No.

In the Supreme Court of the United States

ANDRE G. DEWBERRY, PETITIONER,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a guilty plea waives a challenge on appeal to the denial of a defendant's Sixth Amendment right to represent himself.

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PETITION FOR A WRIT OF CERTIORARI

Andre G. Dewberry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is available at 936 F.3d 803 (8th Cir. 2019).

JURISDICTION

The court of appeals entered judgment on August 27, 2019. The court of appeals denied a timely petition for rehearing en banc on October 2, 2019. On December 4, 2019, Justice Gorsuch extended the time for filing a petition to January 30, 2020. On January 14, 2020, Justice Gorsuch again extended the time for filing a petition to February 20, 2020. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; 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.

STATEMENT

This case presents an important question of criminal law that has divided the courts of appeals: whether a guilty plea waives a challenge on appeal to the denial of a defendant's Sixth Amendment right to represent himself. The Sixth Amendment forbids the court to "compel a defendant to accept a lawyer he does not want," because when it does so "counsel is not an assistant, but a master." *Faretta v. California*, 422 U.S. 806, 820, 833 (1975). When a court denies a criminal defendant the right to defend himself and he pleads guilty upon the advice of a lawyer whom the court has unconstitutionally thrust upon him,

the resulting plea is involuntary and thus cannot waive a challenge to the Sixth Amendment violation.

Courts across the nation have divided on this question. Before this case, the Fourth, Seventh, and Tenth Circuits had held that a guilty plea categorically waives a defendant's challenge to the denial of his Sixth Amendment right to self-representation. The Ninth Circuit has held the opposite. In this case, the Eighth Circuit aligned itself with the majority view—over an objection from Judge Kelly, who concurred in the judgment and rejected the court's categorical rule. The Eighth Circuit's decision deepens a decades-old split in authority on a frequently recurring issue of criminal law. Without this Court's guidance, a fundamental right of pro se criminal defendants—a particularly vulnerable class of litigants—remains uneven throughout the Nation.

This is an ideal case in which to resolve this important and recurring question. Petitioner repeatedly and unequivocally demanded the right to represent himself at trial. The district court initially granted that request. But on the eve of trial the district court reversed itself and denied petitioner's motion for self-representation in order "to get this plea worked out." App. 10a, 90a. The lawyer appointed to represent petitioner then inexplicably negotiated a plea agreement binding petitioner to an above-guidelines sentence—notwithstanding obvious mitigating factors warranting a lower sentence. Convinced that the result of any trial was preordained in light of the court's actions, petitioner pleaded guilty, and the court imposed the binding above-guidelines sentence.

The Eighth Circuit's decision relied solely on its erroneous conclusion that petitioner's guilty plea waived his right to challenge the court's denial of his right to self-representation. This case thus cleanly presents the

waiver question that has divided the lower courts, and it does so on a factual record that illustrates the policy considerations animating the right to self-representation. This Court should grant certiorari.

1. In January 2015, police in Kansas City, Missouri stopped petitioner's vehicle and observed him toss what appeared to be a black handgun underneath his car. App. 2a. The police arrested petitioner and recovered a nonfunctional pistol missing its firing pin. App. 2a; App. 58a-59a. As petitioner later explained, he knew that the pistol did not work but carried it in the event he needed to scare off attackers because he and his fiancée had been the victims of violent crimes in the past. App. 58a, 104a-05a. Police discovered that petitioner was a convicted felon. App. 2a, 56a.

2. A federal grand jury indicted petitioner on one charge of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). App. 2a.

The district court initially appointed counsel to represent petitioner, but petitioner later requested permission to proceed pro se. App. 2a. The magistrate judge granted petitioner's request, and re-appointed the attorney as standby counsel. App. 2a. After repeated clashes with his standby counsel, petitioner requested that the district court appoint substitute counsel, but the district court denied the request. App. 2a. The district court told petitioner that he had three options: continue to represent himself, hire a new attorney, or request that the attorney appointed as standby counsel resume her representation. App. 2a. Petitioner chose to continue representing himself. *See* App. 2a, 13a.

