No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RICHARD LARRY LACEY — PETITIONER

VS.

STATE OF OREGON — RESPONDENT

_____

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

_____

PETITION FOR WRIT OF CERTIORARI

_____

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PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Does a self-represented defendant waive or forfeit his Sixth Amendment right to representation, when the defendant intentionally engages in misconduct that the defendant was advised would result in the defendant's removal from the courtroom and continuation of trial without any defense presence, *i.e.*, with an empty defense table?

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THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Larry Lacey, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court filed on December 13, 2018, and to resolve a significant split among state and federal court determinations that a criminal defendant exercising the Sixth Amendment right to self-representation has waived or forfeited the Sixth Amendment rights to representation and to be present at trial by engaging in misconduct.

OPINIONS BELOW

The Oregon Court of Appeals reversed defendant's conviction and sentence in a divided opinion. *State v. Lacey*, 282 Or. App. 123, 385 P.3d 1151 (2016). Appendix B.

The Oregon Supreme Court reversed the judgment of the Oregon Court of Appeals and affirmed the judgment of the circuit court in a unanimous decision. *State v. Lacey*, 364 Or. 171, 431 P.3d 400 (2018). Appendix A.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the state court's decision on a writ of certiorari.

The Oregon Supreme Court entered its judgment on December 13, 2018. Under S. Ct. Rule 13.3, this petition is timely if filed on or before March 13, 2019.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

I. Material Facts

A. While exercising his right to self-representation at trial, the circuit court removed defendant from the courtroom and proceeded with trial without a defense presence.

The state brought two criminal cases against defendant, each alleging multiple counts of unlawful manufacture, delivery, and possession of marijuana, and one count of criminal forfeiture of proceeds related to the drug charges. The cases, which involved a total of 32 counts, were consolidated for trial. App. A at 4.

Before trial, defendant was represented by four different attorneys in succession. He retained the first two, each of whom withdrew at his request. He then requested a court-appointed attorney. The trial court granted that request and appointed defendant's third attorney. That attorney later withdrew after defendant unsuccessfully attempted to discharge him. The trial court then appointed a fourth attorney, Scales. At a trial readiness hearing, Scales reported that he would be ready for trial on the scheduled trial date. Defendant disagreed and then disobeyed the trial court's orders to be quiet and allow Scales to speak. The trial court held defendant in contempt for three successive violations of its orders, imposing a greater fine each time. App. A at 4-5.

At a subsequent hearing held the week before the scheduled trial date, Scales reported that he was ready for trial. Defendant then filed a motion asking the trial court for a continuance or, in the alternative, to discharge Scales. At that point, the first case had been pending for about three years, and the second case had been pending for about two years. App. A at 5.

The trial court held a hearing on defendant's motion the day before the scheduled trial date. At the hearing, Scales asked to withdraw as defendant's counsel. Scales informed the court that it appeared that defendant, who had been filing motions on his own, wanted to represent himself. Scales also informed the court that defendant was insisting that he raise a defense based on an interpretation of the Oregon Medical Marijuana Act that the trial court had rejected at a prior hearing. App. A at 5.

The trial court denied defendant's request for a continuance. It encouraged defendant to continue with Scales as his attorney, explaining that neither Scales nor defendant could raise the defense that defendant wanted because, as it had already ruled, the defense was based on an incorrect interpretation of Oregon statutes. App. A at 5. The trial court also advised defendant that if he proceeded *pro se* and engaged in disruptive conduct, he would be removed from the courtroom and the trial would proceed without him and without defense counsel:

> "THE COURT: Let me tell you another reason why [proceeding *pro se*] may be a bad idea. One of the things I'm concerned about in this trial is you speaking out of turn or arguing with me after a ruling. And I told you I'm gonna hold you in contempt. And what I'm going to do or what I intend to do to enforce that is to have you removed from the courtroom. If you're not going to behave in court, then you give up the right to be in court. If you have an attorney, your attorney will still be here and can continue to advocate for you, continue to ask questions of witnesses and represent your interests. If you're representing yourself and you're removed from the court, then there's no one sitting at that table . . . and we'll just go on without you."

App. A at 5-6. The trial court repeated that warning, telling defendant that if he engaged in misconduct he would be held in jail for the rest of the trial day:

> "THE COURT: . . . [T]hat's what I'm going to do. I don't want you speaking out of turn. I don't want you arguing. And what I'm going to do is hold you in contempt if you do that and by making the contempt finding, invoke the sanction of having you removed from the courtroom for the rest of the day. You'll go to jail; you'll sit out the rest of the day in jail. At the end of the trial day, you will be released with an order to come back the next day for the next day of trial, and we'll try again. As long as you behave, you can stay here in court.
>
> ". . . .
>
> "[DEFENDANT]: I understand.
>
> "THE COURT: And that's why, that's yet another and very good reason why I think it's a good idea that you keep Mr. Scales as your attorney.
>
> "[DEFENDANT]: Well, we're not gonna do that. So we don't need to talk about it anymore."

App. A at 6. The trial court continued to advise defendant of the risks of self-representation and, after it did, defendant chose to proceed *pro se* and the trial court allowed Scales to withdraw. App. A at 6.

The case was tried over four days, during which defendant repeatedly engaged in misconduct by arguing with the trial court after it issued a ruling and by failing to abide by its rulings. Throughout the trial, the trial court warned defendant that, if he continued his misconduct, he would be removed from the courtroom and the trial would proceed in his absence. App. A at 6-7. On the third day of trial, the trial court admonished defendant outside of the presence of the jury, stating:

> "THE COURT: Alright. The reason I asked the jury to step out is because you are arguing with me in an area that I have specifically told you you're not going to argue with me, and you keep talking after I interrupt you and tell you what my ruling is. That is contempt of court. I've told you what was gonna happen if I held you in contempt of court, and that is that you go to jail and spend the rest of the day there until we finish our proceedings for the day, and then we'll try again the next day. I really don't want to do that because there's no one sitting at your table to carry the ball while you're gone."

App. A at 7.

On the fourth and final day of trial, both parties rested their cases. The trial court and defendant had an extended discussion about closing arguments. Defendant stated his intent to refer to his state-issued medical marijuana card, which had not been admitted into evidence, during his closing argument. The

court forbade defendant to refer to the card or read it to the jury, because it was not in evidence. The court repeated its ruling numerous times in response to defendant's questions and contentions, but defendant refused to accept the court's ruling. He interrupted the court, became defiant and aggressive, disobeyed the court's orders, stated over and over that he intended to read from the card, and challenged the court to remove him from the courtroom. In response, the trial court told defendant, "I think what you're trying to do is . . . to remove yourself from the trial." Defendant said he was not, but he continued to state that he would use the card in closing argument. App. A at 7.

Based on defendant's refusal to abide by its orders and his expressed intention to refer to information that was not in evidence, the trial court held defendant in contempt of court and removed him from the courtroom. App. A at 7-8.

After making a record of its reasons for removing defendant, the trial court proceeded with the trial. The state made its closing argument, the case was submitted to the jury, and the jury returned its verdict, finding defendant guilty on all but four counts. Immediately thereafter, the trial court held a trial on two sentencing enhancement facts, and the jury found both of the sentencing enhancement facts. On a later date, defendant appeared with retained counsel for sentencing. App. A at 8.

B. The Oregon Court of Appeals reversed the circuit court on direct appeal after concluding that the court violated defendant's right to representation.

Defendant appealed, asserting that the trial court had violated his Sixth Amendment right to representation. The Oregon Court of Appeals agreed, holding that, although defendant had waived his right to counsel before trial and had forfeited his rights to self-representation and to be present during trial, he had not forfeited his right to representation. App. A at 8. In doing so, the Court of Appeals relied on its opinion in *State v. Menefee*, 268 Or. App. 154, 341 P.3d 229 (2014, in which it had ruled that, although a *pro se* defendant who acts out at trial "'may forfeit the right to be present and the right to self-representation in the proceeding, the defendant does not also forfeit the right to any representation at trial,'" and, therefore,

> "'after a trial court has removed a *pro se* defendant for his or her misconduct, the trial court cannot proceed in the defendant's absence unless and until the trial court has either secured the defendant's waiver of his or her right to representation at trial or has taken some other course of action that protects the defendant's right to representation, which may include the appointment of counsel.' "

App. A at 8 (*quoting Menefee*, 268 Or. App. at 184-85). Applying that rule in this case, the Court of Appeals reversed the trial court's judgment, reasoning that,

> "after defendant forfeited his rights to be present and self-representation, the trial court continued the trial in defendant's

> absence without complying with the procedure set forth in *Menefee*. The court did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom. As a result, defendant was deprived both of closing argument and the ability to participate in the trial on the sentencing enhancement factors."

