No. 18-7694

IN THE

Supreme Court of the United States

RAYMOND CRESPO,

Petitioner,

- versus -

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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QUESTION PRESENTED

Does the Constitution permit a trial court to deny as untimely a criminal defendant's request to represent himself at his jury trial when the request is made for the first time after eleven jurors have been selected and sworn, and the trial court finds the request to be "simple manipulation"?

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JURISDICTION

The judgment of the New York Court of Appeals was entered on October 16, 2018. On January 9, 2019, Justice Ginsburg extended the time to file a petition for a writ of certiorari to February 13, 2019. The petition was filed on January 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), as interpreted by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

STATEMENT

Following a jury trial in the Supreme Court of the State of New York, New York County, petitioner was convicted of Assault in the First Degree and Criminal Possession of a Weapon in the Third Degree, in violation of New York Penal Law §§ 120.10(1) and 265.02(1) (Pet. App. 30a). The trial court sentenced petitioner, as a persistent violent felony offender under New York Penal Law § 70.10, to concurrent terms of twenty years to life imprisonment on the assault charge and three and a half to seven years on the weapon-possession charge (Pet. App. 30a). Petitioner appealed

to the Appellate Division, First Department, which reversed petitioner's conviction (Pet. App. 30a). The People of the State of New York then obtained leave to appeal to the New York Court of Appeals. People v. Crespo, 29 N.Y.3d 947 (2017). The New York Court of Appeals reversed the Appellate Division's order and remitted the matter to the Appellate Division (Pet. App. 12a). Upon remittitur, the Appellate Division affirmed the judgment of conviction (Pet. App. 35a).

At about 3:00 p.m. on January 21, 2013, petitioner committed what the trial court described at sentencing as a "vicious" and "unprovoked" stabbing outside of a Manhattan restaurant (Resp. App. 42a). Police officers apprehended petitioner literally red-handed—his hands and clothes were covered in the victim's blood—as petitioner fled the scene. The victim, Pedro Garcia Guzman, suffered a punctured, partially collapsed lung and a broken rib. He was hospitalized for three weeks.

In February 2013, a grand jury charged petitioner with one count each of Attempted Murder in the Second Degree (New York Penal Law §§ 110.00, 125.25[1]), first-degree assault, and third-degree weapon possession. At his subsequent arraignment, petitioner was assigned public defender Joseph Conza as counsel.

Conza represented petitioner over the next twenty months as the case proceeded to trial. During that time, Conza appeared in court on petitioner's behalf nineteen times. Conza also arranged video conferences with petitioner, met with him in person outside of court, filed a suppression motion, and represented him at a two-day suppression hearing that ended on October 17, 2014 (Resp. App. 16a, 35a-36a).

That day, immediately after the trial judge issued a bench ruling denying petitioner's motion to suppress the knife used in the stabbing and petitioner's "blood soaked" clothes, petitioner moved for substitution of counsel (Resp. App. 1a). Petitioner claimed that "from the beginning" he had had a "misunderstanding" with counsel (Resp. App. 3a, 7a). Petitioner complained that counsel had told him, "There ain't much I can do to help you" in light of the overwhelming evidence of guilt (Resp. App. 6a). Petitioner also did not feel that counsel had adequately kept him informed of what was happening in the case (Resp. App. 3a-4a). As a result, petitioner did not "feel comfortable" with counsel (Resp. App. 5a). The judge denied the motion, explaining that counsel could not "hid[e] negative facts from you. He's got to say, hey, this is gonna make it tough for me," so that petitioner could make an informed choice about whether to proceed to trial (Resp. App. 7a). The judge also noted that the case had been pending for nearly two years, and, as a result, he would "not delay[] the trial any longer" (Resp. App. 2a). The proceeding ended with petitioner refusing either to speak to counsel or return to court (Resp. App. 3a-8a).

On October 22, 2014, the day jury selection was scheduled to begin, petitioner appeared in court with counsel and renewed his request for substitution. Petitioner reiterated that counsel "only brings me bad news," and that he did not understand "what is going on with [his] case right now"—repeatedly lamenting that he felt "lost" (Resp. App. 9a-15a). Petitioner further complained that counsel should have brought the case to trial earlier and visited him in jail more often (Resp. App. 14a-18a). As

petitioner put it, he "didn't feel the vibe" with counsel (Resp. App. 20a). Petitioner asserted, however, that his issues with counsel were not new. "This is not something that just came up," he claimed (Resp. App. 12a). The judge again denied the motion. He assured petitioner that counsel had "actually put a whole lot of work into your case" (Resp. App. 14a). And, the "only effect" of appointing new counsel, the judge explained, would be to delay the trial (Resp. App. 17a).

Jury selection began the next day, October 23, 2014. That morning, after the trial judge had spoken to a panel of prospective jurors but before voir dire questioning had begun, petitioner addressed the court directly, purporting still not to understand why he could not have new counsel assigned. The judge again said that he would not delay the trial by assigning new counsel (Resp. App. 25a). The judge added that petitioner had not "said anything … substantively about Mr. Conza's representation that leads me to think at all that he is not effectively representing you" (Resp. App. 25a). In response, petitioner promised that "every single day" he would tell the jury "over and over that I don't feel comfortable with my lawyer" (Resp. App. 26a). He then absented himself from the courtroom for the rest of the day. Jury selection proceeded in his absence, with eleven jurors being selected and sworn that day.

