No. 18-7694

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CRESPO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the New York Court of Appeals

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The question presented was posed over 40 years ago by Justice Blackmun: "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se?" *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

The government acknowledges that circuits are split on this question, and this case presents an excellent opportunity to resolve it. The government provides no reason why the Court should not answer Justice's Blackmun's important question now.

I. The government concedes that federal appellate courts are divided on the question presented.

The government cannot deny a split. It acknowledges that in at least two circuits—the Ninth and Tenth—"a *Faretta* request may be considered timely when made after the start of jury selection but before the swearing of the jury" (Resp. 15; *see also* Pet. 9-10). It also acknowledges that in at least three other circuits—the Second, Fourth, and Sixth—the request must come before jury selection begins (Resp. 11; *see also* Pet. 11-12, n.4). And it cannot dispute that Mr. Crespo made his *Faretta* request within the contested territory—after jury selection began and before the jury was empaneled (Resp. 4; *see also* Pet. 11).

As the petition explains, the First, Third, Fifth, Seventh, and Eighth Circuits, like the Ninth and Tenth, have also adopted the bright-line rule that a *Faretta*

request is timely if made before the jury has been "empaneled."[1] The government cannot disagree with that, so it instead argues that all of these courts use the word "empaneled" to mean "the beginning of the jury selection process" (Resp. 14).

That is not what "empaneled" means, and that is not how courts use it. "Empaneled" refers to the *end* of the jury selection process—the point when at least 12 jurors have been selected and are ready to be sworn. *See Gomez v. U.S.*, 490 U.S. 858, 872-73 (1989) (making clear that the "jury is empaneled" after the "jury selection" process); *United States v. Juarez-Fierro*, 935 F.2d 672, 675 (5th Cir. 1991) ("[A] jury is not 'empaneled' until all parties have exercised their strikes, and twelve jurors are selected to hear the case.").[2]

The government's argument that a jury can be "empaneled" at the beginning of jury selection makes no sense. A "jury" does not exist at the beginning of jury selection, only an unaffiliated pool of prospective jurors. *See Juarez-Fierro*, 935 F.2d at 675 (It is "illogical" to say that "the jury is 'empaneled' even before the final jury is selected."). None of the government's cited cases (Resp. 11-12) suggest that any court

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[1] *See* Pet. 9-10 (citing *United States v. Betancourt-Arretuche*, 933 F.2d 89, 96 (1st Cir. 1991) ("In general, a *Faretta* request is timely only if it is asserted before the jury is empaneled."); *United States v. Bankoff*, 613 F.3d 358, 373 (3d Cir. 2010) (A request is untimely "after trial has commenced—i.e. ... after the jury has been empaneled."); *Chapman v. United States*, 553 F.2d 886, 894 (5th Cir. 1977) (A *Faretta* request is timely if asserted "before the jury is empaneled."); *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."); *United States v. Smith*, 830 F.3d 803, 809 (8th Cir. 2016) (A defendant's motion to proceed pro se is timely if made before the jury is empaneled."); *United States v. Young*, 287 F.3d 1352, 1355 (11th Cir. 2002) (following the "precise holding" of *Chapman*)).

[2] For clarity, citations and internal punctuation marks are omitted throughout. All such omissions are non-substantive.

uses the word "empaneled" to mean "the beginning of the jury selection process."[3] The government's argument that "empaneled" means the "beginning of the jury selection process" is a poor attempt to minimize the depth of a split it cannot deny.

The government next attempts to dodge the matter entirely, positing that Mr. Crespo's self-representation motion would be denied "even in the Ninth and Tenth Circuits" because it was a "delaying tactic" (Resp. 18). In support of this argument, the government claims the trial court made a "factual finding" of delay (Resp. 17).