App. A at 8-9.

The Court of Appeals explained that the primary rationale for the approach required by *Menefee* "is to protect the structural integrity of our criminal justice system." App. A at 9. Specifically, the Court of Appeals explained,

> "Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who, like the defendant in *Menefee* and defendant here, work the hardest to undermine it. And the Sixth Amendment imposes upon us, as courts, an obligation to do what we can to prevent them from succeeding. This does not mean that a court has to tolerate an obstreperous defendant's presence in the courtroom, but it does mean that the court may have to appoint counsel for a defendant who previously elected to proceed *pro se*, notwithstanding the awkwardness of doing so mid-trial."

App. A at 9 (citation omitted).

One member of the three-judge panel dissented, stating that the trial court did not err by proceeding with the trial in defendant's absence because "defendant had already waived his right to representation by counsel at the beginning of trial" and "[t]hen, exercising his right of self-representation,

defendant chose to engage in misconduct with full knowledge that the consequence would be his removal from court and the continuation of the trial without anyone to represent him." App. A at 9 (Garrett, J., dissenting). Regarding the majority's concern about "the danger of an empty counsel table," Judge Garrett observed that a defendant's right to self-representation "presumes that a defendant's right to control his own representation is superior to the state's more generalized interest in ensuring that defendants are vigorously and competently represented by counsel." App. A at 10.

C. Discretionary Review by the Oregon Supreme Court

1. Parties' Arguments

The Oregon Supreme Court allowed the state's petition to review the decisions of the circuit court and the Court of Appeals. On review, the state argued that the trial court did not err by proceeding with the trial in defendant's absence. Specifically, the state argued that, if a defendant "validly waives his right to counsel, and then, while representing himself, engages in misconduct that waives his right to be present, the court may continue the trial in his absence without obtaining a second waiver of the right to counsel or appointing new counsel." The state further argued that, even if a second waiver of the right to counsel is required, in this case, defendant waived that right through his misconduct. App. A at 10.

In response, defendant argued, "[t]he absence of anyone to represent the defendant during trial offends the notion of an adversarial judicial system and cannot yield a fair trial," and that "if a defendant waives his right to counsel, and invokes his right to self-representation, engaging in misconduct at trial does not forfeit his constitutional right . . . to a defense presence . . .." According to defendant, "when a *pro se* defendant is removed from the courtroom for misconduct, thus forfeiting his right to presence and right to self-representation, the court must find a way to protect the defendant's constitutional right to counsel." (Footnote omitted. Therefore, defendant concluded, the trial court in this case erred because it "did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom." App. A at 11.

2. The Oregon Supreme Court reversed, holding that the trial court did not violate defendant's Sixth Amendment right to representation.

The Oregon Supreme Court concluded,

> "We recognize the importance of a defense presence at trial. However, in keeping with *Faretta* [*v. California*, 422 U.S. 806, 832 (1975)] we also recognize that a defendant has the right to self-representation, which is based on respect for the defendant's autonomy, and that, when exercising that right, a defendant can choose not to participate in, or even attend, trial. Based on the circumstances of this case, we conclude that that is what defendant did. The trial court found that defendant was trying to get himself

> removed from the courtroom, and the record supports that finding. The trial court clearly and repeatedly warned defendant that, if he insisted that he would violate the court's order prohibiting him from referring to information that had not been admitted into evidence, he would be removed from the courtroom and no one would be present to represent him. Despite those warnings, defendant insisted that he would violate the order. By doing so, he made a knowing and voluntary choice to be removed from the courtroom and leave the defense table empty."
>
> ". . . A defendant cannot force a trial court to appoint counsel or to suspend a trial simply by removing himself from the courtroom. Nor can a defendant do so by having himself removed from the courtroom. When a defendant waives the right to counsel knowing that, if he is removed from the courtroom for misconduct, no one will be present to represent him, and then, while representing himself, intentionally engages in misconduct that he knows will result in his removal, the defendant is choosing to not to participate in or be present at trial. In that circumstance, a trial court can accept the defendant's choice. The trial court is not required to appoint counsel or take other measures to provide a defense presence. A trial court may do so, and it may be advisable for it to do so, but it is not required to do so."

App A. at 18-19 (Footnote omitted).

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari in this case, because the Oregon Supreme Court has decided an important federal question in a way that conflicts with decisions of other state courts of last resort and with decisions of United States Courts of Appeal. This Court should also grant the petition, because the Oregon Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court.

I. The Oregon Supreme Court's opinion in *Lacey* decides an important federal question in a way that conflicts with the decisions of other state courts of last resort and with the decisions of some United States Courts of Appeal.

As the Oregon Supreme Court noted in its opinion, the question presented here was an open one in the State of Oregon, other jurisdictions are divided on it, and—since state and federal courts across the country are fractured on this complex issue—guidance from the Supreme Court would be helpful. App A at 10 n. 3 (citing *Lacey I*, App. B at 8 n. 1 (*quoting Davis v. Grant*, 532 F.3d 132, 140 (2d Cir. 2008, *cert den*, 555 U.S. 1176 (2009.

The Oregon Supreme Court cited the following lower court decisions in support of its conclusion that proceeding with trial in defendant's absence was permissible,

- *Clark v. Perez*, 510 F.3d 382, 396 (2d Cir.), *cert. den.*, 555 U.S. 823 (2008).
- *People v. Brante*, 232 P.3d 204, 208-09 (Colo. App. 2009);
- *State v. Eddy*, 68 A.3d 1089, 1105 (R.I. 2013);
- *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998);
- *Torres v. United States*, 140 F.3d 392 (2nd Cir.), *cert. den.*, 525 U.S. 1042 (1998); and

- *United States v. Stanley*, 739 F.3d 633, 649-50 (11th Cir.), *cert. den.*, 572 U.S. 1126 (2014).

App A at 14-16.

However, and conversely, the Oregon Supreme Court also noted that many courts have observed that the appointment of standby counsel is advisable in situations such as this, because if a *pro se* defendant loses his right to self-representation, standby counsel can assume the representation. App. A at 19 n. 8. The Oregon Supreme Court also noted that a trial court can stop short of terminating the defendant's right to self-representation and instead allow the defendant to continue to participate remotely by arranging for the defendant to monitor and respond to what happens in the courtroom. App. A at 20 n. 8. In support of these propositions, the Oregon Supreme Court cited *Faretta v. California*, 422 U.S. 806 (1975), and the following lower court authority,

- *Jones v. State*, 449 So. 2d 253, 257 (Fla.), *cert. den.*, 469 U.S. 893 (1984);
- *Lacey I*, App. B at 8 n. 2;
- *People v. Carroll*, 140 Cal. App. 3d 135, 189 Cal. Rptr. 327, *cert. den.*, 464 U.S. 820 (1983);
- *People v. Cohn*, 160 P.3d 336, 342-43 (Colo. App. 2007);
- *State v. DeWeese*, 117 Wash. 2d 369, 381, 816 P.2d 1 (1991);

- *Torres v. United States*, 140 F.3d 392;[1]
- *United States v. Jennings*, 855 F. Supp. 1427, 1445-46 (M.D. Pa. 1994), *aff'd without op*., 61 F.3d 897 (3d Cir. 1995);
- *United States v. Mack*, 362 F.3d 597 (9th Cir. 2004); and
- *United States v. Pina*, 844 F.2d 1, 15 (1st Cir. 1988).

App. A at 19-20 n. 8.[2] Specifically, the Oregon Supreme Court noted that those opinions could be read as holding that, if a trial court removes a *pro se* defendant from the courtroom for voluntarily engaging in conduct that he knew would result in his removal and leave the defense table empty, the trial court cannot proceed with the trial unless and until it either appoints counsel or takes other steps to ensure that the defendant is represented. App. A at 22-23.

In sum, the Oregon Supreme Court has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort (*Jones v. State* (Florida Supreme Court, and *State v. DeWeese* (Washington Supreme Court. Furthermore, the Oregon Supreme Court has decided this important federal question in a way that conflicts with the

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[1] *Torres* was cited both in support of, and contrary to, the Oregon Supreme Court's opinion.

[2] And, as discussed *infra*, the Oregon Supreme Court also noted that at least two opinions, *People v. Carroll*, and *United States v. Mack*, came to the opposite conclusion of the *Lacey* opinion.

decisions of some United States Courts of Appeal (*Torres v. United States* (2nd Cir.), *United States v. Jennings* (M.D. Pa. 1994, *aff'd without op* (3d Cir), *United States v. Mack* (9th Cir.), and *United States v. Pina* (1st Cir.)).

