No. 18-697

IN THE

Supreme Court of the United States

TONY VON CARRUTHERS,

Petitioner,

v.

TONY MAYS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statute

REPLY

Respondent does not deny that petitioner's Sixth Amendment right to counsel was violated when he was forced to represent himself for the entirety of his capital trial and sentencing, against his will. Nor does respondent dispute that the state and federal courts, including several federal circuit courts of appeals, are split on whether and when criminal defendants may be sanctioned for misbehavior by stripping them of their constitutional right to counsel. The courts themselves, as well as treatises and scholarly works, have recognized the rampant confusion over this issue in the lower courts. Pet. 12. This is reason enough to grant plenary review of the question presented. Nor could the stakes be higher—respondent does not dispute that absent review by this Court, petitioner will be the first inmate to be executed in nearly a century after being forced to represent himself in a capital trial.

Instead, respondent's sole argument is that this case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and that other courts agree that sanctioning a recalcitrant capital defendant with denial of the right to counsel is not an unreasonable application of this Court's precedents. But the precedents respondent identifies do nothing to resolve the circuit split, because each case comes from a circuit that does not disagree with the underlying premise that there are some circumstances in which a criminal defendant can involuntarily forfeit his right to counsel. In contrast, it is clear that the courts that forbid this sanction derive this rule from this Court's precedents requiring—quite unambiguously—that the right to

counsel be knowingly *and voluntarily* waived. Nothing suggests that these courts would permit a state court to sanction a defendant with involuntary deprivation of the right to counsel, in an AEDPA posture or otherwise. And, contrary to respondent's (sole) argument—it would be wrong to do so: It clearly *is* an unreasonable application of this Court's precedents to hold that a criminal defendant can be forced to represent himself as a sanction for misconduct. This Court can easily so hold, and thereby resolve the evident conflict among lower courts as to whether and when such a sanction is permissible.

I. This Is An Ideal Vehicle To Resolve The Important Question Presented.

1. The State does not contest the deep split in authority, highlighted in detail by the petition. Pet. 12-19. There is a widely recognized split among courts of final review on whether and when a criminal defendant may be forced against his will to represent himself as a sanction for bad behavior. Specifically, there is a head-on conflict between at least the Fourth Circuit and Colorado Supreme Court on the one hand—which hold that a criminal defendant can never be forced to represent himself involuntarily—and the Tennessee Supreme Court and Third and Eleventh Circuits on the other—which hold the opposite. And even among courts that allow involuntarily forfeiture of counsel, there is widespread disagreement on the procedures required before a trial court may use the sanction. Some courts require a colloquy pursuant to *Faretta v. California*, 422 U.S. 806 (1975), notice and hearing on whether to apply the sanction, and even that a defendant have separate counsel to represent his interests at such forfeiture hearing. Others require none of these

protections, and then there are those that fall everywhere in between. Respondent does not dispute any of this.

Nor does respondent contest that, in practice, the vague standards among these courts has led to inconsistent and unpredictable results incompatible with the orderly administration of justice. As exhaustively set forth in the petition, courts sometimes sanction criminal defendants with involuntary loss of trial counsel for threats and violence, and sometimes they do not; courts sometimes permit a defendant to have multiple court-appointed attorneys, and sometimes they do not; and they sometimes limit the sanction to proceedings other than trial, and sometimes they do not. Pet. 19-24. This inconsistency is inappropriate in the context of the criminal law—particularly when it comes to a fundamental constitutional right enshrined in the text of the Sixth Amendment, and particularly when it comes to the regular and predictable administration of capital punishment at stake in this case.

Again, respondent does not disagree with any of this. There is thus no apparent dispute that the petition presents a mature split on a vitally important issue with multiple, reasoned decisions on all sides that is ideally suited for this Court's immediate resolution.

Indeed, respondent does not even claim that petitioner is incorrect on the merits, nor dispute the importance of the issue. This case raises the possibility of executing an indigent inmate who was unconstitutionally forced to represent himself at his capital trial and sentencing. For the reasons set forth in the petition, Pet. 24-30, the Tennessee trial court violated petitioner's Sixth Amendment right to counsel when it forced him to represent himself involuntarily, without

at the very least giving him the warnings required by this Court in *Faretta*. This Court has never permitted anything but a knowing, intelligent, and voluntary waiver of the Sixth Amendment right to counsel. And this makes perfect sense—the text of the Sixth Amendment makes plain that the "Assistance of Counsel" is a defendant's right "[i]n *all* criminal prosecutions," not "*some* criminal prosecutions" or "criminal prosecutions in which you comport yourself well" or the like. U.S. Const. amend. VI (emphasis added).

2. Instead, respondent makes only one argument: the Tennessee decision was not an unreasonable application of federal law under AEDPA. Petitioner addresses why that is wrong in Part II below. Nonetheless, even taking respondent's argument at face value, it would not justify denying certiorari here. The Court recently granted certiorari in a case presented in an AEDPA posture in order to resolve an underlying disagreement among the circuits about how to interpret *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). Indeed, lower courts in that case had pointed to the existence of the split as a reason the AEDPA standard could not be satisfied, *see, e.g.*, *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 705-06 (11th Cir. 2015) (per curiam)—an argument echoed by the dissent. *See McWilliams*, 137 S. Ct. at 1804 (Alito, J., dissenting). But this Court nonetheless granted certiorari and reversed, essentially resolving the underlying split by holding that lower courts were in fact unreasonably applying the holding of *Ake*. This Court can and should follow the exact same course here.