The next morning, before jury selection resumed, petitioner returned to court and announced that he wished to represent himself. The trial judge denied the request as both untimely and as a calculated endeavor to disrupt the trial (Resp. App. 28a-38a). "[Y]ou cannot represent yourself at this point in the trial," the judge

explained (Resp. App. 35a). The judge also pointed out, "This is the first time you have asked to represent yourself in the middle of the trial" (Resp. App. 33a). Petitioner reacted by again promising to "jump up and disrupt the court proceedings" and tell the jury that he was being "force[d]" to go to trial with an attorney who was "not helping" him (Resp. App. 34a-37a). Accordingly, the judge had petitioner removed from the courtroom (Resp. App. 37a). Moments later, the judge remarked, "I can't have him step in and represent himself at this stage of the proceeding. What would he do? He doesn't know what questions were asked of the jurors" (Resp. App. 38a). In addition, the judge observed that, "At this point, frankly, this is just simple manipulation" (Resp. App. 37a-38a).

Expanding on that thought later during trial, the judge found that petitioner's "manipulative" request was "not made because he want[ed] to represent himself" (Resp. App. 40a). Rather, petitioner was "simply … finding new ways to disrupt the proceedings"; perhaps not "physically disrupt" them, the judge clarified, but certainly to delay them (Resp. App. 39a). The judge further remarked that, had petitioner "asked to go pro se the week before trial, before jury selection, I would have allocuted him, told him about the dangers, [and] let him go pro se" (Resp. App. 41a).

Following the denial of petitioner's request for self-representation and his removal from the courtroom, the court and counsel completed jury selection and proceeded with the remainder of trial. On October 30, 2014, the jury acquitted petitioner of attempted murder but convicted him of assault and weapon possession.

On December 19, 2014, the trial court sentenced petitioner, as a persistent violent felony offender, to an aggregate term of twenty years to life in prison.

On appeal to the Appellate Division, First Department, petitioner argued that the trial court had violated his right to represent himself, as guaranteed by the New York State and United States Constitutions. On November 10, 2016, the Appellate Division reversed and remanded the case for a new trial, agreeing with petitioner that the trial court had erred by not allowing him to proceed pro se (Pet. App. 30a, 32a). The Appellate Division recognized that, under New York Court of Appeals precedent, a request for self-representation may not be granted unless the request was, among other things, "'timely asserted'" (Pet. App. 31a) (quoting People v. McIntyre, 36 N.Y.2d 10, 17 [1974]). The Appellate Division held that petitioner's request was timely because he made it before the prosecutor's opening statement (Pet. App. 32a). The Appellate Division rejected the People's argument that a timely request for self-representation must be made before the start of jury selection (Pet. App. 32a).

On March 6, 2017, the New York Court of Appeals granted the People's application for leave to appeal, Crespo, 29 N.Y.3d at 947, which sought review of the Appellate Division's timeliness ruling (Resp. App. 43a-49a).

On October 16, 2018, after reargument, see People v. Crespo, 31 N.Y.3d 999 (2018), a four-judge majority of the New York Court of Appeals reversed the Appellate Division's order and remitted the case, holding that petitioner's request to represent himself was untimely (Pet. App. 12a). The majority began its analysis by

reaffirming the rule the Court of Appeals had announced in People v. McIntyre that a request for self-representation is timely when made "'before the trial commences'" (Pet. App. 7a) (quoting McIntyre, 36 N.Y.2d at 17). To determine whether petitioner had made his request before trial, the majority looked to the definition of "trial" set forth in the New York Criminal Procedure Law ("CPL"), which states that a jury trial "'commences with the selection of the jury'" (Pet. App. 8a) (quoting CPL 1.20[11]). The majority read "the selection of the jury" as referring to the start of the jury selection process (Pet. App. 8a-11a). Accordingly, the majority held that petitioner's end-of-jury-selection request had come after the commencement of trial and, therefore, was untimely (Pet. App. 12a).

The majority noted, however, that a trial court has discretion to grant even untimely requests (Pet. App. 7a) (quoting McIntyre 36 N.Y.2d at 17). The majority also acknowledged that McIntyre had found the self-representation request in that case timely, even though it had come after the end of jury selection (Pet. App. 7a). As the majority explained, McIntyre based its timeliness ruling on the definition of the word "trial" found in the CPL's predecessor, the Code of Criminal Procedure, which, in contrast to the CPL, provided that a jury trial began with the prosecutor's opening statement (Pet. App. 7a-8a). The majority thus limited McIntyre's timeliness ruling to the circumstances of that case. Having held petitioner's request untimely, the majority reversed the Appellate Division's order and remitted the case for consideration of any facts and issues previously raised but not determined (Pet. App. 12a).

The dissent disagreed that McIntyre was distinguishable. In the dissent's view, McIntyre did not base its timeliness ruling solely on the Code of Criminal Procedure's definition of when trial began; rather, McIntyre drew the timeliness line at the People's opening statement because "at its core" a criminal trial is "the actual trial of the defendant by the jury," which starts with the People's opening (Pet. App. 18a) (internal quotation marks omitted). The dissent also read the CPL's reference to "the selection of the jury" to mean the moment the selected jury is sworn (Pet. App. 19a-20a). The dissent thus would have found petitioner's request timely (Pet. App. 29a).

Upon remittal, petitioner conceded, and the Appellate Division concluded, that there were no previously raised facts or issues yet to be determined. Accordingly, the court affirmed petitioner's judgment of conviction (Pet. App. 35a-36a).

REASONS FOR DENYING THE WRIT

In Faretta v. California, 422 U.S. 806 (1975), this Court held that criminal defendants in state court have the right under the Sixth and Fourteenth Amendments to the Constitution to represent themselves. But the right to self-representation "is not absolute." Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U. S. 152, 161 (2000). As Martinez recognized, "most courts" require defendants to invoke the right "in a timely manner." Id. at 162; see also Faretta, 422 U.S. at 835 (noting that Faretta's request for self-representation was made "weeks before trial").