But that is just not true. The court denied Mr. Crespo's requests for one reason, and one reason only: because they were untimely. This is clear from the record. The court responded to Mr. Crespo's first request by telling him "it is too late" (Pet. App. 44a). When Mr. Crespo renewed his request, the court told him, "it is most likely too late" (Pet. App. 44a-45a). When Mr. Crespo further pressed his request, the court responded, "[t]his is not a timely request" (Pet. App. 46a). He asked again, and the court responded, "You are not going to be able to represent yourself because we are in the middle of jury selection" (Pet. App. 47a). And again: "you cannot represent

[3] *See United States v. Jones*, 938 F.2d 737, 743 (7th Cir. 1991) (holding, nearly a decade before Seventh Circuit's express adoption of timely-before-empaneled rule (*see* Pet. 9), that a request made after completion of jury selection, but before official oath, was untimely); *United States v. Prucha*, 856 F.3d 1184, 1187 (8th Cir. 2017) (merely holding that a motion made "midway through the third day of trial" is untimely, without reference to circuit law expressly adopting timely-before-empanelment rule (*see* Pet. 9)); *United States v. Young*, 287 F.3d 1352, 1353 (11th Cir. 2002) (request was untimely when made "after the jury was empaneled," and after jury selection was complete, even though jury had not yet been officially sworn).

yourself at this point in the trial" (Pet. App. 48a). And once more: "it is too late to ask to represent yourself" (Resp. App. 37a). Only after repeatedly stating that Mr. Crespo's requests were untimely did the court comment about "this" being "manipulation" before once again ruling, for the seventh time, that the application was "not a timely [one] and a request to be pro se has to be timely" (Resp. App. 37a-38a).

If the court thought Mr. Crespo was being "manipulat[ive]," it was not enough to simply say so. The law in New York and elsewhere is clear that a judge who suspects a defendant's self-representation request to be insincere must conduct a full hearing into his motives. *See People v. McIntyre*, 36 N.Y.2d 10, 19 (1974) ("Where a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial ... the proper procedure is to conduct a dispassionate inquiry into the pertinent factors."); *see also, e.g., United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982) (A *Faretta* hearing is "vital," "even when the trial judge strongly suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial."); *United States v. Harlan*, 696 F.2d 5, 6 (1st Cir. 1982) (Although "[i]t may well [have] be[en] that the court sized up defendant as a clever manipulator," his self-representation request nonetheless "triggered an

obligation on the court's part to inquire into defendant's reasons for appearing pro se.").[4]

Only after a *Faretta* hearing that results in an "affirmative showing" that the self-representation request was made "solely for the purpose of delay" may a trial court deny it as untimely. *Burton v. Davis*, 816 F.3d 1132, 1151 (9th Cir. 2016); *see also United States v. Tucker*, 451 F.3d 1176, 1182 (10th Cir. 2006) (trial court erred in denying self-representation request where it did not find defendant was seeking self-representation "solely for the purpose" of delay).

Because the trial court denied Mr. Crespo's requests on timeliness grounds, it never conducted a *Faretta* hearing. There was therefore no "affirmative showing" that Mr. Crespo's requests were "solely" for the purpose of delay. *Burton*, 816 F.3d at 1151. The intermediate appellate court noted the trial court's failure to conduct the requisite inquiry (*See* Pet. App. 34a) ("[E]ven if the trial court believed defendant's motion was 'a disingenuous attempt to subvert the overall purpose of the trial,' it was nevertheless required 'to conduct a dispassionate inquiry into the pertinent factors.'") (quoting *McIntyre*, 36 N.Y.2d at 19).

The government then abandoned its "delay tactic" argument in the New York Court of Appeals, conceding that it only "sought review of the Appellate Division's timeliness ruling" (Resp. 6; *see also* Resp. App. 43a (seeking leave to appeal timeliness

[4] In addition to examining the defendant's motives, the *Faretta* inquiry entails an exploration with the defendant of the factors bearing on a knowing and intelligent waiver, including the dangers of abandoning counsel. *See Welty*, 674 F.2d at 188-89.

question only)). The Court of Appeals was not presented with the delay issue, and it could not, and did not, rule on that issue (*See* Pet. App. 20a n.4 (noting that "[t]he trial court made no findings as to defendant's intent, and the Appellate Division specifically could not consider ... whether defendant's conduct was calculated to undermine, upset or unreasonably delay the progress of the trial") (dissenting opinion)). The Court should reject the government's attempt to create a factual issue where none exists. *See Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 862 n.5 (1987) ("[R]espondent effectively abandoned that theory in the lower courts and we decline to consider the argument here.").