Respondent points to several circuit court opinions holding that distinguishable instances of a state

court finding implied waiver or imposing the sanction of involuntary forfeiture of counsel were not unreasonable applications of federal law. BIO 11-14. Indeed, respondent relies most heavily on a Third Circuit AEDPA opinion, BIO 11-13, but as described in the petition, Pet. 12-13, 28, that circuit was foundational in recognizing the sanction of involuntary forfeiture of counsel to begin with. *See United States v. Leggett*, 162 F.3d 237, 250-51 (3d Cir. 1998) (permitting trial courts to strip a defendant's right to counsel "'regardless of the defendant's knowledge'" of the risks "'and irrespective of whether the defendant intended to relinquish the right'" if the court finds misconduct "'extremely serious'") (citations omitted). The Third Circuit's refusal to find an AEDPA violation in the application of a Sixth Amendment exception that circuit itself created is unremarkable, and does nothing to undermine the disagreement that exists between the Third Circuit and the Fourth Circuit or Colorado Supreme Court.

The other AEDPA cases on which respondent relies likewise hail from circuits that do not disagree with the underlying proposition that a criminal defendant may involuntarily forfeit his trial counsel by misbehaving. *E.g.*, *Higginbotham v. Louisiana*, 817 F.3d 217, 223 (5th Cir. 2016) (per curiam) (noting that circuit had "previously indicated that dilatory tactics can constitute an implied waiver of the right to counsel"); *Gilchrist v. O'Keefe*, 260 F.3d 87, 100 (2d Cir. 2001) (noting that court had "no occasion to pass on the question of whether the denial of counsel" as a sanction without prior warning for physically attacking attorney at sentencing "violates the Sixth Amendment *simpliciter*"). Like the Third Circuit, those

courts are naturally unlikely to find unreasonable any individual application of a sanction they do not disapprove.

Simply put, there is an evident disagreement among the circuits as to whether and when this Court's precedents permit a defendant to be involuntarily deprived of counsel. That disagreement can be resolved in a case where—as in other cases this Court has granted—reversal requires finding that the state courts engaged in an unreasonable application of those precedents. As explained below, there is no logical application of this Court's cases that allows a court to sanction a defendant with the removal of counsel without *at least* providing the warnings required by *Faretta*. This Court thus can and should grant certiorari to resolve the confusion in the lower courts.

II. The Tennessee Supreme Court Unreasonably Applied Clearly Established Law.

Respondent's only remaining argument is that the Tennessee Supreme Court's sanction was not an unreasonable application of this Court's holdings in *Illinois v. Allen*, 397 U.S. 337 (1970), and *Taylor v. United States*, 414 U.S. 17 (1973) (per curiam). That is wrong. As respondent would have it, *Allen*—a case in which the defendant was removed from the courtroom for misbehaving, but *was represented by counsel*—applies equally to forcing an indigent defendant to *represent himself* for similar misconduct. And, according to respondent, *Taylor*—a case that explicitly distinguishes capital cases from those in which a defendant may forfeit other Sixth Amendment rights—extends to a death-penalty defendant. This is objectively unreasonable, and it isn't close. The Court's precedents

make clear that a criminal defendant cannot waive his trial counsel *voluntarily* without being provided certain minimum warnings. That holding logically includes the proposition that a defendant cannot be *involuntarily* deprived of counsel without at least providing those same warnings.

1. *Allen* considered whether an unruly defendant could be involuntarily removed from the courtroom during a criminal trial without violating his Sixth Amendment right to be present—a right different in kind from the right to counsel. 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" persists in "disorderly, disruptive, and disrespectful" conduct that prevents his trial from going forward. 397 U.S. at 343.

Critically, however, *Allen* relied heavily on the fact that this deprivation was temporary. This Court emphasized that the defendant "was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner." 397 U.S. at 346-47. And this Court further explained that, "[o]nce lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* at 343. In fact, at all times that Allen was excluded from the courtroom, his court-appointed counsel represented him in absentia; when the defendant agreed not to further disrupt the proceedings, the court permitted him to return "through the remainder of the trial, principally his defense," although his defense was thereafter "conducted by his appointed

counsel." *Id.* at 341. For two reasons, it should be immediately clear that this precedent provides no support whatsoever for the permanent deprivation of the right to counsel.

First, respondent does not dispute that, after being sanctioned, petitioner offered to "'admit that [his accusations against his trial counsel] [were]n't true'" and "'cooperate during this trial.'" Pet. 6 (citation omitted). Indeed, petitioner had two different counsel saying they would willingly represent him. Pet. 4, 6. But the Tennessee court *never* "informed [petitioner] that he could" regain the right to counsel "when he would agree to conduct himself in an orderly manner." *Allen*, 397 U.S. at 346-47. Quite the opposite—the Tennessee court flagrantly ignored this Court's clear statement that, "[o]nce lost," Sixth Amendment rights "can, of course, be reclaimed." *Id.* at 343.

