

No. 19-1052

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*

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
*Solicitor General
Counsel of Record*
BRIAN A. BENCZKOWSKI
Assistant Attorney General
PAUL T. CRANE
Attorney
*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether petitioner is entitled to automatic appellate relief on his claim that the district court erred in denying his request to represent himself at trial, where he subsequently pleaded guilty and waived his right to appeal, and the court of appeals found “no basis” to disturb the “finding [that] he knowingly and voluntarily entered the plea.”

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Dewberry, No. 15-cr-53 (Mar. 1, 2017)

United States Court of Appeals (8th Cir.):

United States v. Dewberry, No. 17-1649 (Aug. 27, 2019)

TABLE OF CONTENTS

	Page
Opinion below.....	1
Jurisdiction.....	1
Statement.....	1
Argument.....	9
Conclusion.....	19

TABLE OF AUTHORITIES

Cases:

<i>Armant v. Marquez</i> , 772 F.2d 552 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986)	17
<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	11, 12, 13, 14
<i>Brewer v. Williams</i> , 430 U.S. 387 (1977).....	17
<i>Buhl v. Cooksey</i> , 233 F.3d 783 (3d Cir. 2000).....	17
<i>Class v. United States</i> , 138 S. Ct. 798 (2018)	7, 8, 10, 11
<i>Faretta v. California</i> , 422 U.S. 806 (1975).....	17
<i>Gomez v. Berge</i> , 434 F.3d 940 (7th Cir.), cert. denied, 547 U.S. 1168 (2006)	15
<i>Indiana v. Edwards</i> , 554 U.S. 164 (2008)	14
<i>Jackson v. Bartow</i> , 930 F.3d 930 (7th Cir. 2019).....	15
<i>Martinez v. Court of Appeal of Cal.</i> , 528 U.S. 152 (2000).....	10, 14
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970).....	12, 13
<i>Ricketts v. Adamson</i> , 483 U.S. 1 (1987)	16
<i>Tollett v. Henderson</i> , 411 U.S. 258 (1973).....	10, 13, 14
<i>Town of Newton v. Rumery</i> , 480 U.S. 386 (1987)	16
<i>United States v. Campbell</i> , 659 F.3d 607 (7th Cir. 2011), vacated on other grounds, 568 U.S. 802 (2012).....	17
<i>United States v. Frazier-El</i> , 204 F.3d 553 (4th Cir. 2000).....	17

IV

Cases—Continued:	Page
<i>United States v. Hernandez</i> , 203 F.3d 614 (9th Cir. 2000).....	8, 12, 13, 15
<i>United States v. Mackovich</i> , 209 F.3d 1227 (10th Cir.), cert. denied, 581 U.S. 905 (2000)	17
<i>United States v. Mezzanatto</i> , 513 U.S. 196 (1995)	16
<i>United States v. Montgomery</i> , 529 F.2d 1404 (10th Cir.), cert. denied, 426 U.S. 908 (1976)	17
<i>United States v. Moussaoui</i> , 591 F.3d 263 (4th Cir. 2010).....	13, 15
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	13
<i>Weaver v. Massachusetts</i> , 137 S. Ct. 1899 (2017).....	13

Constitution, statutes, and rules:

U.S. Const. Amend. VI.....	7, 8, 9, 17
18 U.S.C. 922(g)(1).....	2
18 U.S.C. 924(a)(2).....	2, 16
28 U.S.C. 2255	9
42 U.S.C. 1983	16
Fed. R. Crim. P.:	
Rule 11(a)(12).....	13
Rule 11(c)(1)(C)	6

In the Supreme Court of the United States

No. 19-1052

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*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 936 F.3d 803.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2019. A petition for rehearing was denied on October 2, 2019 (Pet. App. 12a). On December 4, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 30, 2020. On January 14, 2020, Justice Gorsuch further extended the time within which to file a petition for a writ of certiorari to and including February 20, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner

was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-11a.