II. The Oregon Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court.

As acknowledged by the Oregon Supreme Court in *Lacey*, and contrary to its opinion, the courts in *People v. Carroll* and *United States v. Mack* held that a trial court that removes a *pro se* defendant from the courtroom for misconduct cannot continue the trial without either appointing counsel or otherwise arranging for the defendant's representation. App. A at 21-22. The Oregon Supreme Court attempted to distinguish *Carroll* and *Mack*, asserting that it appeared that the defendants in those cases *were not warned*, prior to waiving their right to counsel, that, if they proceeded *pro se* and were removed from the courtroom for misconduct, their trials would continue without anyone present to represent them. App. A at 22. However, the Oregon Supreme Court then conceded that the defendants in those cases *were warned*, stating,

> "To be sure, the defendants in *Carroll* and *Mack* were warned during trial that, if they continued to engage in specific misconduct, they would be removed from their courtrooms and their trials would continue without anyone present to represent them. Thus, their misconduct could be characterized as knowing and voluntary. Consequently, *Carroll* and *Mack* can be read as holding that, if a trial court removes a *pro se* defendant from the courtroom for voluntarily engaging in conduct that he knew would result in his removal and leave the defense table empty, the trial

> court cannot proceed with the trial unless and until it either appoints counsel or takes other steps to ensure that the defendant is represented."

App. A at 22-23.

Realizing the conflict of those cases with its opinion, the Oregon Supreme Court concluded that,

> "To the extent that those cases so hold, they are at odds with the right of a *pro se* defendant to choose whether and how to defend himself. After all, a *pro se* defendant can choose to plead guilty or no contest to the charges against him, if the choice is knowingly and voluntarily made. Given the deference afforded to a defendant's autonomy, we conclude that a trial court is not prohibited from proceeding with a trial if a *pro se* defendant makes a voluntary choice to engage in conduct that he knows will result in his removal and leave him without anyone present to represent him."

App. A at 23.

Whether the opinions in *Carroll* and *Mack* are "at odds with the [Sixth Amendment] right of a *pro se* defendant to choose whether and how to defend himself," is an important question of federal law that has not been, but should be, settled by this Court. Likewise whether the Sixth Amendment establishes that "[g]iven the deference afforded to a defendant's autonomy . . . a trial court is not prohibited from proceeding with a trial if a *pro se* defendant makes a voluntary choice to engage in conduct that he knows will result in his removal and leave him without anyone present to represent him," is an important question of federal law that has not been, but should be, settled by this Court.

III. The Sixth Amendment does not countenance a simultaneous waiver by conduct, or forfeiture, of a self-represented criminal defendant's rights to representation and to be present at trial.

The Sixth Amendment guarantees the right to representation by counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to self-representation, *Faretta v. California*, 422 U.S. 806, 821, 832 (1975), and the right to be present at trial, *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

A criminal defendant may knowingly, voluntarily, and explicitly waive each of those rights independently. *Faretta v. California*, 422 U.S. at 835 ("in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits" associated with the right to counsel); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'").

Under certain circumstances, a criminal defendant may forfeit (or waive by conduct) each of those rights independently. *United States v. Bauer*, 956 F.2d 693 (7th Cir. 1992); *United States v. Weninger*, 624 F.2d 163 (10th Cir. 1980); *United States v. Fowler*, 605 F.2d 181 (5th Cir. 1979) (Sixth Amendment right to representation by counsel); *Faretta*, 422 U.S. at 834 n. 46

(the Sixth Amendment right to self-representation); *Illinois v. Allen*, 397 U.S. at 343 (the Sixth Amendment right to be present at trial).[3]

Based on the foregoing, a *pro se* criminal defendant can knowingly and voluntarily waive the Sixth Amendment rights to representation and to be present at trial, resulting in a trial with an empty counsel table. But a court may not conduct a trial with an empty defense table by concluding that the defendant has simultaneously waived by conduct or forfeited his rights to representation and to be present. And intentional misconduct by a *pro se* criminal defendant who has been warned that misconduct would result in his removal from the

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[3] The Court's use of the terms "waiver" and "forfeiture" has been somewhat conflated, conflicting or confusing. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 895 n. 2, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment) ("The Court uses the term 'waive' instead of 'forfeit.' The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, 'the intentional relinquishment or abandonment of a known right or privilege,' is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver * * * but others may not [including the right to counsel]. A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true.").

Additionally, as a "hybrid" of waiver and forfeiture, some courts have applied the concept of "waiver by conduct"—as opposed to waiver by affirmative election or forfeiture by wrongdoing—in cases where a defendant has been warned that he will lose his right to counsel if he engages in dilatory tactics, such as failing to hire counsel, despite the court's warnings, where he has the financial ability to do so. *United States v. Goldberg*, 67 F.3d 1092, 1099-1103 (3d Cir. 1995).

courtroom and the continuation of trial without a defense presence cannot constitute a knowing and intelligent waiver of the Sixth Amendment right to *any* defense representation.

Therefore, when a *pro se* criminal defendant intentionally engages in misconduct after the defendant was advised that misconduct would result in the defendant's removal from the courtroom and the continuation of trial without a defense presence, a trial court must either allow the defendant the opportunity to make a knowing and voluntary choice to continue without representation (empty counsel table) or appoint counsel to represent him in his absence.

CONCLUSION

Because the Oregon Supreme Court has decided an important federal question in a way that conflicts with decisions of other state courts of last resort and with decisions of United States Courts of Appeal, and because the Oregon Supreme Court has decided an important question of federal law that has not

been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST G. LANNET
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Signed
By Eric Johansen at 3:12 pm, Mar 12, 2019

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Richard Larry Lacey

Filed: December 13, 2018

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Petitioner on Review,

v.

RICHARD LARRY LACEY,

Respondent on Review.

(CC 11CR0121, 12CR0202); (CA A156849 (Control), A156850); (SC S064616)

On review from the Court of Appeals.*

Argued and submitted October 19, 2017.

Lauren P. Robertson, Assistant Attorney General, Salem, argued the cause and filed the brief for petitioner on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Eric Johansen, Deputy Public Defender, Salem, argued the cause and filed the brief for respondent on review. Also on the brief was Ernest G. Lannet, Chief Defender, Office of Public Defense Services.

Before Walters, Chief Justice, and Balmer, Kistler, Nakamoto, Flynn, Duncan, and Nelson, Justices.**

DUNCAN, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

*Appeal from Josephine County Circuit Court,
Michael Newman, Judge.
282 Or App 123, 385 P3d 1151 (2016)

**Landau, J., retired December 31, 2017, and did not participate in the decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review.

[X] No costs allowed.
[ ] Costs allowed, payable by:
[ ] Costs allowed, to abide the outcome on remand, payable by:

DUNCAN, J.

In these criminal cases, which were consolidated for trial, defendant waived his right to counsel and invoked his right to self-representation after being warned that, if he engaged in disruptive conduct during his jury trial, he would be removed from the courtroom, and the trial would proceed without anyone present to represent him. Despite that warning and numerous others during the trial, defendant engaged in disruptive conduct throughout the trial, and, before closing argument, he informed the trial court that he would not abide by its order prohibiting him from referring to information that had not been admitted into evidence. After confirming that defendant intended to violate its order, the trial court removed defendant from the courtroom for the remainder of the trial day.

The jury found defendant guilty of most of the charged crimes. Defendant appealed, asserting that the trial court had violated his rights under the Sixth Amendment to the United States Constitution by proceeding with the trial in his absence.[1] The Court of Appeals agreed, holding that the trial court had violated defendant's Sixth Amendment "right to representation" because "it did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom." *State v.*

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[1] The Sixth Amendment provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Lacey, 282 Or App 123, 127, 385 P3d 1151 (2016). On the state's petition, this court allowed review. As explained below, we conclude that, while representing himself, defendant made a knowing and voluntary choice to be removed from the courtroom and leave the defense table empty and the trial court did not violate defendant's Sixth Amendment rights by accepting that choice.

I. HISTORICAL AND PROCEDURAL FACTS

The state brought two criminal cases against defendant, alleging multiple counts of unlawful manufacture, delivery, and possession of marijuana, and criminal forfeiture. *See former* ORS 475.856 (2011) (manufacture); *former* ORS 475.860 (2011) (delivery); *former* ORS 475.864 (2011) (possession);[2] ORS 131.582 (criminal forfeiture). The state also alleged two sentencing enhancement facts in connection with the crimes charged in the second case. The cases, which involved a total of 32 counts, were consolidated for trial.