Petitioner does not contend that a timeliness requirement offends the Constitution. Instead, he asks this Court to decide when during a criminal case a

request for self-representation becomes untimely. According to petitioner, the Court should grant certiorari because this is a question over which courts are "deeply" divided; it is an "important and recurring" question; this case is an "ideal vehicle" for resolving the question; and the New York Court of Appeals incorrectly held that a request to proceed pro se is untimely if made after the start of jury selection (Pet. 9, 12, 15, 16).

None of those contentions provides any basis for a grant of certiorari. Every regional federal circuit court would find petitioner's request for self-representation untimely, either because the request came after the start of jury selection and, thus, after the commencement of trial, or because—as the trial court found—the request was plainly a tactic to secure delay. At any rate, the timeliness of requests to proceed pro se is not an issue worthy of this Court's review. That is evidenced both by this Court's repeated denial of certiorari petitions raising that issue and by the unanimous agreement among courts—including the New York Court of Appeals—that even untimely requests may be granted as a matter of discretion. Moreover, petitioner's case is anything but an ideal vehicle for deciding the issue, as the majority and dissenting opinions in the New York Court of Appeals focused on questions of New York law, not federal law. Lastly, the majority's decision was entirely correct.

Accordingly, the petition for a writ of certiorari should be denied.

POINT I

EVERY REGIONAL FEDERAL CIRCUIT WOULD FIND PETITIONER'S REQUEST TO REPRESENT HIMSELF UNTIMELY, EITHER BECAUSE HE MADE THE REQUEST AFTER JURY SELECTION BEGAN OR BECAUSE HIS REQUEST WAS A DELAY TACTIC.

Petitioner contends that courts are "deeply divided" on the question of when during a criminal case a defendant's request to proceed pro se becomes untimely (Pet. 9). According to petitioner, "most" federal circuit courts hold that a request for self-representation is timely if made before the jury is "empaneled"—a term he takes to mean the moment when the jury is sworn and jeopardy attaches (Pet. 9-11, 15, 18). Only a "minority" of circuits, he claims, holds that the request must come before "meaningful trial proceedings"—including jury selection—begin (Pet. 11-12 n.4).

Petitioner is incorrect in asserting that most federal circuits deem a request to proceed pro se timely so long as it comes before the jury is sworn. To the contrary, as discussed infra, six circuits have found pre-swearing requests untimely on the ground that the requests came after the commencement of trial, while four other circuits have said generally that a timely request must be made before trial and that trial begins no later than the start of jury selection. Indeed, only two circuits have held that a good faith request to proceed pro se is timely if made at any point before the jury is sworn. Even those circuits, however, hold that a trial court may deny a pre-swearing request as untimely when it is not a sincere request for self-representation, but instead is just a tactic to secure delay—as the trial court found was the case here. Thus, because

federal courts across the country would reject petitioner's disingenuous, end-of-jury-selection request as untimely, the petition for certiorari should be denied.

To begin, the Second, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits have all found self-representation requests made either on the morning of the first day of trial or after the start of jury selection—but in all cases before the swearing of the jury—to be untimely, reasoning that a timely request must come before the beginning of trial. See United States v. Walker, 142 F.3d 103, 108 (2d Cir. 1998) (request made when "voir dire of jurors was virtually completed" but before jury was sworn was untimely because request came after start of trial); United States v. Lawrence, 605 F.2d 1321, 1324-25 (4th Cir. 1979) (request made after completion of voir dire but "before the jury was sworn" was untimely because it came after "meaningful trial proceedings ha[d] commenced"); Robards v. Rees, 789 F.2d 379, 383-84 (6th Cir. 1986) (request made on first day of trial, "after the clerk had called the roll of jurors," was untimely); United States v. Martin, 25 F.3d 293, 296 (6th Cir. 1994) (noting that request in Robards was denied as "not timely" and that "right of self-representation is only unqualified if exercised before trial commences"); United States v. Jones, 938 F.2d 737, 743 (7th Cir. 1991) (request made "on the second day of trial after the jury had been selected but prior to taking its oath" properly denied as untimely because "demand for self-representation must be made before meaningful trial proceedings, such as jury selection, have occurred"); United States v. Prucha, 856 F.3d 1184, 1185-87 (8th Cir. 2017) ("We have routinely found requests made after the commencement

of trial to be untimely," citing United States v. Kelley, 787 F.3d 915, 918 [8th Cir. 2015], where request was made on morning of first day of trial, prior to swearing);[1] United States v. Young, 287 F.3d 1352, 1353-55 (11th Cir. 2002) (request made "after the parties had selected the jury" but before jury was sworn was untimely because "meaningful trial proceedings commenced when the parties selected the jury").

Additionally, while the First, Third, Fifth, and District of Columbia Circuits have not had occasion to rule on the timeliness of a mid-jury selection request to proceed pro se, those courts have said that, as a general matter, a Faretta request is untimely if made after trial commences, see United States v. Noah, 130 F.3d 490, 497 (1st Cir. 1997); United States v. Bankoff, 613 F.3d 358, 373 (3d Cir. 2010); Chapman v. United States, 553 F.2d 886, 895 (5th Cir. 1977); United States v. Washington, 353 F.3d 42 (D.C. Cir. 2004), and that a jury trial commences at the start of jury selection. United States v. Miller, 463 F.2d 600, 603 (1st Cir. 1972); Govt. of Virgin Islands v. George, 680 F.2d 13, 15 (3d Cir. 1982); United States v. Krout, 56 F.3d 643, 645-46 (5th Cir. 1995); United States v. Perry, 479 F.3d 885, 887 (D.C. Cir. 2007). Notably, Miller, George, and Krout, all cases addressing when trial begins under Federal Rule of Criminal Procedure 43,[2] flatly rejected the argument that trial begins when the jury

[1] Although Kelley does not state that the defendant's request came before the jury was sworn, the defendant made that fact clear in his petition for a writ of certiorari, Kelley v. United States, 2015 WL 5117971, at *6, which this Court denied. 136 S. Ct. 284 (2015).