At a hearing days before trial, the district court terminated petitioner's pro se representation and reappointed

as counsel the attorney to whom petitioner had repeatedly objected. App. 2a-3a, 31a-32a, 42a. Petitioner objected again, telling the judge, "I'll represent myself." App. 32a. When the judge repeated that he had reappointed counsel, petitioner responded that he had given up hope at the chance of a fair trial: "[W]hy don't we just go on and kill me now? We don't even have to have the damn trial. We can just go out back with a bullet and get this over with." App. 33a. Petitioner expressed his disbelief, repeating, "you got to be kidding me." App. 34a, 35a, 36a.

Continuing to object, petitioner explained his past disagreements with the appointed lawyer and said, "I said I didn't want her from the beginning." App. 38a. Expressing more dismay that the result was now preordained, petitioner said, "We can get this over with. Like we don't even have to have a trial. I'm cool with it. I'm okay with it because it's already—you already made it clear what's going to happen." App. 40a. When the judge asked petitioner if he wanted to plead guilty, he responded, "Not even." App. 40a.

Given petitioner's ongoing objections, appointed counsel asked the judge "to clarify" whether "the Court [is] denying any desire [petitioner] has to go pro se." App. 42a. The court replied, "Yes. . . . I'm denying his request to go pro se, and I'm reappointing you." App. 42a. Petitioner lamented, "I can't even defend myself now." App. 42a.

One week later, petitioner pleaded guilty pursuant to a binding plea agreement. App. 2a, 48a. The court accepted the change of plea following a plea colloquy. App. 3a.

At petitioner's sentencing several months later, the judge asked him whether he was represented by counsel.

Petitioner responded, "Not under my wishes." App. 90a. The judge acknowledged on the record that petitioner had previously proceeded pro se but said that the court had appointed counsel "to get this plea worked out." App. 10a, 90a; *see also* App. 84a. When the court asked petitioner after sentencing whether he was satisfied with his appointed counsel, he shook his head no. App. 124a.

The guidelines range calculated by the probation office in the presentence investigation report was 46 to 57 months' imprisonment. App. 4a. The binding plea agreement negotiated by appointed counsel required 60 months' imprisonment. App. 4a. When the court commented on the discrepancy between the negotiated sentence and the guidelines range, petitioner said that he had calculated that his guidelines range would be lower than the plea offer and had "mentioned it to the person you gave me for an attorney, and they—she told me I—shut up, I don't know what I'm talking about." App. 98a. The judge enforced the binding plea agreement and sentenced petitioner to 60 months' imprisonment. App. 4a.

3. Petitioner filed a timely pro se notice of appeal. The Eighth Circuit appointed new counsel to represent petitioner. App. 4a.

On appeal, petitioner argued that the district court's appointment of counsel in violation of the Sixth Amendment constituted structural error and rendered the resulting guilty plea involuntary. In response, as the Eighth Circuit explained, "the government conceded that [petitioner's] conduct did not justify the district court's denial of [petitioner's] right to proceed pro se, but argued that the reappointment of counsel was warranted because [petitioner] did not unequivocally assert his right to self-representation." App. 4a-5a. The government also argued, however, that petitioner had waived his right to appeal the

denial of his right to self-representation by pleading guilty, meaning that the court of appeals need not decide the underlying Sixth Amendment issue. App. 5a.

The Eighth Circuit agreed with the government. Concluding that it did not need to decide the government's equivocation argument, the court accepted the government's argument that petitioner's guilty plea waived his right to appeal any denial of his Sixth Amendment right to self-representation. App. 8a.

The waiver question was a matter of first impression in the Eighth Circuit, but the court observed that the circuits are split on the issue. It identified four circuits that had ruled that a guilty plea waives a Sixth Amendment challenge to compelled counsel. App. 6a (citing *Werth v. Bell*, 692 F.3d 486, 497 (6th Cir. 2012); *United States v. Moussaoui*, 591 F.3d 263, 280 (4th Cir. 2010); *Gomez v. Berge*, 434 F.3d 940, 942-43 (7th Cir. 2006); *United States v. Montgomery*, 529 F.2d 1404, 1406-07 (10th Cir. 1976)). *Werth*, in fact, did not independently decide the question; in the process of granting AEDPA deference to a state-court decision, it noted, to the contrary, that "fairminded jurists could (and do) debate" whether pleading guilty waives a self-representation claim. 692 F.3d at 496.