Before trial, defendant was represented by four different attorneys in succession. He retained the first two, each of whom withdrew at his request. He then requested a court-appointed attorney. The trial court granted that request and appointed defendant's third attorney. That attorney later withdrew after defendant unsuccessfully attempted to fire him. The trial court then appointed a fourth attorney, Scales. At trial call, Scales reported that he would be ready for trial on the scheduled trial date. Defendant disagreed and then disobeyed the trial court's orders to be quiet and allow

[2] *Former* ORS 475.856 (2011), *former* ORS 475.860 (2011), and *former* ORS 475.864 (2011) have since been repealed. Or Laws 2017, ch 21, § 126.

Scales to speak. The trial court held defendant in contempt for three successive violations of its orders, imposing a greater fine each time.

At a subsequent trial call held the week before the scheduled trial date, Scales reported that he was ready for trial. After that, defendant filed a motion asking the trial court for a continuance or, in the alternative, to discharge Scales. At that point, the first case had been pending for about three years, and the second case had been pending for about two years.

The trial court held a hearing on defendant's motion the day before the scheduled trial date. At the hearing, Scales asked to withdraw as defendant's counsel. Scales informed the court that it appeared that defendant, who had been filing motions on his own, wanted to represent himself. Scales also informed the court that defendant was insisting on raising a defense based on an interpretation of the Oregon Medical Marijuana Act that the trial court had rejected at a prior hearing.

The trial court denied defendant's request for a continuance. It encouraged defendant to continue with Scales as his attorney, explaining that neither Scales nor defendant could raise the defense defendant wanted to raise because, as it had already ruled, the defense was based on an incorrect statutory interpretation. The trial court also advised defendant that, if he proceeded *pro se* and engaged in disruptive conduct, he would be removed from the courtroom and the trial would proceed without him and without defense counsel:

> "THE COURT: Let me tell you another reason why [proceeding *pro se*] may be a bad idea. One of the things I'm concerned about in this trial is you speaking out of turn or arguing with me after a ruling. And I told you

I'm gonna hold you in contempt. And what I'm going to do or what I intend to do to enforce that is to have you removed from the courtroom. If you're not going to behave in court, then you give up the right to be in court. *If you have an attorney, your attorney will still be here and can continue to advocate for you, continue to ask questions of witnesses and represent your interests. If you're representing yourself and you're removed from the court, then there's no one sitting at that table * * * and we'll just go on without you.*"

(Emphasis added.) The trial court repeated that warning, telling defendant that if he engaged in misconduct he would be held in jail for the rest of the trial day:

"THE COURT: * * * [T]hat's what I'm going to do. I don't want you speaking out of turn. I don't want you arguing. And what I'm going to do is hold you in contempt if you do that and by making the contempt finding, invoke the sanction of having you removed from the courtroom for the rest of the day. You'll go to jail; you'll sit out the rest of the day in jail. At the end of the trial day, you will be released with an order to come back the next day for the next day of trial, and we'll try again. As long as you behave, you can stay here in court.

"* * * * *

"[DEFENDANT]: I understand.

"THE COURT: *And that's why, that's yet another and very good reason why I think it's a good idea that you keep Mr. Scales as your attorney.*

"[DEFENDANT]: *Well, we're not gonna do that. So we don't need to talk about it anymore.*"

(Emphasis added.) The trial court continued to advise defendant of the risks of self-representation and, after it did, defendant chose to proceed *pro se* and the trial court allowed Scales to withdraw.

The case was tried over four days, during which defendant repeatedly engaged in misconduct by arguing with the trial court after it ruled and by failing to abide by its rulings. Throughout the trial, the trial court warned defendant that he would be

removed from the courtroom if he continued his misconduct and the trial would proceed in his absence. On the third day of trial, the trial court admonished defendant outside of the presence of the jury, stating:

> "THE COURT: Alright. The reason I asked the jury to step out is because you are arguing with me in an area that I have specifically told you you're not going to argue with me, and you keep talking after I interrupt you and tell you what my ruling is. That is contempt of court. I've told you what was gonna happen if I held you in contempt of court, and that is that *you go to jail and spend the rest of the day there until we finish our proceedings for the day, and then we'll try again the next day. I really don't want to do that because there's no one sitting at your table to carry the ball while you're gone.*"

(Emphasis added.)

On the fourth and final day of trial, both parties had rested their cases. The trial court and defendant then had an extended discussion about closing arguments, and defendant stated that, in his closing argument, he intended to refer to his medical marijuana card, which had not been admitted into evidence. The court ruled that defendant could not refer to the card or read it to the jury, because it was not in evidence. The court repeated its ruling numerous times in response to defendant's questions and contentions, but defendant refused to accept the court's ruling. He continuously interrupted the court and became defiant and aggressive. He disobeyed the court's orders, stated multiple times that he intended to read from the card, and challenged the court to remove him from the courtroom. In response, the trial court told defendant, "I think what you're trying to do is * * * to remove yourself from the trial." Defendant said he was not, but continued to state that he would use the card in closing argument.

Based on defendant's refusal to abide by its orders and his expressed

intention to refer to information that was not in evidence, the trial court eventually held defendant in contempt of court and removed him from the courtroom.

After making a record of its reasons for removing defendant, the trial court proceeded with the trial. The state made its closing argument, the case was submitted to the jury, and the jury returned its verdict, finding defendant guilty on all but four counts. Immediately thereafter, the trial court held a trial on the two sentencing enhancement facts, and the jury found both of the sentencing enhancement facts. On a later date, defendant appeared with retained counsel for sentencing.

Defendant appealed, asserting that the trial court had violated his Sixth Amendment "right to representation." The Court of Appeals agreed, holding that, although defendant had waived his right to counsel before trial and had forfeited his rights to be present and self-representation during trial, he had not forfeited his "right to representation." *Lacey*, 282 Or App at 127. In doing so, the Court of Appeals relied on its decision in *State v. Menefee*, 268 Or App 154, 341 P3d 229 (2014), in which it had ruled that, although a *pro se* defendant who acts out at trial "'may forfeit the right to be present and the right to self-representation in the proceeding, the defendant does not also forfeit the right to any representation at trial,'" and, therefore,

> "'after a trial court has removed a *pro se* defendant for his or her misconduct, the trial court cannot proceed in the defendant's absence unless and until the trial court has either secured the defendant's waiver of his or her right to representation at trial or has taken some other course of action that protects the defendant's right to representation, which may include the appointment of counsel.'"

Lacey, 282 Or App at 126 (quoting *Menefee*, 268 Or App at 184-85). Applying that rule

in this case, the Court of Appeals reversed the trial court's judgment, reasoning that

> "after defendant forfeited his rights to be present and self-representation, the trial court continued the trial in defendant's absence without complying with the procedure set forth in *Menefee*. The court did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom. As a result, defendant was deprived both of closing argument and the ability to participate in the trial on the sentencing enhancement factors."

Lacey, 282 Or App at 127.

The Court of Appeals explained that the primary rationale for the approach required by *Menefee* "is to protect the structural integrity of our criminal justice system." *Lacey*, 282 Or at 126. Specifically, the Court of Appeals explained,

> "Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who, like the defendant in *Menefee* and defendant here, work the hardest to undermine it. And the Sixth Amendment imposes upon us, as courts, an obligation to do what we can to prevent them from succeeding. This does not mean that a court has to tolerate an obstreperous defendant's presence in the courtroom, but it does mean that the court may have to appoint counsel for a defendant who previously elected to proceed *pro se*, notwithstanding the awkwardness of doing so mid-trial."

Id. at 126-27 (citation omitted).

Judge Garrett dissented, stating that the trial court did not err by proceeding with the trial in defendant's absence because "defendant had already waived his right to representation by counsel at the beginning of trial" and "[t]hen, exercising his right of self-representation, defendant chose to engage in misconduct with full knowledge that the consequence would be his removal from court and the continuation of the trial without anyone to represent him." *Id*. at 133 (Garrett, J., dissenting). Regarding the majority's

concern about "the danger of an empty counsel table," Judge Garrett observed that a defendant's right to self-representation "presumes that a defendant's right to control his own representation is superior to the state's more generalized interest in ensuring that defendants are vigorously and competently represented by counsel." *Id*. at 140 n 3.

The state petitioned for review, asking this court to address what a trial court should do when a *pro se* defendant is removed from the courtroom for misconduct during trial. The state noted that the question was an open one in this court and that other jurisdictions are divided on it.[3] We allowed review.

