 13-14. Again, true but irrelevant. The penalty did not matter to the Minnesota Supreme Court because a defendant's legal skills and experience *never* matter. As the court put it,

> [t]he trial court also noted that the case was complex, requiring experienced legal counsel, and that defendant "was not competent to conduct the sort of legal defense necessitated by this case." It may well be that a defendant's case can be better handled by an experienced lawyer than by the defendant himself, but that is not the point.

456 N.W.2d at 265. In short, "defendant['s] lack[of] ability to conduct his own defense [does not] invalidate[] a knowing and intelligent waiver." *Id.* at 264-265. Minnesota disagrees categorically with Indiana.

Finally, Indiana argues that the Indiana Supreme Court's discussion of the way high penalties matter is dicta—mere "ruminat[ion]"—because the court "ultimately considered the same four elements of counsel waiver—knowing, intelligent, voluntary, and unequivocal—that other courts consider." BIO 14. The court's discussion, however, hardly represents harmless "ruminat[ion.]" The court denied Wright's right to represent himself on this ground. Pet. App. 31a-35a. It expressly held that courts

> should focus [their] inquiry on [(1)] whether and to what extent the defendant has prior experience with the legal system; [(2)] the scope of the

> defendant's knowledge of criminal law, legal procedures, rules of evidence, and sentencing; and [(3)] whether and to what extent the defendant can articulate and present any possible defenses, including lesser-included offenses and mitigating evidence.

Pet. App. 27a. And it admitted that "these factors may not have led us to the same conclusion in a case with less at stake." Pet. App. 35a. That it considered "the same four elements * * * that other courts consider," BIO 14, moreover, makes no difference. The question is *how* it considered them. It considered intelligence in a way that most courts reject.

II. This Court Should Ignore Indiana's Call To Overrule *Faretta*

Perhaps realizing that its arguments against both splits are specious, Indiana makes a final, desperate Hail Mary appeal. It asks this Court to overrule *Faretta*, just as it did 14 years ago in *Indiana* v. *Edwards*, see Pet. Br. 48, 554 U.S. 164 (2008) (No. 07-208). This Court should deny its request once again.

On the merits, Indiana has warmed over the *Faretta* dissents, zested them with some arguments from its merits brief in *Edwards*, and served them back up to the Court. This unappetizing mix represents nothing more than disagreement with *Faretta* and falls far short of the "special justification" required to overcome *stare decisis*. *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020).

History, moreover, belies Indiana's argument. Although Indiana has decried self-representation as a

"crippling disadvantage imposed by a dictatorial regime," Pet. Br. 52, *Edwards*, No. 07-208, history firmly grounds it. Even the Indiana Supreme Court recognized that "[t]he right of self-representation [is] deeply rooted in our legal system." Pet. App. 9a. It argued instead that changing conditions had disestablished it. *Id.* at 10a ("The historical reasons for recognizing the right to self-representation lack the same force today."). In short, history supports, not contradicts, *Faretta*.

Indiana never stops to think about what trials at the Founding would have looked like without a right to self-representation. They would have been worse than show trials, which typically do permit *formal* representation. With no right to appointed counsel, many defendants would have been unable to mount any defense at all. The prosecutor could argue, but without a lawyer, the defendant could not respond. Such trials, not self-representation, constitute "impos[itions of] a dictatorial regime."

Faretta needs no revisiting. But if this Court wishes to reconsider it, the Court should grant this petition and add a third question presented. Petitioner will happily defend *Faretta*'s important holding.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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