No. 18-238

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,
PETITIONER

v.

LAMONT ANTONIO SAMUEL

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT M. PACHAK
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
DIVISION OF APPELLATE DEFENSE
PO Box 11589
Columbia, SC 29211
(803) 734-1330

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., N.W., Suite 500W
Washington, DC 20004
(202) 639-6500

QUESTION PRESENTED

May a trial judge override a criminal defendant's successful invocation of his constitutional right to self-representation solely because the defendant's and a third-party attorney's accounts of the attorney's involvement in the defendant's representation were misaligned?

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

BRIEF IN OPPOSITION

STATEMENT

A. Constitutional Background

Faretta v. *California* recognized that the Sixth Amendment protects a criminal defendant's right to represent himself. 422 U.S. 806 (1975). It further indicated that, when a criminal defendant invokes this right, the trial judge should make him "aware of the dangers and disadvantages of self-representation, so that the record will establish that '[the defendant] knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). If, after being advised of the risks, the defendant elects his right "knowingly and intelligently," the trial court must respect that decision except in limited circumstances. *Ibid.* (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)).

Faretta identified only two such circumstances. First, the trial court may deny a defendant's "cho[ice]" to exercise his right to self-representation if it is not "clearly and unequivocally" invoked. 422 U.S. at 835. In that case, the court may require the defendant to proceed with counsel. Second, even when the defendant's invocation is clear and unequivocal, the court may override his request and "terminate self-representation [if he] deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46.

B. Procedural Background

1. Trial Court Proceedings

Lamont Samuel was indicted for murder. Pet. App. 4. Before his trial began, Samuel made a *Faretta* motion to invoke his right to self-representation. *Ibid.* The circuit judge then commenced an *ex parte* hearing to discuss the motion. *Ibid*.

During the colloquy, the circuit judge made her view of the situation plain—she believed Samuel was making a mistake and hoped he would reconsider. After stating that Samuel's request "scares me to death," Tr. 25,[1] she flatly told him that "I don't want you to represent yourself," Tr. 28. The judge lauded Samuel's appointed counsel as "expert lawyers," *ibid.*, who had his best interest at heart and advised him that he "would be far better defended by a trained lawyer," Tr. 42. And she "strongly urge[d]" him not to proceed pro se, given that he was "not sufficiently familiar with the law," court procedure, or rules of evidence. Tr. 43-44.

Samuel nevertheless unequivocally invoked his right on at least seven occasions throughout the proceedings. See, *e.g.*, Tr. 43 (replying to the court's question as to whether he would agree to proceed with counsel by saying "No. I would like to represent myself."); see also Tr. 28, 44, 53, 70. He stated that his decision was entirely voluntary and made with knowledge of the attendant risks. Tr. 42-44. At no

[1] All transcript citations are to the May 13-14, 2013 proceedings.

point did the court express any doubt that Samuel had clearly invoked his right to represent himself.

At the conclusion of the *Faretta* colloquy, the circuit judge conceded that Samuel "[met] the standard" to invoke his right and proceed pro se. Tr. 57. She noted that he was "incredibly articulate," Pet. App. 5, "exceptionally bright," *ibid.*, and did not "have a problem that [she was] aware of that [she could] use, in all candor, to keep [him] from representing [himself]," *id.* at 23. Indeed, the judge frankly admitted the "problem" from her point of view—Samuel was "bright enough, [and] the constitution says [he is] entitled to represent [himself]." Tr. 50. After again reiterating that she did not want Samuel to do so, she acknowledged that "I can't violate the law" in pursuit of that end. Tr. 50. Thus, despite her misgivings, the circuit judge announced that she was "inclined" to grant Samuel's request. Pet. App. 25.

The circuit judge did not, however, conclude the inquiry there. She instead requested testimony from an attorney, Carl Grant, Pet. App. 23-25, whom Samuel had mentioned earlier in the colloquy, Tr. 35. In response to her question "[d]o you know anything or anyone that I can have you speak with that might urge you to have a lawyer represent you," Samuel had responded "[n]o, ma'am." Pet. App. 6. He then mentioned that his mother had spoken to an attorney, Mr. Grant, who although "he [would] not [be] representing me" and "not * * * be in the courtroom, present," Samuel could "talk to him [and he would] tell me things or he won't." *Id.* at 6-7. Grant later testified, however, that, aside from several discussions

with Samuel's mother regarding fees for potential representation, he had no relationship with Samuel and "if he's representing himself I would not be available to provide any assistance to him in any capacity." *Id.* at 7-8.