II. PARTIES' ARGUMENTS ON REVIEW

On review, the state argues that the trial court did not err by proceeding with the trial in defendant's absence. Specifically, the state argues that, if a defendant "validly waives his right to counsel, and then, while representing himself, engages in misconduct that waives his right to be present, the court may continue the trial in his absence without obtaining a second waiver of the right to counsel or appointing new counsel." The state further argues that, even if a second waiver of the right to counsel is required, in this case, defendant waived that right through his misconduct.

In response, defendant argues, "The absence of anyone to represent the defendant during trial offends the notion of an adversarial judicial system and cannot

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[3] In its decision in this case, the Court of Appeals majority stated: "Given that the state and federal courts across the country are fractured on this complex issue, we echo the sentiments of the Second Circuit: 'Frankly, more guidance from the Supreme Court would be helpful.'" *Lacey*, 282 Or App at 129 n 1 (quoting *Davis v. Grant*, 532 F3d 132, 140 (2d Cir 2008), *cert den*, 555 US 1176 (2009)).

yield a fair trial." "Thus," he further argues, "if a defendant waives his right to counsel, and invokes his right to self-representation, engaging in misconduct at trial does not forfeit his constitutional right * * * to *a* defense presence * * *." (Emphasis in original.) According to defendant, "when a *pro se* defendant is removed from the courtroom for misconduct, thus forfeiting his right to presence and right to self-representation, the court must find a way to protect the defendant's constitutional right to counsel." (Footnote omitted.) Therefore, defendant concludes, the trial court in this case erred because it "did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom."

III. ANALYSIS

The issue in this case implicates three Sixth Amendment rights: the right to counsel, the right to self-representation, and the right to be present during court proceedings.[4] We begin with a brief discussion of those rights.

A. *Sixth Amendment Rights*

1. *Right to Counsel*

The Sixth Amendment expressly guarantees criminal defendants the right

[4] Defendant contends that the trial court violated his rights under both the Sixth Amendment and Article I, section 11, of the Oregon Constitution. But defendant did not raise an Article I, section 11, argument in the Court of Appeals, and we allowed review on the state's petition, which raised only the Sixth Amendment issue. Therefore, we decline to address defendant's Article I, section 11, argument. *See State v. Heilman*, 339 Or 661, 667 n 3, 125 P3d 728 (2005) (declining to reach defendant's state constitutional argument on review in part because defendant did not develop the argument in the Court of Appeals).

to counsel. It provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The right to counsel is a "fundamental" right. *Gideon v. Wainwright*, 372 US 335, 342-43, 83 S Ct 792, 9 L Ed 2d 799 (1963). It is intended to ensure the fairness of criminal proceedings. *Id.* at 344. Criminal proceedings are adversarial, and in order to function properly, both the state and the defendant need to be able to make their cases. *Herring v. New York*, 422 US 853, 862, 95 S Ct 2550, 45 L Ed 2d 593 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

2. *Right to Self-Representation*

Although the right to counsel serves to protect the fairness of criminal proceedings, a defendant can choose to proceed without counsel. That is because, in addition to guaranteeing the right to counsel, the Sixth Amendment guarantees the right to self-representation, as the Supreme Court held in *Faretta v. California,* 422 US 806, 832, 95 S Ct 2525, 45 L Ed 2d 562 (1975). The Sixth Amendment does not explicitly state the right to self-representation, but, as the Court explained in *Faretta*, the right is "necessarily implied" by the text of the amendment, which provides that, in all criminal prosecutions, "the accused" shall enjoy several rights, including the rights to notice, confrontation, and compulsory process. *Id*. at 819. Thus, the amendment guarantees "the accused" the "right in an adversary criminal trial to make a defense as we know it." *Id*. at 818. It "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense," and that is because "it is [the

accused] who suffers the consequences if the defense fails." *Id*. at 819-20.

In *Faretta*, the Supreme Court acknowledged that its conclusion could be seen "to cut against the grain of [its] decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel," given that the "basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial." *Id*. at 832-33 (citing, *inter alia*, *Gideon*, 372 US 335). "But," the Court explained, "it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." *Id*. at 833; *see also id.* at 834 ("[W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him."). The Court granted that, "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," but the Court prioritized a defendant's autonomy, holding that, although a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id*. at 834 (internal quotation marks and citation omitted).[5]

[5] *See Faretta*, 422 US at 821 (stating that "unless the accused has acquiesced in [representation by counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense" (emphasis in original)); *see also Weaver v. Massachusetts*, ___ US ___, ___, 137 S Ct 1899, 1908, 198 L Ed 2d 420 (2017) (observing that the right to self-representation is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the

In exercising the right to self-representation at trial, a defendant might employ a strategy that does not fully challenge the state's case. A *pro se* defendant may lack the legal knowledge and skills necessary to effectively present his or her case. *See Powell v. Alabama*, 287 US 45, 69, 53 S Ct 55, 77 L Ed 158 (1932) (observing that "even the intelligent and educated layman" is unlikely to be able "to prepare his defense, even though he had a perfect one"). Or a *pro se* defendant may refuse to participate or be present during a trial. Courts have held that such refusals are permissible and that a trial court is not required to appoint counsel for a *pro se* defendant who chooses not to participate or be present during trial. Indeed, as the Rhode Island Supreme Court observed in *State v. Eddy*, 68 A3d 1089, 1105 (RI 2013), courts "are almost uniform in holding that a trial judge is not constitutionally required to appoint counsel" for a *pro se* defendant who voluntary absents himself from trial.

Eddy itself is illustrative. In *Eddy,* the defendant validly waived his right to counsel and elected to represent himself during his jury trial. After the jury was sworn, the defendant, who was in custody, asked to leave the courtroom. The trial court engaged in a detailed colloquy with the defendant and then allowed him to leave. The trial continued without the defendant, and the jury convicted him. The defendant appealed, arguing, among other things, that the trial court had violated his rights to counsel and due process by proceeding with the trial in his absence, without appointing counsel. 68 A3d

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proper way to protect his own liberty"); *McKaskle v. Wiggins*, 465 US 168, 176-77, 104 S Ct 944, 79 L Ed 2d 122, *reh'g den*, 465 US 1112 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.").

at 1103-04. The *Eddy* court rejected that argument, holding that the trial court was not required to appoint counsel to replace the defendant because he had made an informed and voluntary choice not to attend his trial. *Id*. at 1106-08. Although the defendant's absence resulted in an empty defense table and, consequently, was inconsistent with the active partisan advocacy that is intended to ensure the fairness of trials, the *Eddy* court held that the defendant's voluntary decision to absent himself was "an exercise of his self-representation," which the trial court was required to accept. *Id*. at 1108; *id*. at 1106 (reasoning that, to the extent the defendant "faced trial without advantages guaranteed by the Sixth Amendment, that was not by the trial judge's imposition, but by [his] own informed choice, which the trial court was bound to respect" (internal quotation marks omitted)).[6]

The *Eddy* court's conclusion is consistent with the conclusions of other courts. For example, in *Torres v. United States*, 140 F3d 392 (2nd Cir), *cert den*, 525 US 1042 (1998), the Second Circuit held that the trial court did not violate the defendant's Sixth Amendment right to counsel by allowing her to proceed *pro se*, despite her intention, which she stated repeatedly and unequivocally from the outset of the

[6] *See also United States v. Stanley*, 739 F3d 633, 649-50 (11th Cir), *cert den,* 572 US 1126 (2014) (holding that trial court did not err in proceeding with trial after *pro se* defendant absconded, because defendant's flight alone did not indicate unambiguously a desire to revoke his valid Sixth Amendment waiver and reinstate counsel); *People v. Brante*, 232 P3d 204, 208-09 (Colo App 2009) ("[T]he trial court did not violate [the defendant's] Sixth Amendment right to counsel by declining *sua sponte* to appoint advisory counsel to take over the defense in his absence."); *State v. Worthy*, 583 NW 2d 270, 279 (Minn 1998) (holding that trial court did not err in failing to reappoint defendants' dismissed counsel after defendants validly waived their rights to counsel and to be present).

prosecution, to not participate in the proceedings. *Id*. at 402-03. The defendant in *Torres* was a self-described "freedom fighter," and she regarded the prosecution as "illegal." *Id*. at 395-96. After engaging in a courtroom protest at the outset of jury selection, she insisted on leaving the courtroom. The trial court allowed her to leave and informed her that she could return whenever she wanted. The court also set up an audio connection in an adjoining room, so the defendant and her legal advisors could monitor the proceedings. Given the defendant's statements and behavior, the Second Circuit held that the trial court had "properly respected [the defendant's] decision" on how to represent herself. *Id*. at 402-03; *see also Clark v. Perez*, 510 F3d 382, 396 (2d Cir), *cert den*, 555 US 823 (2008) (holding, on facts similar to those in *Torres*, that trial court did not err in allowing *pro se* defendant to refuse to attend trial).