[2] Rule 43 authorizes trial in absentia when the defendant voluntarily absents himself "after the trial has begun." Fed. R. Crim. P. 43(c)(1)(A).

is sworn and jeopardy attaches. Miller, 463 F.2d at 603 (noting that "challenging of prospective jurors is an essential part of the trial," and that "Rule 43 refers not to the commencement of jeopardy but to the commencement of trial"); George, 680 F.2d at 15 (agreeing with Miller's analysis); Krout, 56 F.3d at 645-46 (same).

Petitioner mistakenly asserts that the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits would have found his request to proceed pro se timely because those courts have adopted a "bright-line rule that a *Faretta* request is timely anytime until the jury is empaneled" (Pet. 9-10) (citing cases from those circuits stating that request is timely if made before jury is "empaneled"). This assertion rests on the flawed premise that those courts understood the term "empaneled" to mean the moment when the jury is sworn and jeopardy attaches (Pet. 10, 15, 18). However, as noted above, the Seventh, Eighth, and Eleventh Circuits have all found pre-swearing requests untimely on the ground that those requests came after the start of trial. See Jones, 938 F.2d at 743; Prucha, 856 F.3d at 1187 (citing Kelley); Young, 287 F.3d at 1353-55. In addition, the First Circuit has described a putative request to proceed pro se made after jury selection but before the swearing of the jury as having been made "after the jury had been empaneled." Noah, 130 F.3d at 497-98 & n.4.[3] And,

[3] In Noah, the defendant argued on appeal that he had tried to invoke his right to self-representation during an exchange that occurred, in the First Circuit's words, "after the jury had been empaneled." Noah, 130 F.3d at 497-98 & n.4. The Government's brief on appeal makes clear that the exchange took place "after the jury had been selected, but before it had been sworn." United States v. Noah, Govt. Brief, 1997 WL 33769659, at *18. And, (Continued…)

importantly, all six of those circuits hold as a general matter that a Faretta request is untimely if made after the beginning of trial, see Noah, 130 F.3d at 497; Bankoff, 613 F.3d at 373; Chapman, 553 F.2d at 895; Jones, 938 F.2d 743; Prucha, 856 F.3d at 1187; Young, 287 F.3d at 1353; and that trial commences no later than the start of jury selection. United States v. Hellems, 866 F.3d 856, 865 (8th Cir. 2017) (under Fed. R. Crim. P. 43, "a trial has commenced when the jury selection process has begun") (internal quotation marks omitted); Prucha, 856 F.3d at 1185; United States v. Sterling, 738 F.3d 228, 236 (11th Cir. 2013) (under Rule 43, "trial commences no later than on the day of jury selection"); Krout, 56 F.3d at 645-46; Jones, 938 F.2d at 743 (noting that post-jury-selection, pre-swearing request "came on the second day of trial"); United States v. Oakey, 853 F.2d 551, 553 (7th Cir. 1988) ("demand for self-representation must be made before meaningful trial proceedings, such as jury selection[], begin"); George, 680 F.2d at 15; Miller, 463 F.2d at 603.

Thus, those circuits' use of the term "empaneled" in the cases cited by petitioner is better understood as a reference to the beginning of the jury selection process than to the moment the jury is sworn. Compare Bankoff, 613 F.3d at 373 (trial commences "at least after the jury has been empaneled") with George, 680 F.3d

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(…Continued)
notably, the First Circuit declined to decide "whether the invocation of that right after jury selection should be deemed the functional equivalent of a *pretrial* assertion," Noah, 130 F.3d at 498 n.4 (emphasis in original), thus reinforcing its holding in Miller that a jury trial begins at the start of jury selection.

at 15 ("trial commences 'at least' from the time that the work of impaneling jurors begins"); see also United States v. Johnson, 223 F.3d 665, 668 (7th Cir. 2000) ("a motion for self-representation is timely if made before the jury is empaneled," citing Walker, 142 F.3d at 108, where request made after start of jury selection was denied as untimely); compare United States v. Smith, 830 F.3d 803, 809 (8th Cir. 2016) ("A motion to proceed pro se is timely if made before the jury is empaneled") (brackets and internal quotation marks omitted), with Prucha, 856 F.3d at 1187 (Faretta request is untimely when made "after the commencement of trial," and trial "commenced with jury selection"); see Horton v. Dugger, 895 F.2d 714, 717 (11th Cir. 1990) (request in Robards, which came after clerk had called roll of jurors, came "after [the] jury had been empaneled").[4] Petitioner is thus incorrect in claiming that most federal circuits would find his request timely because it came before the jury was sworn.