Second, and perhaps more important, *Allen* does not permit involuntary forfeiture of counsel as a sanction. Rather, *Allen* approved forfeiture of the *right to self-representation* due to misconduct, not forfeiture of the *right to counsel*. *See Faretta*, 422 U.S. at 834 n.46 (under *Allen*, trial courts may "terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"). Specifically, the defendant in *Allen* actually "'wished to conduct his own defense,'" and after "'considerable argument'" with the judge and proper warnings, was permitted to proceed pro se. 397 U.S. at 339 (citation omitted). But the defendant lost the right to represent himself when he was disorderly and disruptive. Even when the defendant regained his Sixth Amendment right to be present and was permitted to return to the courtroom, he was forced to proceed represented by "his appointed

counsel" for "the remainder of the trial." *Id.* at 341; *see Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (courts must "'indulge every reasonable presumption against waiver'" of the right to counsel) (citation omitted). At no point did the defendant in *Allen* lose his counsel due to his conduct.

Although "[s]ome rights may be forfeited by means short of waiver," the right to counsel "may not." *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). Thus, while a "defendant can forfeit his right to self-representation by 'deliberately engag[ing] in serious and obstructionist misconduct,'" a "defendant can only elect self-representation by 'knowingly and intelligently' waiving his right to counsel." *United States v. Berry*, 565 F.3d 385, 390 (7th Cir. 2009) (quoting *Faretta*, 422 U.S. at 834 n.46, 835) (brackets in original). "Of the two rights, … the right to counsel is preeminent and hence, the default position." *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). It was therefore unreasonable to subject petitioner to loss of counsel as a sanction for misconduct, rather than forcing him to proceed with counsel he did not want, as *Allen* approves.

2. Respondent's reliance on *Taylor* fares no better. There, this Court simply applied its longstanding, "'prevailing rule,'" that when "'the offense is *not capital*,'" a defendant waives his Sixth Amendment rights to be present and confront witnesses against him if he absconds during trial. 414 U.S. at 19 (quoting *Diaz v. United States*, 223 U.S. 442, 455 (1912)) (emphasis added). Extending *Taylor*'s reasoning to petitioner's capital case is thus objectively unreasonable.

In any event, cases about an escapee's waiver of the right to be present and confront witnesses are wholly inapposite because they again have nothing to do with the right to *representation* being *involuntarily* deprived. This Court does not require the kind of warnings and record of knowing, intelligent, and voluntary waiver necessary for a defendant to waive the right to counsel when it comes to other Sixth Amendment rights. Thus, although it "is clear that a defendant who escapes from custody during trial thereby waives his Sixth Amendment rights to be personally present and to confront witnesses both during the remainder of the trial and during sentencing," it is equally clear that, without more, continuing without the benefit of counsel violates the Sixth Amendment. *Golden v. Newsome*, 755 F.2d 1478, 1481-82 (11th Cir. 1985) (reasoning that a "waiver by escape" theory would be difficult to reconcile with this Court's precedent).

3. This Court has never allowed an implicit waiver or involuntary forfeiture of the Sixth Amendment right to counsel. Rather, the Court has reaffirmed time and again that the right to counsel is fundamental and must be affirmatively waived, and that waiver must be knowing and intelligent. Pet. 24-27.

As for *voluntary* waiver, the "controlling rule" has long been "that 'absent a knowing and intelligent waiver, no person may be imprisoned for any offense … unless he was represented by counsel at his trial.'" *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)) (alteration in original). For a criminal conviction to stand, this Court has held that a defendant must either have been "represented by counsel at his trial," or know-

ingly and intelligently waived the right. *Id.* Waiver must be clear and unequivocal, and the record must show that the defendant "was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Faretta*, 422 U.S. at 835.

If the Court requires these warnings for the *voluntary* waiver of the right to counsel, certainly, by implication, a defendant must receive fair warning to the same degree before being sanctioned by finding *involuntarily* waiver of the right to counsel. Any holding to the contrary would be clearly unreasonable; it would suggest that less stringent warnings are necessary to take a lawyer away from someone who does not want that result than are necessary for a defendant who has already determined that he does not want a lawyer. But as the Sixth Circuit found below, the Tennessee trial court failed to provide petitioner with the minimum warnings required by this Court in *Faretta*. The Tennessee Supreme Court thus applied this Court's precedent in a manner that is logically insupportable.

In the end, this is an easy case. This Court has clear precedents requiring formal warnings before the Sixth Amendment right to representation is voluntarily waivable, and those warnings are thus the absolute minimum requirement for involuntary waivers of the same right. In so holding, this Court can resolve the underlying confusion in the lower courts about whether and when the involuntary deprivation of counsel is appropriate. And it can ensure that petitioner does not become the first defendant in a century executed after being *forced* to represent himself at trial and sentencing. This Court should grant certiorari, and reverse.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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