Upon hearing Grant's testimony, the circuit judge denied Samuel's *Faretta* motion. Pet App. 33. From Samuel's and Grant's misaligned accounts of their relationship, the circuit judge found Samuel to have displayed a lack of candor towards the tribunal. Tr. 73-74. She then indicated that Samuel's testimony amounted to a breach of Rule 3.3 of the South Carolina Rules of Professional Conduct, which "places upon attorneys the ethical duty to have candor toward the tribunal." Tr. 74. She made no attempt to warn Samuel of the potential sanctions he might face if he lacked candor during the trial, considered no alternatives to taking away his right to represent himself, and made no findings that his future conduct would likely obstruct the proceedings. She instead "put together 3.3, * * * which requires lawyers to be candid with the court, * * * with the case * * * that says you're not allowed to attempt to manipulate the court[, to hold] there is authority for me to disallow your self-representation." Tr. 75. "The reason I am disallowing your self-representation is because it is impossible for me to trial [*sic*] a case if I do not have candor from those who are making representations to the court." *Ibid.*

Trial proceeded with appointed counsel representing Samuel. Tr. 76. He was found guilty and sentenced to fifty years in prison. Pet. App. 9.

2. Appellate Court Proceedings

Samuel appealed his conviction. Pet. App. 114. The South Carolina Court of Appeals explained that, while a defendant "has a constitutional right to self-representation," that right "is not absolute." *Id.* at 115. A trial court "may refuse" a criminal defendant's right of self-representation, it noted, if the right is "used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Id.* at 116. A judge "may [also] terminate self-representation [if] a defendant * * * deliberately engages in serious and obstructionist misconduct." *Id.* at 115 (quoting *Faretta*, 422 U.S. at 834 n.46). And a trial court may deny the defendant that right if he "is not able and willing to abide by rules of procedure and courtroom protocol." *Id.* at 116 (internal citations omitted).

The court also explained that criminal defendants who exercise their right to self-representation must follow ethical rules binding on attorney conduct. When exercising their right to self-representation, defendants "assume[] the responsibility of acting as * * * officer[s] of the court." Pet. App. 117. Citing South Carolina Rules of Professional Conduct and South Carolina Appellate Court Rules, the court noted that "[t]his responsibility includes displaying candor toward the court." *Ibid.* "As the record supports the trial judge's determination Samuel displayed an unwillingness to act as an officer of the court through his lack of candor, we find the trial judge did not abuse her discretion in denying his request to represent himself." *Id.* at 118.

The South Carolina Supreme Court granted discretionary review, Pet. App. 9, heard oral argument, *id.* at 2, and reversed, *id*. at 17. When a defendant "clearly and unequivocally assert[s] his desire to proceed *pro se*," it held, "the only basis upon which a circuit judge may deny a defendant's *pre-trial* motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." *Id*. at 10-11 (citing *State* v. *Reed*, 503 S.E.2d 747, 750 (S.C. 1998)) (emphasis added).

The South Carolina Supreme Court then explained how the lower court "went beyond the scope" of the permitted inquiry. Pet. App. 14. Although "it was within the circuit judge's authority to summon Grant," *ibid*., it held, "whether Grant would be available to advise or coach Samuel throughout the trial relates to [Samuel's] competence to represent himself" and "is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation." *Ibid*. To the South Carolina Supreme Court what happened was "clear": "[T]he circuit judge, with the best of intentions, was so concerned with Samuel proceeding *pro se* that she * * * use[d] Grant's testimony as the basis to prevent Samuel from invoking his constitutional right." *Ibid*.

The court next rejected "the circuit judge's reliance on Rule 3.3 RPC." Pet. App. 15. The court noted that not only had it "never held that a criminal defendant acting *pro se* must comply with the rules of professional conduct, but [it was] unaware of any jurisdiction [that had] explicitly required criminal

defendants to comply with ethical rules governing lawyers." *Ibid.* The court remarked, in fact, that its precedent "suggest[s], albeit in *dicta*, that the opposite may be true." *Ibid.* (citing *State* v. *Barnes*, 774 S.E.2d 454, 455 n.1 (S.C. 2015)).

Finally, although the court agreed with both courts below that even if a defendant satisfies the *Faretta* inquiry a trial judge may "consider [his] attempted manipulation of the proceedings" to "preclude him from exercising his right to self-representation," it "discern[ed] no attempt by Samuel to disrupt or manipulate the process here." Pet. App. 16-17. A court may override a defendant's successful invocation on this basis, it held, only when "the defendant was clearly attempting * * * to make impermissible arguments or raise invalid defenses at trial—in effect, to 'beat the system'—rather than to waive the benefits of counsel." *Id*. at 16. "The only instance of manipulation the circuit judge cited[,]the disparate testimony from Samuel and Grant regarding their relationship[,] even if * * * misleading[,] is not enough to preclude him from exercising his right to self-representation." *Id*. at 16-17 (citing *Barnes*, 774 S.E.2d at 455 n.1).