Far from a "majority" (Pet. 11), only two circuits—the Ninth and Tenth—have held that a Faretta request may be considered timely when made after the start of jury selection but before the swearing of the jury. See United States v. Price, 474 F.2d 1223, 1226-27 (9th Cir. 1973) (request made "[a]fter the jury had been impaneled and

[4] Compare also State v. Cornell, 878 P.2d 1352, 1364 (Ariz. 1994) (requests to proceed pro se "made after jury selection has begun are untimely") with State v. De Nistor, 694 P.2d 237, 242 (Ariz. 1985) ("A motion to proceed without counsel is timely if it is made before the jury is empaneled"); see also Commonwealth v. Vaglica, 673 A.2d 371, 373 (Pa. Super. Ct. 1996) (listing Fifth Circuit's opinion in Chapman, cited by petitioner [Pet. 9-10, 13, 18], among circuit court opinions holding that "meaningful trial proceedings have begun once the process of jury selection is commenced").

before it was sworn" was timely);[5] United States v. Tucker, 451 F.3d 1176, 1182 (10th Cir. 2006) (request granted after jury was selected but before it was sworn was timely). Petitioner is nevertheless mistaken in claiming that his request would have been timely in those jurisdictions (Pet. 10-11, 15). That is because, as petitioner acknowledges (Pet. 10 n.3), those circuits hold that a pre-swearing request to proceed pro se may be denied as untimely when it is not a good faith request for self-representation, but is merely "a tactic to secure delay." United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994) (internal quotation marks omitted); accord United States v. Simpson, 845 F.3d 1039, 1053 (10th Cir. 2017) (same), cert. denied, 138 S. Ct. 140 (2017).[6]

Here, the trial court found that petitioner's request was "manipulative" and "not made because he want[ed] to represent himself" (Resp. App. 40a; see also Resp. App. 37a-38a ["[T]his is just simple manipulation"]). It was "clear" to the judge that petitioner was simply "finding new ways to disrupt the proceedings" (Resp. App. 40a). As the judge clarified, he did not "mean physically disrupt" the proceedings, but delay them (Resp. App. 40a; see also N.Y. Ct. App. Feb. 8, 2018 Oral Arg. Tr. 7 ["JUDGE FAHEY: Well, it's … fair to argue that it was a delaying tactic. I think the [trial]

[5] It bears noting that the Ninth Circuit—like the other circuits discussed above, but unlike petitioner—distinguishes between the "empaneling" and the swearing of the jury.

[6] Some of the circuits requiring requests for self-representation to be made before jury selection also hold that an otherwise-timely request may be denied as untimely if it is a delay tactic. See United States v. Hilton, 701 F.3d 959, 964-65 (4th Cir. 2012); Chapman, 553 F.2d at 887; Johnson, 223 F.3d at 668; Smith, 830 F.3d at 809; Young, 287 F.3d at 1354.

court recognized that"], available at http://www.nycourts.gov/ctapps/arguments/2018/Feb18/Transcripts/020818-27-Oral-Argument-Transcript.pdf).

Significantly, the trial court's finding that petitioner's request did not reflect a sincere desire to represent himself is a factual finding to which this Court must defer "in the absence of exceptional circumstances." Hernandez v. New York, 500 U.S. 352, 366 (1991). No such circumstances exist here.

In determining whether a defendant's request to defend himself is simply a tactic to secure delay, courts look to whether the request would in fact have resulted in delay, whether any delay could have been avoided had the request been made earlier, and whether the defendant reasonably could have made the request sooner. See Avila v. Roe, 298 F.3d 750, 753 (9th Cir. 2002); Tucker, 451 F.3d at 1181-82. Applying those factors here, the record amply supports a finding of intent to delay.

For starters, it was obvious that granting petitioner's request would have necessitated delay—regardless of whether he sought a continuance (Pet. 10 n.3). Petitioner was facing serious felony charges (including attempted murder); he had absented himself from jury selection; and he kept insisting that he was "lost" and did not understand what was happening in the case (Resp. App. 19a-25a). As the trial judge observed moments after denying petitioner's request, there was simply no way that petitioner could have assumed his own defense at that point; he needed time to prepare (Resp. App. 38a ["I can't have him step in and represent himself at this stage of the proceeding. What would he do? He doesn't know what questions were asked

of the jurors"]). To have granted the request and proceeded without giving petitioner time to prepare would have been, as the judge put it, a "travesty" (Resp. App. 40a).

Following on the heels of a baseless, eve-of-trial request to replace the attorney who had ably represented him for twenty months, petitioner's request to represent himself was plainly just another delaying tactic. But, even taking petitioner at his word, his alleged issues with counsel "all related to matters that had occurred prior to trial." United States v. Smith, 780 F.2d 810, 812 (9th Cir. 1986). After all, as petitioner asserted, his problems with counsel started "from the beginning" (Resp. App. 3a); they were "not something that just came up" on the eve of trial (Resp. App. 12a). "Thus, they could have been raised earlier." Smith, 780 F.2d at 812.

Lastly, as to whether delay could have been avoided had the request been made earlier, the trial judge stated that, had petitioner asked to represent himself the week before trial, the judge would have "let him go pro se" (Resp. App. 41a). Granting the motion at that point thus would have at the very least avoided the delay resulting from having to update petitioner, who had absented himself, about where voir dire stood in his case. But, just as likely as a practical matter, granting a pretrial request would have saved the time of re-doing the voir dire process. See People v. Stone, 22 N.Y.3d 520, 523 n.1 (2014) (voir dire began "anew" after court granted mid-jury selection request)

In short, the trial judge was entirely correct in finding that petitioner's request to proceed pro se was "simple manipulation" (Resp. App. 38a). Given the insincerity of the request, it would be deemed untimely even in the Ninth and Tenth Circuits.

Petitioner attempts to sidestep the trial court's finding by noting that the Appellate Division observed that he had not "engag[ed]" in any "disruptive behavior" before the denial of his request (Pet. 10 n.3). The Appellate Division made that observation in concluding that petitioner had not forfeited the right to represent himself, presumably through "speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial," Illinois v. Allen, 397 U.S. 337, 338 (1970), such as cursing or knocking over a chair. See McIntyre, 36 N.Y.2d at 18. In no way did the Appellate Division reject the trial court's finding that petitioner's request for self-representation was a delay tactic. And, to the extent any tension exists in those conclusions, the trial court's firsthand assessment is unimpeachable given that petitioner refused to speak to his attorney and to be produced to court. And, as noted supra, when petitioner did come to court, he vowed to disrupt the proceedings through courtroom outbursts before the jury.