1. In January 2015, police officers observed petitioner driving his car through Kansas City, Missouri, and ran a warrant check of his license plate. Plea Agreement 2. The check revealed that the car was associated with six active warrants, five of which were for petitioner. *Ibid.*

After the officers initiated a traffic stop, petitioner stepped out of the car with a black handgun in his right hand, bent over, and tossed the gun under the car. Plea Agreement 2. The officers placed petitioner under arrest and recovered a .380-caliber, semi-automatic handgun from under the car. *Ibid.* A subsequent criminal history check revealed that petitioner was a convicted felon. *Ibid.*

2. A federal grand jury in the Western District of Missouri charged petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1. The district court appointed a federal public defender to represent petitioner. Pet. App. 2a.

a. One year later, the public defender filed a motion to withdraw as petitioner's attorney, explaining that petitioner had "instructed Counsel to seek permission to withdraw from his case." Mot. to Withdraw 1. After a hearing, the district court granted the motion, relieved the public defender of representation in the case, and appointed her to act as stand-by counsel. Order 1 (Mar.

1, 2016). During the hearing, the government's plea offer of 60 months of imprisonment was put on the record. Gov't C.A. Br. 7.

Two weeks later, petitioner filed a motion for replacement counsel, arguing that he had a constitutional right to appointed counsel and that he was being "forced to represent [him]self" without any knowledge of the statutes, codes, rules, and procedures "of court and law." Mot. of Objection to Defendant Being Pro Se Head Counsel 1. The district court denied the motion. Order 1 (Mar. 16, 2016). The court explained that, "[a]s I have previously told [petitioner], I do not find any of [the public defender's] actions or inactions warrant appointment of replacement counsel." *Ibid.* The court stated that petitioner thus had three options: he could "(1) continue to represent himself; (2) hire a new attorney; or (3) request that [the public defender] resume representation." *Ibid.* Petitioner continued to proceed *pro se*.

b. In the lead up to trial, petitioner indicated to the district court and the government that he intended to argue at trial that he was justified in possessing the firearm based on a previous incident where he was allegedly attacked. See Gov't Mot. in Limine 3 (Sept. 6, 2016). In response, the government filed a motion in limine to preclude petitioner from making such an argument to the jury without establishing a foundation for the affirmative defense of justification. *Id.* at 1. The government argued that petitioner could not satisfy the elements for a justification defense under circuit precedent, including a "present, imminent, and impending threat of death [or] serious bodily injury," and asked the court to preclude him from arguing justification unless

he could offer evidence “that a reasonable person could conclude * * * support[ed] [his] position.” *Id.* at 6-7.

At a hearing on the government’s motion, petitioner acknowledged that, at the time of his arrest, he did not face any imminent threat. Pet. App. 19a-22a; see *id.* at 13a-45a. The district court thus granted the government’s motion and explained to petitioner that he would be precluded at trial the following week “[f]rom telling the jury in any way during voir dire or during trial that [he] felt [he] w[as] justified” in possessing the handgun. *Id.* at 22a, 24a. Petitioner remarked, “Then I probably should have got killed before I got in the car.” *Id.* at 22a. “[I]f there’s nothing you can do to stop somebody from hurting you,” he continued, “then you just go on and die.” *Id.* at 25a. After a protracted exchange between petitioner and the court about his ability to argue justification at trial—during which petitioner, at one point, requested capital punishment for his offense, *id.* at 24a—the court announced that “we’re going to prepare for trial.” *Id.* at 29a; see *id.* at 24a-29a.

The district court then asked petitioner, “Now, are you still going to represent yourself, or do you want Ms. Allen to help you?” Pet. App. 29a. Petitioner responded, “She says she ain’t going to do it, and y’all can’t make her do it.” *Ibid.* The court inquired, “I thought you fired her.” *Ibid.* Petitioner, however, stated several times that Ms. Allen “doesn’t want to be on the case.” *Id.* at 30a. Turning to Ms. Allen—who was still serving as standby counsel—the court asked, “do you want to represent him, or what’s the problem?” *Ibid.* Ms. Allen explained that she had filed the motion to withdraw at petitioner’s request, and that she “absolutely” would represent petitioner if the court wanted

her to do so “and if [petitioner] want[ed] [her] to represent him.” *Ibid.*

When again asked his intentions, petitioner expressed disbelief that counsel could be reappointed. Petitioner stated, “there’s no way you can say—if she quit, there’s no way you can say she’s fired—she’s hired again after she quit.” Pet. App. 31a. The district court informed petitioner that it could “solve” that issue. *Ibid.* “I’ll reappoint her, if you think she’s not appointed, and direct her to be prepared to go to trial next Monday morning.” *Id.* at 31a-32a. Petitioner responded, “Then I’ll represent myself like I have been doing, because she quit.” *Id.* at 32a. The court reiterated, however, that Ms. Allen “just said she would represent [petitioner] at trial” and that the court had “reappointed her.” *Ibid.*