Although a defendant has the right to proceed *pro se* and a *pro se* defendant must be allowed to control the defense, there are limits to a defendant's right to self-representation. In *Faretta*, the Supreme Court noted that, if a *pro se* defendant engages in misconduct during the trial, the trial court can terminate the defendant's self-representation and appoint counsel, even over the defendant's objection. Specifically, the Court stated:

> "We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, *the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Of course, a State may -- even over objection by the accused -- appoint a 'standby counsel'* to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of

the defendant's self-representation is necessary."

Faretta, 422 US at 834 n 46 (citation omitted).

Relying on *Faretta*, trial courts frequently appoint standby counsel, and appellate courts recommend such appointments. *See People v. Cohn*, 160 P3d 336, 342-43 (Colo App 2007) (citing cases). But as long as a defendant is proceeding *pro se*, the defendant "must be allowed to control the organization and content of his own defense." *McKaskle*, 465 US at 174.

3. *The Right to be Present During Court Proceedings*

In addition to having the right to representation, either through counsel or self-representation, a defendant also has the right to be present during court proceedings. The right derives from the Sixth Amendment's Confrontation Clause, and is "one of the most basic rights" guaranteed by the clause. *Illinois v. Allen*, 397 US 337, 338, 90 S Ct 1057, 25 L Ed 2d 353, *reh'g den*, 398 US 915 (1970). Nevertheless, a defendant may lose the right to be present either by affirmatively waiving it or by engaging in misconduct. *Id*. at 342-43. Specifically as to misconduct, a defendant may lose the right to be present "if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* (footnote omitted).

B. *Whether the Trial Court Violated Defendant's Sixth Amendment Rights*

In this case, defendant does not dispute that, at the hearing the day before trial, he knowingly and voluntarily waived his right to counsel. Nor does he dispute that,

during trial, he knowingly and voluntarily engaged in conduct for which the trial court permissibly found him in contempt of court and removed him from the courtroom for the remainder of the day. He argues only that, after removing him from the courtroom for misconduct, the trial court had to appoint counsel or take other steps to ensure that he was represented. He contends that, despite his waiver and misconduct, he retained a "right of representation," and, therefore, the trial court could not proceed with the trial in his absence unless and until it either secured a waiver of that right or appointed counsel or took other measures to protect that right.

We recognize the importance of a defense presence at trial. However, in keeping with *Faretta*, we also recognize that a defendant has the right to self-representation, which is based on respect for the defendant's autonomy, and that, when exercising that right, a defendant can choose not to participate in, or even attend, trial. Based on the circumstances of this case, we conclude that that is what defendant did. The trial court found that defendant was trying to get himself removed from the courtroom, and the record supports that finding. The trial court clearly and repeatedly warned defendant that, if he insisted that he would violate the court's order prohibiting him from referring to information that had not been admitted into evidence, he would be removed from the courtroom and no one would be present to represent him. Despite those warnings, defendant insisted that he would violate the order. By doing so, he made a knowing and voluntary choice to be removed from the courtroom and leave the defense table empty.

If defendant had simply walked out of the courtroom, there would be no

question that the trial court could proceed with the trial in defendant's absence. A defendant cannot force a trial court to appoint counsel or to suspend a trial simply by removing himself from the courtroom. Nor can a defendant do so by having himself removed from the courtroom. When a defendant waives the right to counsel knowing that, if he is removed from the courtroom for misconduct, no one will be present to represent him, and then, while representing himself, intentionally engages in misconduct that he knows will result in his removal, the defendant is choosing to not to participate in or be present at trial. In that circumstance, a trial court can accept the defendant's choice.[7] The trial court is not required to appoint counsel or take other measures to provide a defense presence. A trial court may do so, and it may be advisable for it to do so, but it is not required to do so.[8]

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[7] The defendant's choice to engage in the conduct must be voluntarily and knowingly made. Conditions, including a defendant's mental health issues, could affect a defendant's ability to make such a choice, but there is no evidence of any such conditions in this case.

[8] Under *Faretta*, if a *pro se* defendant engages in misconduct, a trial court can terminate his self-representation and appoint counsel, even over the defendant's objection. Consequently, as many courts have observed, the appointment of standby counsel is advisable because, if a *pro se* defendant loses his right to self-representation, standby counsel can assume the representation. *See, e.g., Cohn*, 160 P3d at 342-43 (citing, *inter alia*, *People v. Carroll*, 140 Cal App 3d 135, 189 Cal Rptr 327, *cert den*, 464 US 820 (1983); *United States v. Mack*, 362 F3d 597 (9th Cir 2004); *United States v. Pina*, 844 F2d 1, 15 (1st Cir 1988) ("Removal of a defendant from the courtroom is more difficult when the defendant is acting *pro se*. We thus encourage a trial judge to employ his or her wisdom to appoint standby counsel whenever a defendant refuses or discharges counsel."); *Jones v. State*, 449 So 2d 253, 257 (Fla), *cert den*, 469 US 893 (1984) (observing that, when trial court was faced with an "obstreperous defendant who might well attempt to disrupt and obstruct the trial proceedings," it was prudent to appoint standby counsel, even over defendant's objection, "to represent defendant in the event it became necessary. . . [to remove] him from the courtroom" (omission and alteration in

In holding otherwise, the Court of Appeals relied on its decision in *Menefee*. But it does not appear that the defendant in *Menefee* received warnings like those defendant received in this case. Specifically, it does not appear that the defendant was warned that, if he chose to exercise his right to self-representation and then engaged in misconduct, he would be removed from the courtroom and the trial would continue without anyone present to represent him. Thus, in *Menefee*, the defendant's waiver of the right to counsel may not have been knowingly made, in that he may not have been aware of a critical consequence of the waiver. Therefore, the trial court may not have been able to rely on that waiver after it removed the defendant from the courtroom. In addition, it does not appear that defendant in *Menefee* was warned that the type of conduct he engaged in could result in his removal from the courtroom. Given the lack of warnings about both the consequences of the waiver of the right to counsel and the consequences of the defendant's conduct, it made sense for the Court of Appeals to rule that a "trial

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Cohn))); *see also Lacey*, 282 Or App at 130 n 2 (recommending that trial courts advise defendants that, if they proceed *pro se* and are removed from the courtroom for misconduct, their rights to self-representation will be terminated and counsel will be appointed). Alternatively, a trial court can stop short of terminating the defendant's right to self-representation and instead allow the defendant to continue to participate remotely by arranging for the defendant to monitor and respond to what happens in the courtroom. *See, e.g., Torres*, 140 F3d at 402-03; *United States v. Jennings*, 855 F Supp 1427, 1445-46 (MD Pa 1994), *aff'd without op*, 61 F3d 897 (3d Cir 1995) (affirming conviction of *pro se* defendant who was removed from courtroom for misconduct, but was able to listen to the proceedings from another location and transmit messages to the court); *State v. DeWeese*, 117 Wash 2d 369, 381, 816 P2d 1 (1991) (unpublished) (holding that trial court did not err by proceeding with trial after removing *pro se* defendant, who was placed in an office where he could monitor the proceedings and invited to return to cross-examine witnesses). A trial court may choose to do either of those things in order to protect the interests of the defendant, state, courts, and public in fair trials and accurate verdicts.

court cannot proceed in the defendant's absence unless and until [it] has either secured the defendant's waiver of his or her right to representation at trial or has taken some other course of action that protects the defendant's right to representation * * *." *Menefee*, 268 Or App at 185.

Understood in light of its facts, *Menefee* stands for the proposition that a trial court cannot proceed with an empty defense table unless the defendant has made a knowing and voluntary choice to leave it empty. But it does not establish that a defendant cannot make that choice by doing what defendant did in this case. Indeed, in *Menefee*, the Court of Appeals noted that "[t]he right to representation, like any constitutional right, may be waived, but that waiver must be knowing and intelligent." 268 Or App at 186. And the Court of Appeals suggested that the waiver could be through misconduct after warnings, observing that

> "some state and federal courts have held that a defendant may impliedly waive his or her Sixth Amendment right to counsel by engaging in repeated misconduct in the attorney-client relationship if the defendant has received an advance warning that a repetition of behavior that amounts to misconduct will result in the defendant waiving the right to counsel."