The court made clear that its holding was narrow. "[W]e do not," it noted, "strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them." Pet. App. 52 n.4. "[O]nce a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right." *Ibid.* In particular, it noted that "[o]ur holding does not require trial courts to suffer 'mischief' or disruptive behavior in the courtroom with no

recourse, but recognizes a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case." *Ibid.*

The dissent disagreed for two reasons. First, it preferred to "construe the *Faretta* framework more broadly." Pet. App. 18. Where a "knowing[], intelligent[], and voluntar[y] assert[ion] [of the] right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice," it would defer to the trial court's discretion to deny the request. *Ibid.* This deference, it thought, would prevent "those who seek to exploit the right to self-representation for manipulative or disruptive ends," *ibid.*, from creating "mischief in the trial-courts," *id.* at 19.

Second, the dissent would have held that Samuel's "manipulat[ion]" sufficiently "preclude[d]" him from exercising his right to self-representation. Pet. App. 45. Samuel's "untruthful[ness] about his relationship with Mr. Grant," *id.* at 41, together with some of his other pre-trial conduct, it believed, supported the conclusion that he "would continue to be a disruptive force during the trial," *id.* at 48.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict

Petitioner argues that the South Carolina Supreme Court's holding conflicts with those of the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, along with those of the California and

Minnesota Supreme Courts. Pet. 11-12, 18 n.3. That is incorrect. Many of the cases petitioner cites involve *invocation* of the right to self-representation, not judicial override of a properly asserted right. But even the override cases in these other jurisdictions are consistent with *Samuel*. In short, none of these courts have indicated that they would handle a case involving *Samuel*'s unique facts any differently.

A. Petitioner's Many Cases Involving The Failure To Properly Invoke The Right To Self-Representation Cannot Establish A Conflict

As *Faretta* itself indicated, overriding a clear request to represent oneself is not the same as concluding that a defendant never actually invoked the right. See 422 U.S. at 834 n.46 (describing circumstances when "the trial judge may terminate self-representation" *after* defendant has invoked the right). *Samuel* involves the former, not the latter. Samuel "clearly expressed his understanding of the nature of the charge against him * * * and continuously asked to represent himself." Pet. App. 13. The trial judge never questioned the clarity or consistency with which he asserted the right to self-representation. See *id.* at 22-35. Whether Samuel properly invoked his right is not at issue.

Yet nearly half of the cases petitioner cites as evidence of a conflict concern invocation, not override, of the right to self-representation. See *United States* v. *Bush*, 404 F.3d 263, 268-271 (4th Cir. 2005) (holding that the defendant did not clearly and unequivocally assert the right to self-representation where the

defendant responded in the negative when the judge asked him if he was prepared to go to trial); *United States* v. *Long*, 597 F.3d 720, 723-725 (5th Cir. 2010) (holding that the defendant did not clearly and unequivocally invoke the right to self-representation when he fired his attorney but then responded "No, sir" when asked whether he wished to represent himself); *United States* v. *Pryor*, 842 F.3d 441, 449 (6th Cir. 2016) (holding that defendant's statement "'I will be myself' * * * can hardly be called a clear assertion of the right to self-representation, especially given [the defendant's] failure to confirm that meaning of his statement upon repeated inquiries by the judge"); *Raulerson* v. *Wainwright*, 732 F.2d 803, 808 (11th Cir. 1984) (holding that the defendant did not clearly and unequivocally invoke the right to self-representation where he abruptly walked out of the courtroom during his *Faretta* hearing).[2] These cases are simply inapposite.

B. Petitioner's Cases That Do Involve Judicial Override Are Very Different From *Samuel* And Do Not Establish A Conflict

The override cases that petitioner does cite do not establish a conflict between those jurisdictions and South Carolina. The overrides permitted in these cases depended on facts very different from those in *Samuel*.

Petitioner points to *United States* v. *Glover*, 715 Fed. Appx. 253 (4th Cir. 2017), as evidence of a conflict

---

[2] Since *Raulerson* is the only Eleventh Circuit case petitioner cites, any conflict with that circuit disappears completely.

with the Fourth Circuit. Pet. 16. As that opinion itself announced, however, "[u]npublished opinions are not binding precedent in this circuit." 715 Fed. Appx. at 254. Even if apposite, they can establish no law binding the same court going forward, let alone create a conflict with a different court.