Although expressing continued disbelief that his appointed counsel could “quit” and then be reappointed by the district court, Pet. App. 32a, petitioner spent most of the remainder of the hearing expressing frustration about his inability to argue justification. *Id.* at 32a-45a. Petitioner characterized the court’s motion-in-limine ruling as meaning that even “if somebody threatened [his] life,” he “can’t say nothing.” *Id.* at 33a. He asserted that he knew that the district judge had a “gun up there” at the bench and suggested that they could “get this over right out back.” *Id.* at 39a. And he stated that, “we don’t even have to have a trial * * * because it’s already—[the judge] already made it clear what’s going to happen.” *Id.* at 40a.

As the lengthy hearing came to a close, Ms. Allen stated that she “d[id]n’t know if [petitioner] would still be choosing to go pro se if [she] were representing him.” Pet. App. 42a. She asked the district court to confirm

that it was “denying any desire he ha[d] to go pro se and appointing” her. *Ibid.* The court replied, “Yes[,] * * * I’m denying [petitioner’s] request to go pro se, and I’m reappointing you.” *Ibid.* At that point, petitioner asserted, “I can’t even defend myself now.” *Ibid.*

c. One week later, petitioner pleaded guilty pursuant to a binding plea agreement entered under Federal Rule of Criminal Procedure 11(c)(1)(C). Judgment 1; Plea Agreement 1-11; Pet. App. 46a-88a. Among other things, the parties agreed that, if the plea were accepted by the district court, petitioner would be sentenced to 60 months of imprisonment. Plea Agreement 1, 3. They recognized that the court would calculate petitioner’s advisory Sentencing Guidelines range, but expressly agreed that the calculation would not affect the court’s obligation to impose the parties’ mutually agreed-to 60-month sentence. *Id.* at 6. The government promised, among other things, “not to bring any additional charges against defendant for any federal criminal offenses related to being a felon in possession of a firearm * * * which arose out of [petitioner’s] conduct” described in the agreement. *Id.* at 4. And petitioner agreed to waive “his right to appeal or collaterally attack a finding of guilt following the acceptance of th[e] plea agreement, except on grounds of (1) ineffective assistance of counsel; or (2) prosecutorial misconduct” and “his right to appeal his sentence, directly or collaterally, on any ground except claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) an illegal sentence.” *Id.* at 9.

At a change of plea hearing, the district court confirmed that petitioner understood the plea agreement “limit[ed] any appeal” he might file to specified grounds. Pet. App. 81a. At three separate points, the

court confirmed that petitioner had not been “threatened or coerced in any manner” to plead guilty. *Id.* at 66a, 82a, 84a. It also confirmed that petitioner was satisfied with his counsel’s assistance. *Id.* at 84a-85a. Following the plea colloquy, the court found that petitioner had entered his plea “understandingly, knowingly and voluntarily” and did so “with the advice of counsel.” *Id.* at 85a.

d. At the sentencing hearing, the district court calculated petitioner’s advisory Sentencing Guidelines range to be 46 to 57 months of imprisonment. Pet. App. 101a. The court then accepted the plea agreement and, in accordance with the binding agreement, sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 109a-110a; Judgment 2-3.

3. Petitioner filed a *pro se* notice of appeal, and was appointed new counsel. Pet. App. 4a. The court of appeals affirmed. *Id.* at 1a-11a.

a. The court of appeals determined that petitioner “waived his right to appeal the district court’s alleged denial of [his right to self-representation] by pleading guilty.” Pet. App. 5a. The court of appeals observed that a “valid guilty plea . . . waives a defendant’s ‘independent claims relating to the deprivation of constitutional rights that occurred prior to’ pleading guilty.” *Ibid.* (citations omitted). It explained that such “[c]ase-related constitutional defects” are generally made “‘irrelevant to the constitutional validity of the conviction’ by a guilty plea ‘[b]ecause the defendant has admitted the charges against him.’” *Ibid.* (quoting *Class v. United States*, 138 S. Ct. 798, 804-805 (2018)) (second set of brackets in original). The court noted some exceptions to that rule, but explained that the Sixth

Amendment right to self-representation is not among them. *Id.* at 6a-9a.