In sum, this is not a case in which federal circuit courts would disagree about whether petitioner's "manipulative," end-of-jury-selection request was untimely.

POINT II

THE QUESTION OF WHEN A REQUEST FOR SELF-REPRESENTATION BECOMES UNTIMELY IS NOT AN ISSUE WORTHY OF THIS COURT'S REVIEW.

Petitioner is incorrect in asserting that the timeliness of a request to proceed pro se presents an issue of "immense practical importance" (Pet. 12). As an initial matter, this Court has more than once declined to decide when a trial court may deny

a Faretta request as untimely. See Kelley v. United States, 2015 WL 5117971 (Cert. Pet.), cert. denied, 136 S.Ct. 284 (2015); Moriel v. Prunty, 1997 WL 33557054 (Cert. Pet.), cert. denied, 520 U.S. 1230 (1997); Bunnell v. Armant, 1986 WL 767197 (Cert. Pet.), cert. denied, 475 U.S. 1099 (1986).

Moreover, the petition does not raise an important issue of law because the "uniform view" among federal circuit courts and state high courts is that trial courts can, in an exercise of discretion, grant even clearly untimely requests. State v. Hightower, 393 P.3d 224, 228-29 & n.1-2 (Or. 2017) (collecting cases). Thus, defendants who make obviously untimely requests, such as a request made "[o]n the fourth day of trial," have "not necessarily relinquished permanently the right to self-representation." Id. at 228. They may yet still ultimately represent themselves.

Importantly, as a practical matter, trial courts in New York and elsewhere do in fact grant undeniably untimely requests to proceed pro se, especially where—unlike here—the request is unqualified and genuine. See, e.g., People v. Hassan, 159 A.D.3d 1390, 1391 (N.Y. App. Div. 2018); People v. Garifo, 47 Misc.3d 136(A), at *2 (N.Y. App. Term 2015); People v. Dashnaw, 116 A.D.3d 1222, 1232 (N.Y. App. Div. 2014); People v. Chandler, 109 A.D.3d 1202, 1203 (N.Y. App. Div. 2013); United States v. Stanley, 739 F.3d 633, 640-41 (11th Cir. 2014); United States v. Stringer, 730 F.3d 120, 123 (2d Cir. 2013); United States v. Hilton, 701 F.3d 959, 965 (4th Cir. 2012); United States v. Washington, 596 F.3d 926, 940 (8th Cir. 2010); United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003); United States v. George, 85 F.3d 1433, 1436 (9th

Cir. 1996). And, although the decision of whether to deny an untimely request lies in the trial court's discretion, see Hightower, 393 P.3d at 228-29 & n.1-2, that discretion is of course "not unbridled."[7] Noah, 130 F.3d at 498. Appellate courts have not hesitated to reverse trial court decisions denying untimely requests when there was no indication that the defendant was using the right to self-representation as a means of obstructing the trial or that granting the request would have resulted in delay. See, e.g., State v. Brown, 676 A.2d 513, 525-26 (Md. 1996); State v. Paumier, 230 P.3d 212, 220 (Wash. Ct. App. 2010); State v. Bean, 762 A.2d 1259, 1268 (Vt. 2000); People v. Rogers, 37 Cal.App.4th 1053, 1057 (Cal. Ct. App. 1995); People v. Anderson, 247 N.W.2d 857, 861 (Mich. 1976). Accordingly, in the unlikely event that an indigent defendant does not meet assigned counsel until the day of trial (Pet. 14), or learns only during voir dire that counsel is incompetent, misunderstands key facts, or intends to pursue a defense strategy with which the defendant disagrees (Pet. 13), the defendant is hardly without recourse because of a hard-and-fast rule that untimely requests must always be denied. See Rogers, 37 Cal.App.4th at 1057 (trial court abused its discretion in denying Faretta request made after the jury was sworn where defendant sought to represent himself because of "a 'profound' difference of opinion with defense counsel regarding the manner in which the case should proceed").

[7] In fact, in New York, the Appellate Division has the power to substitute its own discretion for that of a trial court. People v. Harrison, 27 N.Y.3d 281, 289 (2016). Notably, in this case, petitioner never argued in the Appellate Division that, even if untimely, his request for self-representation should have been granted as a matter of discretion.

In sum, the issue of when a Faretta request becomes untimely is not a question needing this Court's review since courts can, and do, grant plainly untimely requests.

POINT III

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DECIDING WHEN A REQUEST TO PROCEED PRO SE BECOMES UNTIMELY.

Petitioner contends that this case is an "ideal" vehicle for deciding when a request for self-representation becomes untimely (Pet. 15). Petitioner offers three reasons in support of this argument: (1) that the New York Court of Appeals decided the case "on constitutional grounds in a full-dress opinion, set in relief by a robust dissenting opinion"; (2) that "[e]very jurisdiction with a 'timely-before-empanelment rule," as petitioner articulates it, would find his request timely, while every jurisdiction with a "'meaningful-trial-proceedings' (or similar) rule" would find his request untimely; and (3) that the Court's decision will be "outcome-determinative" in that he will be entitled to a new trial if the Court holds that mid-jury selection requests are timely (Pet. 15-16). Petitioner is wrong on all counts.

To begin, it is inaccurate to suggest that the New York Court of Appeals majority and dissent respectively provided "full-dress" and "robust" analysis on the timeliness of petitioner's request from a federal constitutional perspective (Pet. 15). Rather, the disagreement between the majority and dissent focused almost exclusively on issues of New York law—specifically, whether the Court of Appeals' prior decision in McIntyre required the trial court to find petitioner's request timely, and

whether, under the definition of "trial" set forth in the CPL, a jury trial commences at the beginning of jury selection or when the jury is sworn. The centrality of New York law to the Court of Appeals' analysis makes this case a poor vehicle for deciding when a request to proceed pro se is timely as a matter of federal constitutional law.