The facts, moreover, are very different from those in *Samuel*. In *Glover*, the district court revoked the defendants' right to self-representation because they had filed numerous frivolous motions asserting that they were "sovereign citizens" and "refused to engage in any meaningful discussion with the district court during multiple pretrial conferences." 715 Fed. Appx. at 255. They also "denied that they were defendants in the case, asserted that they were 'idiot[s],' and refused to review discovery provided by the government." *Ibid*. Despite "many, measured [court] admonitions, the defendants expressed no intent to alter their abusive behavior [and so] the district court appointed counsel to represent them for trial." *Ibid*. And "[e]ven after trial began * * * the defendants continued their disruptive conduct by requesting that their counsel be removed because counsel declined to advance frivolous positions." *Id*. at 255-256.

The Fourth Circuit held that the defendants' "*obstructionist* behavior would have rendered it *impossible* for the district court to conduct the trial." *Glover*, 715 Fed. Appx. at 256 (emphasis added). Samuel's statement about his relationship to Mr. Grant had no such effect. See Pet. App. 16. The South Carolina Supreme Court, moreover, understood itself to be following Fourth Circuit law, not contradicting it.

To support its holding that a court can override a defendant's right to self-representation when the "court has found a defendant to be manipulative [or] the defendant was clearly attempting to dispense with counsel in order to make impermissible arguments or raise invalid defenses at trial—in effect, [the defendant is trying] to 'beat the system'—rather than to waive the benefits of counsel," it cited leading, *published* Fourth Circuit case law. *Ibid.* (citing *United States* v. *Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000)).

Petitioner's one Fifth Circuit override case, which it merely cites without discussion, see Pet. 16-17, is similarly inapposite. In *United States* v. *Weast*, the district court revoked the defendant's right to self-representation after the defendant's "bizarre and disruptive" behavior during pretrial hearings. 811 F.3d 743, 750 (2016). According to the court of appeals,

> after Weast repeatedly disrupted pretrial hearings, the district court entered a lengthy and detailed order detailing his obstreperous conduct up to that point. The court explained that Weast consistently refused to answer basic questions (e.g., what his name was and whether he was pleading guilty or not guilty), interrupted the court *ad nauseam*, and "barraged the court with bizarre filings." His behavior showed no sign of abating over time, and he ignored numerous entreaties from the bench to change tack. The court concluded that Weast was pursuing "a deliberate and calculated defense strategy to so disrupt the proceedings that they cannot go forward in a meaningful way," and

> determined that absent a change in behavior, he could not be allowed to represent himself. [But] no such change occurred between the time the order was entered and the time of trial. Weast filed more nonsensical motions, and was, if anything, more disruptive than before.

Id. at 748-749. This behavior is far different from Samuel's single misstatement.

Petitioner's single override case from the Sixth Circuit, *United States* v. *Powell*, 847 F.3d 760 (2017), also creates no conflict. *Powell* overrode the defendant's right to self-representation on a very different ground: that the defendant was simply "engaged in a ploy to avoid trial at the last minute." *Id*. at 776. The district court "made explicit its finding that Powell's assertion of the right to self-representation 'was not made in good faith but was intended as a tactic to delay trial,'" *ibid*., and the Sixth Circuit agreed, *id*. at 777. In *Samuel*, by contrast, the trial court expressly found that the defendant was *not* "attempting to delay * * * the proceedings." Pet. App. 32-33 ("I do not believe that you are trying to delay the proceedings."). In short, nothing in *Powell* bears on whether a court can override a defendant's right to self-representation when he misstates his relationship to an attorney.[3]

---

[3] The same is true of the Tenth Circuit case petitioner cites in support of a conflict. In *United States* v. *Mackovich*, the court made clear that override was appropriate because "the request [for self-representation] was made to delay the trial." 209 F.3d 1227, 1238 (2000). *Mackovich* does not concern override on grounds of bad behavior.

The Sixth Circuit, in fact, would agree that the trial court's override of Samuel's right to self-representation was error for an additional reason. It holds that courts cannot override the right on grounds of bad behavior without first warning the defendant. *Pryor*, 842 F.3d at 450 ("[N]o action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior.") (citation omitted). Because Samuel was never warned that, if he continued to lack candor, his request to proceed pro se would be overruled, the Sixth Circuit would consider the override in his case doubly improper.