The court of appeals observed that the “majority of the circuits to reach the issue have held a defendant waives the right to bring a claim for a potential violation of the right to proceed pro se by pleading guilty.” Pet. App. 6a (collecting cases). The court rejected the reasoning of the only court of appeals to conclude otherwise—the Ninth Circuit in *United States v. Hernandez*, 203 F.3d 614 (2000)—finding “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.” Pet. App. 7a (citing *Hernandez*, 203 F.3d at 627).

The court of appeals explained that *Hernandez* rested “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.” Pet. App. 7a. The court observed that, in fact, such a defendant “could seek an appellate remedy” if he were convicted at trial, or “enter a conditional plea of guilty,” reserving the right to challenge the adverse determination on appeal. *Id.* at 7a-8a (citations omitted). The court explained that the Ninth Circuit’s contrary approach turned “on its head” this Court’s recent holding that “‘case-related constitutional defects’ are made ‘irrelevant to the constitutional validity of the conviction’ by a later guilty plea [b]ecause the defendant has admitted the charges against him.” *Id.* at 8a (quoting *Class*, 138 S. Ct. at 804-805).

The court of appeals thus determined that unless a defendant “can show * * * on the specific facts of his

case that he did not enter the plea knowingly and voluntarily,” he relinquishes any right to bring a Sixth Amendment self-representation claim on appeal. Pet. App. 8a. In light of the plea colloquy in this case—in which the district court “repeatedly questioned [petitioner] to ensure the plea was voluntary” and that he “knew and understood his rights and that he was waiving his trial rights”—the court of appeals found “no basis” to conclude that petitioner did not “knowingly and voluntarily enter[] the plea” here. *Id.* at 8a-9a.

b. Judge Kelly concurred in the judgment. Pet. App. 9a-11a. Judge Kelly explained that she would have concluded that “the district court impermissibly denied [petitioner] his right to represent himself at trial.” *Id.* at 10a. Nevertheless, Judge Kelly agreed with the majority that a guilty plea made after the improper denial of a right to proceed *pro se* is not categorically involuntary and did not dispute that petitioner’s claim of involuntariness here was not “apparent in the current record.” *Id.* at 11a (citation omitted). Judge Kelly further stated that petitioner “is not barred from challenging the validity of his guilty plea—or raising a claim of ineffective assistance of counsel—in a post-conviction proceeding” under 28 U.S.C. 2255, in which a court could consider “facts outside the original record.” Pet. App. 11a.

ARGUMENT

Petitioner contends (Pet. 8-21) that he was entitled to appellate relief on the theory that the denial of a defendant’s right to self-representation “necessarily renders [any] subsequent guilty plea involuntary, thus permitting the defendant to raise the [self-representation] objection on appeal.” Pet. 16. The court of appeals cor-

rectly rejected that contention. And although some disagreement exists in the courts of appeals on whether an otherwise valid guilty plea precludes a defendant from raising a self-representation claim on appeal, the conflict is shallow, stale, and lopsided. Particularly in light of this Court’s recent decision in *Class v. United States*, 138 S. Ct. 798 (2018), further review of the question is not warranted at this time. In any event, this case would not be a suitable vehicle for addressing that question, because in addition to pleading guilty, petitioner also expressly waived any right to raise a self-representation claim on appeal and because, even if petitioner had not waived his self-representation claim, it lacks merit.

1. As this Court recently reiterated, “a valid guilty plea ‘forfeits not only a fair trial, but also other accompanying constitutional guarantees.’” *Class*, 138 S. Ct. at 805 (2018) (citation omitted). It “also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered.” *Ibid.*; see *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process.”). The court of appeals correctly applied those principles in rejecting petitioner’s contention here.