Moreover, petitioner is mistaken in asserting that the timing of his request "highlights the contrasting positions of the lower courts" on the question of when a request for self-representation becomes untimely (Pet. 15). If anything, petitioner's request highlights the unanimity among courts faced with requests made under similar circumstances. As explained above, every regional federal circuit court would hold that a dilatory request made after the start of jury selection—as was the case here—is untimely. For that same reason, a decision by this Court to adopt any of the approaches used in the lower federal courts will not change the outcome of this case. Under even the most lenient of those timeliness rules, the request here was untimely.

This case is, therefore, anything but an "ideal" vehicle for deciding when a request for self-representation becomes untimely.

POINT IV

THE NEW YORK COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S END-OF-VOIR DIRE REQUEST TO PROCEED PRO SE WAS UNTIMELY.

As mentioned above, petitioner asked to represent himself for the first time only after eleven jurors had been selected and sworn. The New York Court of Appeals rightly concluded that this request was untimely.

The Court of Appeals began its analysis by reaffirming the rule it announced in McIntyre: An application to proceed pro se is timely when made "'before the trial commences'" (Pet. App. 6a-7a). "[T]he commencement of trial is established as the point at which the application may be denied as untimely," the court explained, because at that point a trial court may conduct a thorough inquiry into the defendant's desire to proceed pro se "without causing significant delay or confusion in the trial proceedings" (Pet. App. 2a, 7a). The Court of Appeals then reasoned that, because the CPL "defines the commencement of trial as the beginning of jury selection," petitioner's end-of-jury-selection request was untimely (Pet. App. 12a).

The Court of Appeals' analysis was entirely proper. Courts unanimously agree—and petitioner does not dispute—that midtrial requests to proceed pro se are untimely. See, Noah, 130 F.3d at 497; Walker, 142 F.3d at 108; Bankoff, 613 F.3d at 373; Hilton, 701 F.3d at 965; Chapman, 553 F.2d at 887, 893-94; Martin, 25 F.3d at 296; Jones, 938 F.2d at 743; Prucha, 856 F.3d at 1187; United States v. Bishop, 291 F.3d 1100, 1114 (9th Cir. 2002); United States v. Beers, 189 F.3d 1297, 1303 (10th Cir. 1999); Young, 287 F.3d at 1354-55; Washington, 353 F.3d at 46; Wayne R. LaFave et al., Criminal Procedure § 11.5(d) (4th ed. 2018) ("[A]ppellate courts uniformly accept a trial court's broad discretion to treat as untimely a request made during the course of the trial"). And, for more than a century, this Court has recognized that, outside the double jeopardy context, a jury trial "'commences at least from the time when the

work of empanelling the jury begins.'"[8] Gomez v. United States, 490 U.S. 858, 872-73 (1989) (quoting Lewis v. United States, 146 U.S. 370, 374 (1892), in turn quoting Hopt v. Utah, 110 U.S. 574, 578 [1884]); accord Pressley v. Georgia, 558 U.S. 209, 212-13 (2010) (Sixth Amendment right to public trial "extends to the jury selection phase of trial"); Ricketts v. Adamson, 483 U.S. 1, 3 (1987) (noting that respondent agreed to plead guilty "[s]hortly after his trial had commenced, while jury selection was underway"); United States v. Powell, 469 U.S. 57, 66 (1984) ("[T]rials generally begin with voir dire"). As the New York Court of Appeals put it in this case, the idea that jury selection is part of a criminal trial reflects a "modern and commonsense view of the practical realities of a jury trial" (Pet. App. 8a). For these reasons, the Court of Appeals correctly held that petitioner's request was untimely.

Nonetheless, petitioner argues that the Court of Appeals' analysis was "flawed" because the court relied upon state procedural law to define the scope of a federal constitutional right (Pet. 16). However, there was nothing wrong with the Court of Appeals relying on the CPL's definition of trial because, as explained, that definition is consistent with this Court's precedent on when a jury trial begins. And, notably, at least one other state high court has relied on a substantially similar state law definition of trial to deny a defendant's request to proceed pro se. See State v. Nix, 327 So.2d

[8] "[F]or purposes of the Double Jeopardy Clause," a jury trial begins when the jury is sworn. Gomez, 490 U.S. at 872 (citing Serfass v. United States, 420 U.S. 377, 388 [1975]).

301, 354 (La. 1975) (defendant's Faretta request, "coming as it did after the trial had commenced with the selection of the jury, La.C.Cr.P. art. 761, was not a timely assertion of his right to conduct a defense in proper person"), cert. denied sub nom. Fulford v. Louisiana, 425 U.S. 954 (1976); see also La. C.Cr.P. Art. 761 ("A jury trial commences when the first prospective juror is called for examination").

Petitioner further contends that the Court of Appeals' "abstract concerns about 'delay or confusion'" do not justify its decision to mark the start of jury selection as the point at which a Faretta request becomes untimely (Pet. 17). As an initial matter, the concern that granting petitioner's eleventh-hour request to represent himself would have resulted in delay was anything but "abstract" (Pet. 17). As discussed earlier, petitioner's trial undoubtedly would have been delayed had the trial court granted his request because petitioner was simply in no position to begin representing himself at that point. He had absented himself from the entire jury selection process, and he kept insisting that he did not understand what was happening in the case. Had the trial court granted the request without delaying the trial, it would have been, in the judge's words, a "travesty" (Resp. App. 40a). It makes no difference that petitioner did not request a continuance, for one "may fairly infer on the day of trial … that a defendant's last-minute decision to represent himself would cause delay, whether or not [he] requests a continuance." Hill v. Curtain, 792 F.3d 670, 681 (6th Cir. 2015).