On the other side of the split, the court explained that the Ninth Circuit's opinion in *United States v. Hernandez*, 203 F.3d 614 (9th Cir. 2000), *overruled in part on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008), holds that Sixth Amendment compelled-counsel claims survive a guilty plea. In the Ninth Circuit's view, a court's denial of a defendant's right to represent himself "rendered his guilty plea involuntary" and therefore was not waived on appeal. App. 7a. According to the Ninth Circuit, a "district court's refusal to allow [the defendant] to exercise the right of self-representation forced him to

choose between pleading guilty and submitting to a trial *the very structure* of which would be unconstitutional." App. 7a (alteration in original). Such a choice, the Ninth Circuit reasoned, placed "unreasonable constraints" on a defendant, rendering a plea involuntary. App. 7a.

The Eighth Circuit declined to follow the Ninth Circuit, holding that it saw "no basis to conclude a district court's improper denial of a defendant's Sixth Amendment right to self-representation categorically transforms the defendant's later decision to plead guilty into a per se involuntary decision." App. 7a. According to the Eighth Circuit, the Ninth Circuit's contrary decision was "based on the false premise that the defendant who is denied his right to represent himself is forced to either plead guilty or submit to an unconstitutional trial." App. 7a. The court disagreed with that premise, noting that a defendant who wishes to preserve such a claim should either enter a conditional guilty plea, or go to trial and, if convicted, raise the claim on appeal. App. 7a-8a.

Judge Kelly concurred in the judgment only. She asserted that the record made it "clear that the district court violated [petitioner's] right to self-representation." App. 9a. And she agreed with petitioner that the Sixth Amendment violation "may have rendered Dewberry's guilty plea involuntary," rejecting the majority's categorical conclusion that petitioner waived the claim by pleading guilty. *See* App. 9a. However, she concluded that post-conviction processes could flesh out the voluntariness question. App. 9a-11a.

REASONS FOR GRANTING THE PETITION

The division of authority on the question presented is clear and acknowledged. Four circuits have held that a guilty plea waives a defendant's challenge to the violation

of his Sixth Amendment right to proceed pro se. One circuit has held the opposite. This persistent split leaves the procedural rights of particularly vulnerable defendants uneven throughout the Nation. This Court's review is warranted in this case because it cleanly presents the waiver question and its facts clearly implicate the policies underlying the Sixth Amendment right to self-representation.

I. The Decision Below Deepens a Split in Authority

The federal courts of appeals have been divided on the question presented for decades, with no sign that the division will resolve itself. Only this Court can break the deadlock and clarify this important question of criminal law.

1. The Ninth Circuit has held that a guilty plea does not waive a defendant's right to challenge the violation of his Sixth Amendment right to represent himself. *Hernandez*, 203 F.3d at 626.

In *Hernandez*, the Ninth Circuit concluded that a defendant's right to challenge a violation of his right to self-representation survives a guilty plea. *Id.* In that case, the district court had denied the defendant his Sixth Amendment right to self-representation. *Id.* The defendant then pleaded guilty; on appeal, he sought to set aside his guilty plea on the ground that it was involuntary. *Id.* at 618.

The Ninth Circuit noted that a guilty plea must be voluntary to be valid. *Id.* It further explained that a guilty plea is involuntary when it results from "unreasonable constraints on [the defendant's] decisionmaking process." *Id.* at 626.

The court concluded that an erroneous deprivation of a defendant's right to represent himself imposes unreasonable constraints on the decision to plead guilty. *Id.* It

observed that "[t]he Supreme Court ha[d] held that the denial of a defendant's Sixth Amendment right to conduct his own defense is a structural error—an error that undermines the integrity of the trial mechanism itself." *Id.* (citing, *inter alia*, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). As a result, a court's denial of a defendant's right to self-representation "force[s] [the defendant] to choose between pleading guilty and submitting to a trial *the very structure* of which would be unconstitutional." *Id.* In that scenario, the court concluded, the defendant's "decision to plead guilty is not voluntary, for in that case, he has not been offered the lawful alternatives—the free choice—the Constitution requires." *Id.* at 627. The court analogized an erroneous deprivation of the right to self-representation to an erroneous deprivation of the right to counsel—which, the court observed, a defendant may challenge on appeal notwithstanding a guilty plea. *Id.* at 626 (citing *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970)).