The Seventh Circuit authority on which petitioner relies, *United States* v. *Brock*, 159 F.3d 1077 (1998), similarly presents no conflict. In *Brock*, the Seventh Circuit considered whether a defendant's persistent refusal to "cooperate in any way with the proceedings," coupled with numerous instances of outrageous conduct resulting in contempt citations, justified the district court's decision to override his right to self-representation. *Id.* at 1079-1081. The Seventh Circuit concluded that "when a defendant's *obstreperous* behavior is so disruptive that the trial *cannot* move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel." *Id.* at 1079 (emphasis added). In *Samuel*, by contrast, the defendant did not behave "in a manner so disorderly, disruptive, and disrespectful of the court that his trial [could not] be carried on." *Ibid.* (quoting *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970)). *Brock*

agreed, moreover, with the Sixth Circuit in *Pryor* that counsel should not be imposed on an unwilling defendant unless he persists in disruptive conduct after being warned by the judge. *Ibid.* For this additional reason, the Seventh Circuit too would hold the override in Samuel's case improper.

Petitioner's Eighth Circuit case fares no better. In *United States* v. *Mosley*, the trial court overrode defendant's right to represent himself after he filed two incoherent pleadings, prompting a competency hearing during which he refused to answer questions. 607 F.3d 555, 557 (2010). The Eighth Circuit held that "Mosley's obstreperous conduct provided sufficient grounds for the district court to terminate and disallow Mosley's self-representation." *Id.* at 559. Not only did his "behavior interfere[] with pretrial proceedings and delay[] the trial" but "there was good cause to believe that [he] would continue to disrupt the proceedings." *Ibid.* Samuel's misstatement, by contrast, was hardly obstreperous and implicated none of these other concerns.

Petitioner also claims, in a footnote, that *Samuel* conflicts with decisions of the California Supreme Court. Pet. 18 n.3. But neither case petitioner cites shows any tension at all. In *People* v. *Carson*, the defendant improperly received and kept discovery materials including witness contact information, and "attempt[ed] to suborn perjury, fabricate an alibi, and possibly intimidate a prosecution witness." 104 P.3d 837, 843 (2005). Despite the gravity of the defendant's misbehavior, the California Supreme Court remanded for a hearing "to determine whether defendant's * * *

misconduct seriously threatened the core integrity of the trial." *Id.* at 844. Samuel's "lack [of] candor," Pet. App. 33, is far less serious. The *Carson* court would have rejected judicial override of Samuel's right for two further reasons. As the opinion makes clear, the trial court must consider both "the availability and suitability of alternative sanctions," like contempt and perjury, and "whether the defendant has been warned that particular misconduct will result in termination." 104 P.3d at 841. Neither happened here.

Petitioner's other California case, *People* v. *Williams*, 315 P.3d 1 (2013), which petitioner discusses in a single sentence in the same footnote, Pet. 18 n.3, poses no conflict, as petitioner's own discussion of it reveals. Petitioner states that "the Court concluded that the defendant's right to self-representation was not violated since '[t]he trial court did not abuse its discretion in finding that defendant had engaged in "delay tactics" in the course of his self-representation.'" *Ibid.* That description, while accurate, undercuts the relevance of the case's holding. The trial judge below specifically found the opposite: "I do not believe that you are trying to delay the proceedings." Pet. App. 32-33.

Finally, petitioner suggests enigmatically, in a one-sentence "Cf." citation sentence at the end of the same footnote, that the decision below conflicts with a decision of the Minnesota Supreme Court. See Pet. 18 n.3. (citing *State* v. *Worthy*, 583 N.W.2d 270 (Minn. 1998)). That is mistaken. For starters, *Worthy* does not even concern override of the right to self-representation, but rather waiver of the right to

counsel. In *Worthy*, the defendants fired their court-appointed attorneys on the first morning of trial after warnings from the court that they would have to proceed pro se. 583 N.W.2d at 276. Whether a defendant has waived the right to counsel has no bearing on the standard for judicially overriding a defendant's right to self-representation. Second, the dicta from *Worthy* that petitioner quotes, "trial courts may have the authority in some cases to require manipulative defendants to accept legal representation," Pet. 18 n.3 (citation omitted), merely restates similar language from *Faretta*, see 422 U.S at 834 n.46 ("the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"), language that the court below agreed with, see Pet. App. 52 n.4 ("a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case"). There is no disagreement here.

* * *

In short, petitioner puts forth no evidence of a conflict. The cases it points to are either inapposite or concern much more serious misconduct. Many of them, particularly those requiring warnings, consideration of the adequacy of alternative remedies, or express findings, in fact, offer additional reasons for why those allegedly conflicting jurisdictions would have decided the case below the same way.