What the government describes as the trial court's "finding" of delay (Resp. 17) was really just off-hand speculation made to the attorneys, during a break from trial testimony, outside Mr. Crespo's presence, and long after his *Faretta* motion was denied on timeliness grounds (*See* Resp. 5 (acknowledging that the court was "[e]xpanding on [its] thought" about manipulation "later during trial"). Even at this point, although the court repeated its speculation about manipulation, it did not make explicit any "finding" about delay (Resp. App. 39a-40a); *see also United States v. Loya-Rodriguez*, 672 F.3d 849, 859 (10th Cir. 2012) ("[T]he district court did not adequately respond to Defendant's request to represent himself' where it failed to "explain what it thought Defendant was seeking by being 'manipulative.'").[5]

[5] Unable to point to any explicit statement by the trial court about delay, the government quotes a remark by Judge Fahey during oral argument that it was "fair to argue that it was a delaying tactic. I think the trial court recognized that" (Resp. 16-17). Judge

A *Faretta* inquiry would not even have confirmed the court's suspicions about Mr. Crespo's motives. The court was authorized to deny the motion only if Mr. Crespo's requests were made "solely" for delay purposes. *Burton*, 816 F.3d at 1151. Yet the record shows that was not why Mr. Crespo sought self-representation. Mr. Crespo *did* have a bona fide reason for seeking pro se status: it was the only available course after the court denied his repeated requests to replace his lawyer, with whom he had a "complete breakdown of communication and trust" (Pet. App. 37a-38a). Indeed, the record suggests that not even the trial court considered delay to be Mr. Crespo's "sole[]" motive—it acknowledged the requests were "made in the context of his dissatisfaction with counsel" (Resp. App. 40a). The government cannot bootstrap from the court's speculative afterthoughts about "manipulation" a "factual finding" about delay tactics that would have, in any event, been improperly made absent the requisite inquiry.

Nothing else shows a delay tactic. Mr. Crespo had a valid reason for not making the application sooner—he "d[id]n't have the knowledge" that self-representation was an option (Pet. App. 47a). And he did not seek a continuance, as one would expect from a defendant with a dilatory motive. *See United States v. Simpson*, 845 F.3d 1039, 1044 (10th Cir. 2017) (denial of request proper where defendant's pro se motion was "conditioned on the grant of a continuance").[6] Finally, there was no evidence that

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Fahey was incorrect that the trial court recognized that. But he was unmoved anyhow—he ultimately voted with the dissent in favor of Mr. Crespo (Pet. App. 29a).

[6] The government speculates that, even though Mr. Crespo did not request a continuance, "it was obvious that granting [his] request would have necessitated delay"

Mr. Crespo had actually delayed the proceedings. *See Smith*, 830 F.3d at 809 ("Nor had Smith previously attempted to delay his trial."). To the contrary, Mr. Crespo expressed frustration that the case had dragged on for nearly two years, telling the court he was "always available" for trial, which should have occurred "six months or seven months ago," and blaming his lawyer for not advancing the case more quickly (Resp. App. 13a-14a). The court, too, was frustrated ("it is my oldest case"), but nonetheless assured Mr. Crespo he was not responsible for the delay, telling him: "I am not blaming you for the delay" (Resp. App. 14).

A genuine split exists in the lower appellate courts. Mr. Crespo's request would have been granted in jurisdictions that deem such requests timely if made before the jury is empaneled.