The Ninth Circuit has reiterated its holding in *Hernandez*, and lower courts have followed it. *See, e.g.*, *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001); *see also Malmo v. Ryan*, No. CV-14-2396, 2016 WL 492136, at *10 (D. Ariz. Jan. 8, 2016) (following *Hernandez*); *Michigan v. Hoffman*, No. 266560, 2007 WL 397224, at *2 (Mich. Ct. App. Feb. 6, 2007) (same).

2. In contrast, four federal courts of appeals, including the Eighth Circuit below, hold that guilty pleas waive objections to a denial of the Sixth Amendment right to self-representation.

In *United States v. Moussaoui*, the Fourth Circuit rejected the argument that compelled-counsel claims survive a guilty plea, holding that defendants may only challenge "jurisdictional errors" or the validity of the plea.

591 F.3d 263, 279 (4th Cir. 2010). The *Moussaoui* panel held categorically that a deprivation of a defendant's right to self-representation does not render a plea involuntary. *Id.* at 280. In particular, the court disagreed with the Ninth Circuit's view that a defendant's "only alternative [to pleading guilty] was to submit to an unconstitutional trial," reasoning that "if the defendant proceeded to trial and was convicted, he could seek an appellate remedy for the constitutional violations he alleged." *Id.*

The Seventh, Tenth, and now Eighth Circuits have taken the same categorical position. *See Jackson v. Bartow*, 930 F.3d 930, 933 (7th Cir. 2019) (violation of defendant's Sixth Amendment right to self-representation "does not entitle [defendant] to relief if he validly waived his right to contest it"); *United States v. Montgomery*, 529 F.2d 1404, 1406-07 (10th Cir. 1976) ("we hold that appellant is precluded from asserting that his right to represent himself was infringed" because plea colloquy established "that the plea of guilty was voluntarily entered"); *see also* App. 7a-8a (rejecting *Hernandez* and following *Moussaoui*).

3. This split is acknowledged. At least three circuits have noted the split in authority. The Eighth Circuit below noted the split in the course of deciding to deepen it. App. 6a. In *Moussaoui*, the Fourth Circuit expressly considered and rejected the Ninth Circuit's *Hernandez* decision. 591 F.3d at 279-80. And the Sixth Circuit, in *Werth v. Bell*, acknowledged the split in concluding that federal law on the question was unsettled, and observed that "fairminded jurists could (and do) debate" the question, justifying AEDPA deference. 692 F.3d at 496. At least one state court has also acknowledged the conflict. *See Illinois v. Rainey*, --- N.E.3d ---, 2019 WL 6337832, at *4 (Ill. App. Ct. Nov. 27, 2019) ("The federal courts of appeals

have split on this question."). Criminal procedure treatises have also acknowledged the split. Wayne LaFave et al., *Criminal Procedure* § 11.5(a), n.11 (4th ed. 2019); *id.* § 21.3(a), n.5; Brian R. Means, *Postconviction Remedies* § 45:11 n.4 (2019 ed.).

The division over the question presented will not abate without the guidance of this Court.

II. The Case Cleanly Presents an Important Question

Whether a guilty plea waives a defendant's appellate challenge to the denial of his right to self-representation is an exceptionally important question. The right to represent oneself lies at the core of the protections afforded by the Sixth Amendment. Given the pressures to plead guilty created by the modern criminal justice system, it is unsurprising that this question is frequently recurring, and it will continue to arise without this Court's guidance. This case presents an ideal vehicle for the Court to decide this important question.