II. The Decision Below Was Correct

A. Petitioner's Fears Of A "Right To Lie" Are Unfounded

Petitioner sees quite the calamity in the South Carolina Supreme Court's decision. The State's core claim is that "the decision * * * grants a defendant a legally unsupportable right to lie under oath," Pet. 26 (internal quotations omitted), "an unprecedented and constitutionally indefensible Sixth Amendment 'right' for criminal defendants to testify falsely," Pet. 23. See also Pet. 3, 21, 22. Hardly. The decision concerns only whether Samuel had properly invoked his right to self-representation and whether judicial override of that invocation was appropriate. Pet. App. 17 ("[W]e find Samuel made a knowing, intelligent and voluntary request to proceed *pro se* * * * and he should have been given the opportunity to represent himself.").

This Court has, moreover, repeatedly rejected the notion of a "right to lie." See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 180 (1977) ("If the citizen answers the question, the answer must be truthful."); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911) (no "license to commit perjury"). The South Carolina Supreme Court's decision does not depart from this well-established rule.

Bizarrely, petitioner seems to recognize this elsewhere in its argument. The State asserts that "if an accused does testify falsely, the trial court * * * [has] recourse to deal with his perjury." Pet. 22. This is undoubtedly true. The South Carolina Supreme Court's holding does not prevent a trial judge from

sanctioning untruthful defendants. Petitioner can also take comfort in the multiple state and federal perjury and obstruction statutes that criminalize lies before a judge. See S.C. Code Ann. § 16-9-10(A)(1) ("It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath."); see also 18 U.S.C. §§ 1001, 1503, 1621, 1623. Or petitioner might find solace in judges' well-recognized ability to immediately initiate criminal contempt proceedings for "clear and open willful disregard for the authority of the court" or "any act calculated to embarrass, hinder or obstruct the court in the administration of justice." John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice* § 33.1 (3d ed. 2017); see also 7A Francis M. Dougherty & Robert B. McKinney, *Federal Procedure, Lawyer's Edition* §§ 17.1, 17.5 (2018). These time-tested responses to perjury negate any right to lie while preserving properly invoked constitutional rights.

B. The Trial Court's Override Of Samuel's Right To Represent Himself Was Unjustified

Faretta recognized only two circumstances where a judge can refuse a defendant's request to represent himself. First, a defendant may not represent himself if he did not properly invoke his right. See *Faretta* v. *California*, 422 U.S. 806, 835 (1975) ("[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits [of the right to counsel].") (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). The defendant's invocation must be clear and unequivocal. *Ibid.* Second, a judge

may override a defendant's right to self-representation, after the right is invoked, if the defendant engages in extremely disruptive conduct. *Id*. at 834 n.46 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.").

This case does not concern proper invocation. The record shows Samuel unequivocally asserted the right. Pet. App. 4, 6. The trial court expressly acknowledged that Samuel was "bright enough, educated enough . . . [and did not] have a problem * * * that [the judge could] use to keep [him] from representing [him]self." *Id*. at 7. The only question is whether Samuel's behavior justified judicial override of his right to represent himself.

Judicial override is appropriate only in extreme circumstances. In *Faretta*, this Court held that "the trial judge may terminate self-representation by a defendant who deliberately engages in *serious* and *obstructionist* misconduct." 422 U.S. at 834 n.46 (emphasis added). To illustrate how egregious the misbehavior must be, it cited *Illinois* v. *Allen*, 397 U.S. 337 (1970), see *Faretta*, 422 U.S. at 834-835 n.46 (citing *Allen*), in which the defendant had repeatedly threatened and verbally abused the trial judge and refused to comply with commands from the court, *Allen*, 397 U.S. at 338-40 (quoting defendant saying to the judge "When I go out for lunchtime, you're going to be the corpse here."). In contrast, Samuel never disrupted the proceedings and did not disrespect the judge or any officers of the court. His conduct was a far cry from the "serious and obstructionist

misconduct" that can justify a judicial override of this constitutional right.

Faretta condemns the trial court's override for another, independent reason. It indicated that override is appropriate only in cases of "deliberate disruption," 422 U.S. at 834 n.46, and the trial court never found that Samuel had acted "deliberate[ly]."

C. The Trial Court Also Violated The Constitutionally Required Procedures That Safeguard The Right

"No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984). To protect trial rights, this Court allows override only after the trial court (1) warns the defendant of the consequences of his behavior, (2) considers less drastic alternatives, and (3) makes express findings that the defendant's misbehavior warrants override and that less drastic alternatives are inadequate. The trial court violated all three of these required procedural protections.