II. The question presented is an important and recurring one, and this case is an excellent vehicle for its resolution.

Resolution of this conflict is of immense practical importance to both criminal defendants and trial courts (*See* Pet. 12-15). *Faretta* requests often come shortly before trial. Criminal defendants, who often have few chances to assess their lawyer's competency, need clear and uniform guidance on when a last-minute request becomes an untimely one (*see* Pet. 13-14). And judges, who are perennially frustrated by eve-

(Resp. 17). Even were that true, "[d]elay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation." *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982). The fact that Mr. Crespo did not even ask for a continuance is evidence of his good faith, irrespective of what might have happened had the court granted the application.

of-trial *Faretta* requests,[7] deserve a clear and uniform rule about when they must nonetheless tolerate them (*see* Pet. 14-15).

The government's arguments about why this issue is not worthy (Resp. 19) are uncompelling. For instance, the government has tracked down a handful of cases where courts have discretionarily granted untimely requests (Resp. 20-21). But the government omits that such requests may be granted "only in compelling circumstances." *McIntyre*, 36 N.Y.2d at 17. Therein lies the importance of Justice Blackmun's question: when a self-representation motion is timely, it must be thoroughly explored, via a *Faretta* hearing, regardless of the "circumstances." Defendants are entitled to know when exactly this fundamental entitlement devolves into merely the chance that the trial judge will take a favorable view of the "circumstances."

The fact that the New York Court of Appeals also addressed state law does not, as the government argues (Resp. 22), somehow detract from the fact that it also addressed Mr. Crespo's federal constitutional challenge (*see* Pet. App. 11a-12a ("Our conclusion is also consistent with federal case law," and examining federal cases). Identical policy considerations underlie the state and federal self-representation right, and the Court of Appeals thoroughly considered and debated those policies over

[7] *See United States v. Berkowitz*, 927 F.2d 1376, 1383 (7th Cir. 1991) ("When the Supreme Court in *Faretta* announced the right to self-representation it placed trial judges between a rock and hard place.").

the course of full briefing, argument, re-argument, and majority and dissenting opinions (*see, e.g.*, Pet. App. 7a, 11a, 18a, 24a-27a).

Finally, the fact that this Court has denied previous petitions involving similar issues (Resp. 19-20) does not mean the Court denied those petitions because the issue presented here is unimportant. The petitions the government cites (Resp. 20) were in fact poor candidates to address Justice Blackmun's question.[8]

This case is an ideal vehicle (Pet. 15-16). Lower appellate courts have resolved Justice Blackmun's question about timing in different ways, and Mr. Crespo's requests fell right in the disputed territory—they were untimely in New York but would have been timely in a majority of federal jurisdictions. The government offers no reason why this Court should not review this case, which will directly address and resolve lower courts' conflicting applications of a fundamental constitutional right.

* * *

The government's response concludes with a series of wrong-headed arguments about the trial judge's discretion to control the boundaries of the pro se right (Resp. 23-31). Our petition anticipated and addressed these arguments (Pet. 12-18). Suffice it here to say that the government's arguments track those the *Faretta* majority rejected as insufficient to overcome the Sixth Amendment's grant "to the

[8] *See Kelley v. United States*, 2015 WL 5117971 (Cert. Pet. 2015) (requests were conditioned on a continuance and the denial of request for substitute counsel); *Moriel v. Prunty*, 1997 WL 33557054 (Cert. Pet. 1997) (habeas case where trial judge expressly found that request "was made for the purpose of delay."); *Bunnell v. Armant*, 1986 WL 767197 (Cert Pet. 1986) (defendant's request was made "in conjunction with a request for a substantial continuance")).

accused personally the right to make his defense." 422 U.S. at 819; *see also id.* at 840, 845 (Burger, C.J., dissenting) (advocating that "the trial court [should] retain[] discretion to reject any attempted waiver of counsel" and predicting that "there will be added congestion in the courts and that the quality of justice will suffer"); *id.* at 852 (Blackmun, J., dissenting) (predicting "confusion" and a host of "procedural problems" including the question raised here about timeliness).

The Court should grant certiorari to provide a definitive answer to Justice Blackmun's important question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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