1. a. In *Faretta v. California*, this Court recognized the extraordinary history and fundamental importance of a criminal defendant's right to self-representation. 422 U.S. 806, 812-35 (1975). The Founders enshrined that right as a response to British practice, where "there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding"—"the Star Chamber." *Id.* at 821. That court "not merely allowed but required defendants to have counsel," which the Crown used to control the accused. *Id.*

By the time they rebelled against the Crown, "[t]he Founders believed that self-representation was a basic right of a free people." *Id.* at 830 n.39. They wove that right into the very "structure of the Sixth Amendment,"

in which "[t]he right to defend is given directly to the accused," not to counsel. *Id.* at 819-20. The Sixth Amendment protects a defendant's right to the "assistance" of counsel for "his" defense, and provides that "*the accused* shall enjoy" the Amendment's many privileges. U.S. Const. amend. VI (emphasis added); *see Faretta*, 422 U.S. at 819 ("The Sixth Amendment 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.").

This Court has thus noted "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta*, 422 U.S. at 817; *see also Carter v. Illinois*, 329 U.S. 173, 174-75 (1946) (same); *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964) (same).

But the right to self-representation is not a historical curiosity; it is a core bulwark of individual rights, particularly for the indigent. For defendants who cannot pay for counsel of their choice, the right to reject counsel is equivalent to the right to control their own defense. Because "appointed counsel manages the lawsuit and has the final say in all but a few matters of trial strategy," unwanted counsel trap defendants rather than empower them. *Faretta*, 422 U.S. at 812 n.8. A defendant with appointed counsel "must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Appointed counsel control "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is

the last." *Gonzalez v. United States*, 553 U.S. 242, 248-49 (2008) (citations omitted); *see also Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting). Unwanted counsel thus "imprison[s] a man in his privileges," transforming a defendant into a bystander in his own defense. *Adams v. United States*, 317 U.S. 269, 280 (1942). As this Court has deftly put it, unwanted counsel "'represents' the defendant only through a tenuous and unacceptable legal fiction"; in truth, such "counsel is not an assistant, but a master." *Faretta*, 422 U.S. at 820-21.

Empirical evidence supports the conclusion that the right to self-representation not only protects "the dignity and autonomy of the accused," *McKaskle*, 465 U.S. at 176-77; but that in some cases "the defendant might in fact present his case more effectively by conducting his own defense," *Faretta*, 422 U.S. at 834. According to one study, "[t]he small, self-selected group of felony defendants who choose to represent themselves may make that choice because of legitimate concerns about court-appointed counsel." Erica J. Hashimoto, *Defending the Right of Self–Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 424 (2007). Although courts have generally assumed that self-representation harms defendants, statistical evidence suggests that pro se felony defendants do as well or better in state courts and about the same in federal courts as represented defendants. *Id.* at 447-54.

b. The question presented is likely to recur without this Court's guidance. As noted above, five circuits have already decided the issue, as have federal and state lower courts. The lack of clarity on this issue, moreover, has likely caused these rights to be under-prosecuted. In California, where the state supreme court has held that state law gives criminal defendants the right to challenge the

denial of the right to self-representation after a guilty plea, such cases arise with significant frequency. *See, e.g.*, *California v. Marlow*, 96 P.3d 126, 135 (Cal. 2004); *California v. Solano*, No. B281707, 2018 WL 3045582, at *4 (Cal. Ct. App. June 20, 2018); *California v. Jones*, No. B233588, 2013 WL 1771488, at *3 (Cal. Ct. App. Apr. 25, 2013); *California v. Evans*, No. D060227, 2012 WL 3330430, at *1 n.1 (Cal. Ct. App. Aug. 15, 2012); *California v. Butler*, No. B213049, 2010 WL 2000332, at *8 n.7 (Cal. Ct. App. May 20, 2010); *California v. Luna*, No. C051359, 2007 WL 1057377, at *5 (Cal. Ct. App. Apr. 10, 2007); *cf. California v. Briscoe*, No. F045685, 2006 WL 551577, at *2 (Cal. Ct. App. Mar. 8, 2006); *California v. Thomas*, No. B175366, 2005 WL 2158825, at *7 (Cal. Ct. App. Sept. 8, 2005).