In *Illinois* v. *Allen*, the very case cited by *Faretta*, this Court held "that a defendant can lose his right to be present at trial if, *after he has been warned* by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on [disrupting the court]." *Allen*, 397 U.S. at 343 (emphasis added). Lower courts and the Federal Rules of Criminal Procedure, moreover, recognize *Allen* as "stand[ing] for the proposition that a trial court must warn a defendant of the possible consequences of continued misbehavior" before depriving him of his

rights. *Gray* v. *Moore*, 520 F.3d 616, 621-622 (6th Cir. 2008); see also *United States* v. *Gillenwater*, 717 F.3d 1070, 1082 (9th Cir. 2013) (holding that *Allen* requires "the court * * * to warn a defendant of the consequences of his disruptive behavior before" imposing penalties); Fed. R. Crim. P. 43(c)(1)(C) (allowing the court to override a defendant's right to be present at trial "when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom").

Samuel received no warnings. He was not "fully and fairly informed that his conduct [was] wrong and intolerable, [nor was he] warned of the possible consequence of continued misbehavior," *Allen*, 397 U.S. at 350 (Brennan, J., concurring), before the trial court overrode his right to represent himself. The trial judge simply took his right away after stating that "I do not believe what you are telling me [about your relationship with Mr. Grant] is accurate," Tr. 74, and citing a state bar rule intended specifically to regulate attorneys, *ibid.*

Illinois v. *Allen* also made clear that courts should not routinely terminate defendants' trial rights, even after a warning. Recognizing that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations," 397 U.S. at 343, the Court held that a trial court should consider alternative remedies for a defendant's misbehavior and choose the least restrictive one, *id.* at 344-346 (rejecting alternative remedies available as either

unnecessarily restrictive or inadequate); cf. *Riggins* v. *Nevada* 504 U.S. 127, 135 (1992) (holding that courts need to consider "less intrusive alternatives" before forcing a defendant to consume antipsychotic medication at trial).

In Samuel's case, the trial court considered no alternatives. The trial judge never discussed the suitability of a possible perjury prosecution or contempt proceedings, let alone the appointment of standby counsel who could step in if Samuel's perceived misconduct continued. The court simply reached for the most draconian remedy available: completely overriding Samuel's constitutional right.

To ensure that less drastic alternatives are properly considered, this Court has imposed a final procedural requirement: that trial courts make express findings that no less intrusive alternatives would work. In *Riggins*, for example, this Court held both that the lack of findings about the necessity of overriding a defendant's trial right itself violated that right, 504 U.S. at 129 ("Because the Nevada courts failed to make findings sufficient to support forced administration of [an antipsychotic] drug, we reverse."), and that appropriate findings would have justified override, *id*. at 135 ("[I]f the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others," the State "certainly would have satisfied due process."). The lack of findings made all the difference. Cf. *Waller* v. *Georgia*,

467 U.S. 39, 48 (1984) (for a court to close a suppression hearing "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it *must make findings adequate to support the closure*") (emphasis added).

In the present case, the trial judge failed to make any findings that Samuel's "lack [of] candor" was likely to obstruct future proceedings and, if so, that alternative remedies like the threat of perjury or contempt proceedings or using standby counsel would not check it. Pet. App. 33. She simply imposed the most intrusive "fix": taking away his right to represent himself.

III. This Case Is A Poor Vehicle To Address The Question Presented

Even if the Court wished to address the question presented, this case presents a poor opportunity to do so. For starters, the State itself believes that South Carolina Supreme Court case law on the issue "cannot be reconciled" and "give[s] trial judges two separate and distinct paths when conducting a *Faretta* hearing." Pet. App. 67. Contradictory opinions from the same court cannot establish a conflict with other courts, particularly when, as here, petitioner maintains that one of the two cases involved in the confusion supports the otherwise unanimous rule. See Pet. App. 60-68 (discussing *City of Columbia* v. *Assa'ad-Faltas*, 800 S.E.2d 782 (S.C. 2017) (per curiam)). The State is effectively asking this Court to resolve what it

views as a conflict between two decisions of its own supreme court. But "[i]t is primarily the task of [that court] to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). As the second Justice Harlan noted, "contrary decisions * * * of the same [c]ourt * * * will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the [c]ourt * * * itself." John M. Harlan II, *Manning the Dikes*, 13 Rec. Ass'n B. N.Y. City 541, 552 (1958); see also Eugene Gressman et al., *Supreme Court Practice* 253 (9th ed. 2007) ("[A] conflict between decisions rendered by * * * the same court * * * is not a sufficient basis for granting a writ of certiorari."). At the least, this Court should wait until petitioner believes the South Carolina Supreme Court knows its own mind.