Id. (citing *State v. Langley*, 351 Or 652, 669-70, 273 P3d 901 (2012)).

Several courts have held that a trial court that removes a *pro se* defendant from the courtroom for misconduct cannot continue the trial without either appointing counsel or otherwise arranging for the defendant's representation (for example, by having the defendant participate from another location by videoconferencing). For example, in *People v. Carroll*, 140 Cal App 3d 135, 141, 189 Cal Rptr 327, 330, *cert den*, 464 US 820 (1983), the California Court of Appeal held that the trial court had erred by

proceeding with a trial after removing the *pro se* defendant for misconduct, reasoning that, "[b]ecause defendant represented himself, his removal from the courtroom deprived him not only of his own presence, but of legal representation," and that offended "the most fundamental idea of due process of law." And, relying on *Carroll*, in *United States v. Mack*, 362 F3d 597, 601 (9th Cir 2004), the Ninth Circuit held that the trial court had erred because it had removed the defendant who had been acting "as his own counsel and nobody stepped in to fill the gap," which "effectively [left] him without representation."

But *Carroll* and *Mack* are distinguishable from this case, because it does not appear that the defendants in those cases were warned, prior to waiving their right to counsel, that, if they proceeded *pro se* and were removed from the courtroom for misconduct, their trials would continue without anyone present to represent them. Thus, the defendants' waivers of counsel may not have been made with the knowledge of a critical consequence, and, therefore, the trial courts may not have been able to rely on the waivers after removing the defendants.

To be sure, the defendants in *Carroll* and *Mack* were warned during trial that, if they continued to engage in specific misconduct, they would be removed from their courtrooms and their trials would continue without anyone present to represent them. Thus, their misconduct could be characterized as knowing and voluntary. Consequently, *Carroll* and *Mack* can be read as holding that, if a trial court removes a *pro se* defendant from the courtroom for voluntarily engaging in conduct that he knew would result in his removal and leave the defense table empty, the trial court cannot proceed with the trial unless and until it either appoints counsel or takes other steps to

ensure that the defendant is represented. To the extent that those cases so hold, they are at odds with the right of a *pro se* defendant to choose whether and how to defend himself. After all, a *pro se* defendant can choose to plead guilty or no contest to the charges against him, if the choice is knowingly and voluntarily made. Given the deference afforded to a defendant's autonomy, we conclude that a trial court is not prohibited from proceeding with a trial if a *pro se* defendant makes a voluntary choice to engage in conduct that he knows will result in his removal and leave him without anyone present to represent him. Therefore, the trial court in this case did not err by proceeding with the trial in defendant's absence.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

FILED: November 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICHARD LARRY LACEY,
Defendant-Appellant.

Josephine County Circuit Court
11CR0121, 12CR0202

A156849 (Control)
A156850

Michael Newman, Judge.

Argued and submitted on April 28, 2016.

Eric R. Johansen, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

LAGESEN, J.

Reversed and remanded.

Garrett, J., dissenting.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

[ ] No costs allowed.
[ ] Costs allowed, payable by
[ ] Costs allowed, to abide the outcome on remand, payable by

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LAGESEN, J.

Defendant, who elected to represent himself at his criminal trial, behaved abysmally throughout the course of that trial. The trial court afforded defendant great patience but, shortly before closing argument, after repeatedly informing defendant that his behavior risked his removal from court and the trial proceeding in his absence, the court found defendant in contempt, declared defendant to have forfeited his right to present closing argument and otherwise participate in the proceedings, and ordered defendant removed from the courtroom. The trial continued in defendant's absence and, because defendant had been self-represented, no one appeared on defendant's behalf. The jury convicted defendant of most charges, and also found against him as to several sentencing enhancement factors at the subsequent trial on those factors, from which defendant also was excluded.

Defendant has appealed. Relying on our decision in *State v. Menefee*, 268 Or App 154, 341 P3d 229 (2014), decided after defendant's trial, defendant argues that the trial court's continuation of the trial in his absence violated his Sixth Amendment right to representation because the trial court did not take steps to protect defendant's right to representation, and because defendant did not knowingly and intelligently waive that right. Reviewing for legal error, *see generally Menefee*, 268 Or App at 183-86 (so reviewing same question), we agree with defendant and reverse.

It is unfortunate that we had not yet decided *Menefee* at the time of defendant's trial, because that decision would have assisted the trial court in addressing

the complex problems created by defendant's misconduct. In *Menefee*, we set forth the procedure that the Sixth Amendment requires a trial court to follow when a self-represented defendant's misconduct causes the court to remove the defendant from the courtroom. 268 Or App at 185-86. The issue was one of first impression in Oregon and, after reviewing the case law from other state and federal courts to have considered the question, we observed that a situation like that confronted by the trial court here raises "complex constitutional issues," because it implicates three related but distinct Sixth Amendment rights: (1) the right to be present at trial; (2) the right to self-representation; and (3) the right to representation. *Id.* at 184-85. Persuaded by the Ninth Circuit's analysis in *United States v. Mack*, 362 F3d 597 (9th Cir 2004), we held that a defendant may forfeit the first two of those rights by misconduct, but does not forfeit the third: "although a defendant who acts out at trial may forfeit the right to be present and the right to self-representation in the proceeding, the defendant does not also forfeit the right to any representation at trial." *Menefee*, 268 Or App at 184-85.

Consequently, because a criminal defendant does not forfeit the right to representation by misconduct (only the rights to self-representation and to be present), "after a trial court has removed a *pro se* defendant for his or her misconduct, the trial court cannot proceed in the defendant's absence unless and until the trial court has either secured the defendant's waiver of his or her right to representation at trial or has taken some other course of action that protects the defendant's right to representation, which may include the appointment of counsel." *Id.* at 185. Thus, in *Menefee*, where the trial

court continued the trial in the defendant's absence without appointing counsel or obtaining a waiver of the defendant's right to representation, we concluded that the defendant's Sixth Amendment right to representation had been violated and that reversal was required. *Id.*

As the Ninth Circuit recognized in *Mack*, one of the primary rationales for this approach is to protect the structural integrity of our criminal justice system. Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who, like the defendant in *Menefee* and defendant here, work the hardest to undermine it. And the Sixth Amendment imposes upon us, as courts, an obligation to do what we can to prevent them from succeeding. *See Mack*, 362 F3d at 603 ("no matter how vexed [a court] becomes with a defendant's noisome nonsense," the Sixth Amendment does not permit the court to "eliminate important elements of a trial"). This does not mean that a court has to tolerate an obstreperous defendant's presence in the courtroom, but it does mean that the court may have to appoint counsel for a defendant who previously elected to proceed *pro se*, notwithstanding the awkwardness of doing so mid-trial. For this reason, as we observed in *Menefee*, "it is advisable for a trial court to appoint advisory counsel for a defendant whom the court suspects will be disruptive so that the court can appoint that lawyer as counsel if the defendant can no longer represent himself." *Menefee*, 268 Or App at 185 n 13.

In this case, after defendant forfeited his rights to be present and self-

representation, the trial court continued the trial in defendant's absence without complying with the procedure set forth in *Menefee*. The court did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom. As a result, defendant was deprived both of closing argument and the ability to participate in the trial on the sentencing enhancement factors.

Under *Menefee*, it appears that the trial court erred, and that the error requires reversal. *Menefee*, 268 Or App at 186 (trial court's decision to continue trial without securing waiver of right to representation or otherwise taking steps to protect right to representation required reversal); *Mack*, 362 F3d at 603 (same). The state and the dissenting opinion, however, advance several arguments as to why that should not be the case. For the following reasons, we are not persuaded.

First, the state argues that defendant did not preserve his claim of error. The state is correct that defendant did not present to the trial court the same constitutional argument that he is presenting to us. However, defendant made clear his desire to present closing argument, objected to being excluded from his trial, and argued that the court was not letting him present his case. In addition, the court and the prosecutor recognized that the court's removal of defendant implicated his constitutional rights. The prosecutor specifically requested the court to make a finding that defendant had "essentially forfeited his right to remain in the Courtroom for the remainder of the Trial," and the court found that, as a result of his misconduct, defendant "thereby forfeited the right to make his

closing argument and to be present during the rest of the proceedings in this matter or today's proceedings." In *Menefee*, we held that objections like those made by defendant in this case were sufficient to preserve the defendant's assignment of error, where the record also indicated that the prosecutor and the court were aware that proceeding in the defendant's absence raised constitutional concerns. 268 Or App at 174. The circumstances in this case are not meaningfully distinguishable. As a result, we conclude that defendant has preserved his assignment of error.