The prevalence of guilty pleas also renders the question important. Guilty pleas are "the defining[] feature" of the modern American criminal justice system. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1064 (2006). As this Court has observed, "[p]leas account for nearly 95% of all criminal convictions." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Given the immense pressure to plead guilty, attorneys appointed to represent criminal defendants in violation of their Sixth Amendment right to self-representation will continue to negotiate plea deals for their clients—as occurred here. And because a violation of this right "can only lead [a defendant] to believe that the law contrives against him," *Faretta*, 422 U.S. at 834, these defendants will inevitably give up and accept the plea deals negotiated by their unwanted attorneys—as also occurred here. This Court's guidance on the effect of these pleas is desperately needed.

2. This case is an ideal vehicle to decide this question. The question is cleanly presented. The Eighth Circuit relied entirely on the government's waiver argument, and squarely held that it could not evaluate petitioner's claim even if "the district court may have violated [petitioner's] right to self-representation." App. 9a. Nor does the question presented require any factual development: the question is whether a denial of a defendant's constitutional right to defend himself necessarily renders his subsequent guilty plea involuntary, thus permitting the defendant to raise the objection on appeal. While Judge Kelly suggested in her concurrence in the judgment that the voluntariness of a plea "is the sort of issue that is often better deferred to post-conviction proceedings . . . as it usually involves facts outside the original record," App. 11a, no such facts are needed here. Under the Ninth Circuit's categorical rule, the denial of petitioner's right to self-representation necessarily means that petitioner's guilty plea was involuntary. *Hernandez*, 203 F.3d at 627; *see also id.* at 619-20 (rejecting need for further factual development). And under the Eighth Circuit's contrary rule, a guilty plea waives even a proven violation of petitioner's right to self-representation. App. 9a. The question before this Court is simply the effect a guilty plea has on a self-representation claim; neither the majority nor minority rule relies on factual development to answer that question. The question presented is ripe for decision.

Although unnecessary for this Court's review of the waiver question, the merits of petitioner's claim are also clear. As the Eighth Circuit noted, "the government conceded [petitioner's] conduct did not justify the district court's denial of [petitioner's] right to proceed pro se." App. 4a. While the government argued below that the reappointment of counsel was justified because petitioner's objection was "equivocal," and the Eighth Circuit did not

reach that argument, the government's equivocation argument is plainly wrong. As Judge Kelly noted, "the record makes clear that the district court violated [petitioner's] right to self-representation when it reappointed counsel to represent him." App. 9a. As in *Hernandez*, "the trial court's denial of [petitioner's] self-representation request is on the record, there is no factual dispute about what the court said, and there is no need for any further factual information." 203 F.3d at 619.

This case is also an ideal vehicle because the factual record clearly illustrates the policy considerations underlying the right to self-representation and the reasons why a guilty plea resulting from a violation of that right is involuntary.

First, the right to self-representation protects a defendant's ability to control his own defense. Absent the right to decline counsel, "appointed counsel manages the lawsuit and has the final say in all but a few matters of trial strategy." *Faretta*, 422 U.S. at 812 n.8; *see also Taylor*, 484 U.S. at 418; *Gonzalez*, 553 U.S. at 248-49. In this case, petitioner requested the right to self-representation because he disagreed with the defense strategy his counsel suggested, which included the implausible argument that "somebody else threw the gun under the car." App. 38a. As his counsel acknowledged, she moved to withdraw, at petitioner's request, "[b]ecause there was a breakdown in communication." App. 30a. Petitioner was expressly motivated to proceed pro se so he could control the theory of his defense, as the Sixth Amendment contemplates he should. *Faretta*, 422 U.S. at 819 ("The Sixth Amendment . . . grants to the accused personally the right to make his defense."). Petitioner clearly understood this:

when the district court appointed counsel over his objection, he lamented, "I can't even defend myself now." App. 42a.

Second, self-representation preserves "the dignity and autonomy of the accused." *McKaskle*, 465 U.S. at 176-77. This Court recognized that to "force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Faretta*, 422 U.S. at 834. That concern is manifest in the record: as soon as the district court reappointed counsel over petitioner's objection, he repeatedly objected that the fix was in. He told the court, "We can get this over with. Like we don't even have to have a trial. . . . [Y]ou already made it clear what's going to happen." App. 40a. Despairing at his lack of control, he said, "[W]hy don't we just go on and kill me now? We don't even have to have the damn trial. We can just go out back with a bullet and get this over with." App. 33a. Noting that his counsel had already sought to withdraw, he became concerned that she would represent him only because she was afraid of the judge. App. 36a. The district court's forced appointment of a lawyer whom petitioner had rejected for months led "him to believe that the law contrives against him." *Faretta*, 422 U.S. at 834.