Second, the issue is completely fact-bound. The South Carolina Supreme Court expressly agreed with the legal standard other courts (and even the dissent) apply in these cases. It held that

> once a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right for any of the reasons for which the dissent expresses concern. Our holding does not require trial courts to suffer "mischief" or disruptive behavior in the courtroom with no recourse, but recognizes a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case.

Pet. App. 52 n.4 (internal citation omitted). But the court "discern[ed] no attempt by Samuel to disrupt or manipulate the process here." *Id*. at 16. "The only instance of manipulation the circuit judge cited," the supreme court noted, "was the disparate testimony from Samuel and Grant regarding their relationship," which, it found, "is not enough to preclude him from exercising his right to self-representation." *Id*. at 16-17. The question presented is thus not a legal one. It concerns only whether under the unique facts of this case the agreed-upon legal standard is met. This is, moreover, "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity," *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984). As this Court's own rules note, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Third, if this Court takes up the issue of how much and what types of misconduct constitute sufficiently serious obstruction and manipulation to justify overriding a defendant's right to represent himself, it should do so in a case where the right's procedural requirements have been followed. The type and degree of misconduct required depend in large part on the particular warnings given, the alternative mechanisms available to curb the particular misconduct, and the findings made by the trial court about why in light of these factors it applied the most extreme remedy available: override. In this case, the Court would be ruling in a vacuum.

Fourth, if on remand the defendant does obstruct the proceedings as the State predicts, the trial court can follow the lead of the South Carolina Supreme Court and override his right of self-representation after issuing proper warnings, considering alternatives, and making appropriate findings to justify its decision. After review in state court, if the State still believes there is a conflict and is unhappy with the result achieved there, it can seek review before this Court on a record better suited for addressing the issue.

Fifth, "in many instances," this Court has recognized that "periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Through percolation, different courts can "serve as laboratories." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari). This allows "further consideration of the substantive and procedural ramifications of the problem by other courts [and] enable[s this Court] to deal with the issue more wisely at a later date." *Id*. at 962. Further percolation is particularly appropriate here, where the question is one of fact, not law. Until more courts weigh in on how override properly applies in diverse factual circumstances, this Court cannot make a rule in full knowledge of the different situations it may need to be applied to.

Sixth, the infrequency with which this issue arises detracts from any urgency to decide it without a more

suitable vehicle. According to the State, this case is about deception. See Pet. 2-3. That is a sharp contrast from the aggressive and threatening conduct with which courts generally grapple in Sixth Amendment override cases. See, *e.g.*, *United States* v. *Jennings*, 855 F. Supp. 1427, 1433 (M.D. Pa. 1994) (holding defendant lost his right to counsel after he made "threats to cut the throat of former counsel and 'drink his blood,' to 'slaughter' corrections officers, and to murder the Assistant United States Attorney"). Very few courts have spoken to terminating the right to proceed *pro se* due to deception because it simply does not often occur.

Most defendants do not choose, moreover, to proceed pro se in felony cases to begin with. A 2000 study revealed that 0.4 percent of defendants in the 75 largest counties represented themselves in felony cases at the county level, and only 0.3 percent did so in the federal district courts. Caroline Wolf Harlow, U.S. Dep't of Justice, Off. of Justice Programs, *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases* 1 (2000), https://tinyurl.com/ya2j7qzl. And in 2010, only 29 percent of 171 state court judges surveyed reported that they had noticed an increase since then. Linda Klein, ABA Coal. for Justice, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* 8 (July 2010), https://tinyurl.com/y74pr66w. The issue presented is one that occurs in only a small fraction of an already very small pool of criminal cases.

In those very rare instances where the issue has arisen, moreover, courts have seldom found that

deception greatly mattered. In *United States* v. *Smith*, the district court found that the *pro se* defendant was "dishonest" and lied to the court regarding why he was late to a pretrial conference. 830 F.3d 803, 807 (8th Cir. 2016). The Eighth Circuit had this to say: "Clearly, this was an annoying mistake, one that wasted the court's time * * *. But Smith apologized for his mistake [and] * * * he was polite and articulate" in doing so. *Id.* at 811. No further discussion was necessary. See *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT M. PACHAK
SOUTH CAROLINA
COMMISSION ON
INDIGENT DEFENSE
DIVISION OF APPELLATE
DEFENSE
PO Box 11589
Columbia, SC 29211
(803) 734-1330

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave.,
N.W., Suite 500W
Washington, DC 20004
(202) 639-6500

NOVEMBER 2018