Second, the state and the dissenting opinion argue that *Menefee* does not govern this case because in this case the trial court warned defendant repeatedly that his misconduct could result in his removal from the courtroom and the case proceeding without him; the state notes that it does not appear that such warnings were given in *Menefee*. In the dissenting opinion's view, *Menefee* does not control this case because in *Menefee* we did not expressly address whether the procedure described would apply where a defendant had been warned expressly of the risk that the defendant would forfeit the right to representation by misconduct. ___ Or App at ___ (Garrett, J., dissenting) (slip op at 5). The state's argument is different. It does not dispute that *Menefee* required the trial court to obtain a knowing and voluntary waiver of the right to representation but argues that *Menefee* does not dictate reversal because, under *Menefee*'s framework, the warnings given by the trial court would permit the inference that defendant knowingly and voluntarily waived his right to representation when he engaged in the misconduct that led to his exclusion from the courtroom.

We do not think that the dissenting opinion's approach can be squared with the interpretation of the Sixth Amendment adopted by *Menefee*. We stated our holding unequivocally, rejecting the notion that a defendant can forfeit the right to representation by misconduct and explaining, precisely, what trial court must do when excluding a *pro se* defendant from the courtroom: "[A]fter a trial court has removed a *pro se* defendant for his or her misconduct, the trial court cannot proceed in the defendant's absence unless and until the trial court has either secured the defendant's waiver of his or her right to representation at trial or has taken some other course of action that protects the defendant's right to representation, which may include the appointment of counsel." *Menefee*, 268 Or App at 185. Nothing in that holding suggests that the procedure would not apply if a trial court warned a *pro se* defendant that the trial could go on in the defendant's absence if the defendant was excluded for misconduct. Although we could have qualified our holding in that way, we did not.

Moreover, the dissenting opinion's approach is difficult to square with *Mack*, the case on which we relied in *Menefee* to conclude that the Sixth Amendment prohibited a trial court from excluding a *pro se* defendant from the courtroom and then proceeding in the defendant's absence without obtaining a knowing and intelligent waiver of the right to representation. In *Mack*, the *pro se* defendant had been warned that, "if his shenanigans continued, he would be removed from the courtroom, his questioning of witnesses would cease, and he would not be permitted to present argument to the jury." 362 F3d at 599. Although those warnings did not state expressly that the trial would

continue in the defendant's absence, that was their fair import. Yet those warnings were immaterial to the Ninth Circuit's analysis of the core question presented by the situation that arises upon the removal from court of a *pro se* defendant: whether the Sixth Amendment permits the continuation of trial in the absence of a *pro se* defendant who has been removed from the courtroom with no one present to represent the defendant. As noted, the Ninth Circuit concluded that the Sixth Amendment does not permit such a process, and we adopted the Ninth Circuit's interpretation in *Menefee*. The dissenting opinion correctly observes there are other approaches that we could have adopted, but the state does not argue that *Menefee* is wrongly decided. We acknowledge that reasonable jurists can disagree as to what the Sixth Amendment requires when a *pro se* defendant is removed from a courtroom for misconduct, but we decline to retreat from our decision in *Menefee* to adopt *Mack*'s view of the Sixth Amendment.[1]

As to the state's point--that the warnings permit the conclusion that defendant knowingly and intelligently waived the right to representation recognized in

[1] Given that state and federal courts across the country are fractured on this complex issue, we echo the sentiments of the Second Circuit: "Frankly, more guidance from the Supreme Court would be helpful." *Davis v. Grant*, 532 F3d 132, 140 (2d Cir 2008), *cert den*, 555 US 1176 (2009). In *Davis*, on federal habeas review of a state court decision under 28 USC § 2254, the Second Circuit held that a New York state court's determination that a *pro se* criminal defendant's Sixth Amendment rights were not violated when that defendant was removed from the courtroom for misconduct without the appointment of standby counsel was not contrary to clearly established Supreme Court precedent. 532 F3d at 145. However, the court noted that, if it had been deciding the issue for itself in the first instance, "we might conclude that [the state trial court] erred when [it] failed to appoint [counsel] to represent [the *pro se* defendant] during his well-earned absence from the courtroom." *Id.*

Menefee--for us to conclude that defendant knowingly and intelligently waived his right to representation after he forfeited his rights to self-representation and to be present in court, we would have to be able to conclude that defendant *knew* that he retained the right to representation, notwithstanding his forfeiture of the other two rights. *See State v. Guerrero*, 277 Or App 837, 845, 373 P3d 1127 (2016) (explaining that, for waiver of right to be intelligent, a defendant must have knowledge and understanding of that right). But nothing in the trial court's warnings would have made defendant aware of the fact that he would retain the right to representation if he were excluded from the courtroom for misconduct, such that he would be entitled to appointment of counsel for the duration of the proceeding if he wanted representation.[2] The trial court's warnings merely told

[2] The district court's warnings to the self-represented defendant in *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or 2016), and the process that it employed to address the defendant's misconduct, illustrate the type of warnings and process contemplated by *Mack*. In response to misconduct by the defendant in that case, the court repeatedly warned the defendant that, as allowed by *Faretta v. California*, 422 US 806, 834 n 46, 95 S Ct 2525, 45 L Ed 2d 562 (1975), and as contemplated by *Mack*, the court would terminate his right to self-representation and re-appoint his previously appointed counsel to represent him. Minute Order, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Jul 29, 2016), ECF 955 (citing *Faretta*); Order to Show Cause as to Defendant Ryan Bundy, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Aug 24, 2016), ECF 1101 (citing *Faretta* and *Mack*). When the court concluded that the defendant's misconduct risked prejudice to the "fair administration of justice," it directed the defendant to show cause why the court should not declare his right to self-representation forfeited, and re-appoint counsel. Order to Show Cause as to Defendant Ryan Bundy, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Aug 24, 2016), ECF 1101. By alerting the defendant that the consequence of his misbehavior would be the forfeiture of the right to self-representation and the appointment of counsel, the court's warnings informed the defendant that he had retained the right to representation even upon forfeiture of the right to self-representation. Such warnings laid the groundwork for the knowing and intelligent waiver of the right to representation that exists upon the forfeiture of the right to self-representation although, ultimately, the court in the *Bundy* case decided not to

him that the trial would proceed without him if he was held in contempt, without alerting him of his ongoing right to representation in those circumstances. That omission precludes us from concluding that the trial court's warnings to defendant in this case could supply a basis for concluding that defendant knowingly and intelligently waived the right to representation identified in *Menefee*.

Finally, the state argues that, even if the trial court erred under *Menefee*, that error does not require reversal or, at most, requires reversal of defendant's sentences but not his convictions. The state argues that defendant was deprived only of the opportunity to participate in closing argument and in the trial on the sentencing enhancement factors, and that there is no basis to think that the outcome of the proceedings would have been different if defendant had been represented at those stages of the case.

We again disagree. Under *Menefee* and *Mack*, the trial court's decision to continue the trial in defendant's absence without obtaining a waiver of his right to representation, appointing counsel, or otherwise taking steps to protect that right, violated defendant's rights under the Sixth and Fourteenth Amendments. Under *Mack*, that type of Sixth Amendment error constitutes structural error and mandates reversal. 362 F3d at 602-03 (concluding that district court committed structural error where "as an aspect of termination of his self-representation, [the defendant was] denied the right to conduct any closing argument at all"). Although we did not address the point of harmless error

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declare a forfeiture of the right to self-representation.

expressly in *Menefee*, we concluded that reversal was required based on the trial court's failure to appoint counsel or to obtain a knowing and intelligent waiver of the right to representation, consistent with *Mack*'s conclusion that such an error mandates reversal. *Menefee*, 268 Or App at 185-86. We adhere to that approach here.

Reversed and remanded.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RICHARD LARRY LACEY — PETITIONER

VS.

STATE OF OREGON — RESPONDENT

_____

PROOF OF SERVICE

I, Eric Johansen, do swear or declare that on this date, March 12, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

LAUREN P. ROBERTSON, Assistant Attorney General, 1162 Court Street NE, Salem, OR 97301, Phone: (503) 378-4402, Attorney for Respondent.

OFFICE OF PUBLIC DEFENSE SERVICES
SENIOR DEPUTY PUBLIC DEFENDER
COUNSEL OF RECORD

Signed
By Eric Johansen at 3:13 pm, Mar 12, 2019

ERIC JOHANSEN OSB #822919