Finally, this Court has recognized that in some cases, "the defendant might in fact present his case more effectively by conducting his own defense." *Id.* This may well have been one of those cases. Petitioner's unconstitutionally appointed counsel negotiated a *binding* plea agreement to an *above*-guidelines sentence. App. 4a. At sentencing, petitioner stated that he had calculated that his guidelines would be lower, and "mentioned it to the person you gave me for an attorney," but that "she told me I—shut up, I don't know what I'm talking about." App.

98a. And, given the mitigating circumstances of the offense, it is difficult to discern any sound reason for an above-guidelines sentence. At sentencing, the district judge expressed surprise that "the gun didn't work," and asked petitioner why he bothered to carry a broken gun. App. 106a. Petitioner explained that he had not wanted to possess a gun to fire it or hurt anybody; instead, he wanted it only to scare away would-be attackers, because both he and his fiancée had been victims of violent crime in the past. His fears eventually came true; tragically, his fiancée was murdered after petitioner's arrest. App. 104a-09a.

Contrary to popular perceptions "that defendants who represent themselves are foolish at best and mentally ill at worst," Hashimoto, *supra*, at 426, this Court has recognized that the right to self-representation protects critical dignitary and strategic interests. This case aptly demonstrates those interests.

III. The Decision Below Is Erroneous

The court of appeals erred in holding that petitioner's guilty plea waived his right to challenge the district court's denial of his right to self-representation. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). An involuntary and therefore invalid plea must be reversed. *See id.*

As the Ninth Circuit held in *Hernandez*, the district court rendered petitioner's plea involuntary and invalid by unconstitutionally forcing counsel upon him and denying him the right to control his own defense. 203 F.3d at

626-27. This Court has already recognized that a violation of a defendant's Sixth Amendment right to counsel renders a guilty plea involuntary. "[A] guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Brady*, 397 U.S. at 748 n.6. Guilty pleas also do not waive ineffective-assistance-of-counsel claims. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Hill*, 474 U.S. at 56. And several courts of appeals have held that guilty pleas also do not waive choice-of-counsel claims. *United States v. Smith*, 618 F.3d 657, 663 (7th Cir. 2010); *United States v. Sanchez Guerrero*, 546 F.3d 328, 332 (5th Cir. 2008). In each circumstance, guilty pleas do not waive Sixth Amendment claims because a guilty plea must "be the voluntary expression of [the defendant's] own choice." *Brady*, 397 U.S. at 748. And the defendant cannot voluntarily make that choice when he wants, but does not receive, the effective assistance of counsel.

The same logic applies to violations of a defendant's right to self-representation. The right to counsel and the right to self-representation are flip sides of the same coin. Both rights flow from the same constitutional source: the Sixth Amendment. As this Court held in *Faretta*, the Sixth Amendment's guarantee of the "assistance" of counsel was intended to assist a criminal defendant in exercising "the right . . . personally to manage and conduct his own defense." 422 U.S. at 817. Counsel "however expert, is still an assistant," one that, "like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820.

Denying a defendant's right to self-representation thus infringes the defendant's right to define and control his own defense. An unwanted counsel does not truly

"represent" a defendant, except through an "unacceptable legal fiction." *Id.* at 821. When a defendant has not "acquiesced" to a representation, "the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.* A defendant represented by unconstitutionally appointed counsel therefore is not constitutionally represented at all. As this Court put it, "[i]n such a case, counsel is not an assistant, but a master." *Id.* at 820. And a defendant who has been unconstitutionally stripped of his right to control his defense cannot make the "voluntary expression of [his] own choice" called for by *Brady*. As a result, a guilty plea made upon advice of unconstitutionally appointed counsel cannot operate to waive a defendant's right to challenge the Sixth Amendment violation on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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