Insofar as petitioner argues that, as a general matter, delay is not a valid concern because trial courts have "broad discretion to deny adjournment requests," it

bears noting that appellate courts have reversed convictions in cases where the trial court granted the defendant's untimely Faretta request but denied his request for a continuance, holding that the denial of a continuance was a deprivation of due process. See, e.g., People v. Hill, 148 Cal.App.3d 744 (Cal. Ct. App. 1983) ("[W]hile the disposition of an untimely [motion to proceed pro se] is discretionary, the disposition of a request for continuance following the grant of such a motion is not: If … the trial judge allows the defendant to discharge his counsel … it appears a reasonable continuance is mandatory and a failure to grant such continuance would be reversible error") (internal quotation marks omitted).

As for the risk of juror confusion resulting from the grant of a mid-voir dire Faretta request, Maryland's highest court has explained that "jurors may be confused when a defendant's motion to discharge counsel is granted and defendant embarks on abrupt and apparent change to [voir dire] strategy" and questioning. State v. Hardy, 4 A.3d 908, 917 (Md. 2010). Again, that concern was hardly "abstract" here (Pet. 17). Indeed, after denying petitioner's Faretta request, the trial judge remarked, "I can't have him step in and represent himself at this stage of the proceeding. What would he do? He doesn't know what questions were asked of the jurors" (Resp. App. 38a).

Petitioner further contends that drawing the timeliness line at the start of jury selection denies criminal defendants the chance to make a "fully-informed choice about whether to waive counsel" (Pet. 18). According to petitioner, a defendant cannot "meaningfully assess" whether to waive counsel without seeing counsel engage

in voir dire (Pet. 18). At the outset, petitioner's intertwining of a defendant's right to represent himself with his dissatisfaction with counsel does not bear scrutiny. If a defendant is dissatisfied with his attorney, the more natural response is to request new counsel. In contrast, a defendant with a genuine desire to steer his own defense would presumably assert that right long before trial, and would certainly not wait until eleven jurors had been selected before making the request.

But, even on its own terms, petitioner's argument proves too much. By its logic, a defendant could not make a fully informed choice about self-representation at trial without seeing counsel give an opening statement, examine witnesses, object to evidentiary rulings, or deliver a summation. Obviously, a defendant is not entitled to a dress rehearsal of the trial before deciding whether to proceed pro se. Additionally, the argument begs the question of how much of the voir dire process must a defendant be allowed to watch before he can "meaningfully assess" whether to represent himself. One would think that, by the time eleven jurors are selected and sworn, a defendant would have had a more than "meaningful" opportunity to decide whether to invoke the right to self-representation.

In any event, it blinks reality to assert that defendants cannot "meaningfully assess" whether to proceed pro se at trial before counsel begins voir dire. That certainly was not the case here, as counsel made nineteen pretrial court appearances, had video conferences with petitioner, and met with him outside of court, all before representing him at a suppression hearing. Petitioner thus had ample opportunity to

determine whether the "potential advantage of [his] lawyer's assistance might, in fact, be realized" (Pet. 18) (internal quotation marks omitted). In fact, by his own account, petitioner concluded long before trial that he did not "feel the vibe" with counsel (Resp. App. 20a).

Moreover, it bears reminder that petitioner gave up the chance to assess his lawyer's performance during voir dire by absenting himself from the jury selection process after the trial court denied his request for substitution of counsel. Thus, even if it could be said that a defendant cannot make a "fully-informed" choice about proceeding pro se at trial without seeing counsel perform voir dire (Pet. 18), petitioner voluntarily chose not to observe voir dire in this case.

Lastly, to the extent petitioner argues that the point at which a Faretta request becomes untimely should coincide with the attachment of jeopardy, the rationale for the rule that jeopardy attaches when the jury is sworn is entirely different from the rationale for requiring defendants to invoke the right to self-representation in a timely manner. "The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury." Crist v. Bretz, 437 U.S. 28, 35 (1978). The rule is grounded in the "strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict." Id. at 36.

By contrast, the rule requiring that defendants timely invoke the right to self-representation is not designed to protect the defendant's interests; just the opposite,

the rule reflects the principle that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez, 528 U.S. at 162; accord United States v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978) ("In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"); Commonwealth v. El, 977 A.2d 1158, 1165 (Pa. 2009) ("Indeed, the very basis for requiring a timely and unequivocal assertion of the right to proceed pro se is to avoid manipulation and delay"). Thus, petitioner's "focus on jury empanelment is made in the abstract and … is based on an incomplete analysis." State v. Christian, 657 N.W.2d 186, 192 (Minn. 2003).

In sum, deciding when a Faretta request becomes untimely requires a balancing of the defendant's interest in exercising the right to self-representation against the state's interest in the orderly and efficient administration of justice. Every court to reach the issue—including the dissent below—agrees that the balance is best achieved by drawing the line at the start of trial. At that point, the defendant will have had enough time to make an informed choice about whether to proceed with counsel, and some delay and confusion can be eliminated. Undeniably, jury selection marks the start of trial. More importantly, drawing the line at the start of jury selection, rather than when the jury is sworn, is consistent with the principle that we should "indulge every reasonable presumption against waiver" of the right to counsel, Boyd v. Dutton,

405 U.S. 1, 3 (1972) (internal quotation marks omitted)—a principle that is not "paternalistic[]" (Pet. 18), but a reflection of the "fundamental" importance of the right to counsel. Luis v. United States, 136 S. Ct. 1083, 1089 (2016).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 30, 2019