Unlike the narrow categories of claims that survive a valid guilty plea, a self-representation claim is not the type of claim that “would extinguish the government’s power to constitutionally prosecute the defendant if the claim were successful.” *Class*, 138 S. Ct. at 806 (citations and internal quotation marks omitted). Rather, it is the procedural “right to defend oneself at trial.” *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 154 (2000). That is precisely the sort of constitutional guarantee

“accompanying” trial that a defendant forgoes when he enters a valid guilty plea. *Class*, 138 S. Ct. at 805. And even if denying self-representation at an earlier stage of the proceeding is an independent constitutional wrong, such “[c]ase-related constitutional defects’ are made ‘irrelevant to the constitutional validity of the conviction’ by a guilty plea ‘[b]ecause the defendant has admitted the charges against him.’” Pet. App. 5a (quoting *Class*, 138 S. Ct. at 804-805) (second set of brackets in original).

Petitioner does not appear to dispute that, if his guilty plea was valid, it relinquished his claim that he was erroneously denied his right to self-representation at trial. He instead argues (Pet. 19-21) that a guilty plea entered after a defendant has been erroneously denied his right to self-representation categorically renders the subsequent plea “involuntary” and therefore invalid. See Pet. App. 7a (explaining that petitioner “urges us to * * * hold his guilty plea was involuntary based on the earlier denial of his right to represent himself”). But the court of appeals correctly found “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.” *Ibid.*

A “plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel,” is voluntarily made unless it was “induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business.” *Brady v. United*

States, 397 U.S. 742, 755 (1970) (citation omitted). Nothing about the denial of self-representation categorically prevents a defendant from entering such a plea. And here the district court's thorough plea colloquy with petitioner makes clear that petitioner "knowingly and voluntarily" entered his plea. Pet. App. 8a-9a.

In *United States v. Hernandez*, 203 F.3d 614 (2000), the Ninth Circuit concluded that the denial of self-representation rendered a guilty plea involuntary because it deprives the defendant of "the free choice" that the Constitution requires. *Id.* at 627. The court reasoned that, because a defendant in that situation "is offered a choice between pleading guilty and receiving a trial that will be conducted in a manner that violates his fundamental Sixth Amendment rights, his decision to plead guilty is not voluntary." *Ibid.* But this Court has already rejected similar claims. In *Brady v. United States*, *supra*, the Court made clear that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty" under a statute that unconstitutionally "permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial." 397 U.S. at 746, 755. And in *McMann v. Richardson*, 397 U.S. 759 (1970), the Court refused to find a guilty plea involuntary on the ground that it was motivated by a concern that a coerced confession would be used against the defendant at trial. *Id.* at 771.

Contrary to the Ninth Circuit's reasoning, a defendant in such a case is not deprived of any "lawful alternative[]" to pleading guilty. *Hernandez*, 203 F.3d at 627. "The sensible course" for such a defendant "would be to contest his guilt, prevail on his * * * claim at trial, on appeal, or, if necessary, in a collateral proceeding, and

win acquittal.” *McMann*, 397 U.S. at 768; see Pet. App. 7a (“[I]f the defendant proceeded to trial and was convicted, he could seek an appellate remedy for the constitutional violations he alleged.”) (quoting *United States v. Moussaoui*, 591 F.3d 263, 280 (4th Cir. 2010)). Or, as the court of appeals here suggested, “if a defendant wishes to preserve his right to appeal, he [can] enter a conditional plea of guilty,” reserving his right to appeal such a claim. Pet. App. 8a (citation omitted); see Fed. R. Crim. P. 11(a)(12).

That reasoning is not undermined by this Court’s categorization of the denial of the right of self-representation as “structural error.” *Hernandez*, 203 F.3d at 626. “Despite its name, the term ‘structure error’ carries with it no talismanic significance as a doctrinal matter.” *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017). “It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was ‘harmless beyond a reasonable doubt.’” *Ibid.* (citation omitted). It does not suggest that the error is unwaivable or that it categorically invalidates a subsequent plea. Compare, *e.g.*, *Tollett*, 411 U.S. at 266 (holding that “a criminal defendant [who] pleads guilty, on the advice of counsel, * * * is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected”), with *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986) (plurality opinion) (recognizing that racial discrimination in the selection of a grand jury is structural error).

Petitioner (Pet. 20) attempts to draw an analogy between his case and this Court’s decisions holding that “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, and that a guilty plea does not waive

ineffective-assistance-of-counsel claims, *Tollett*, 411 U.S. at 267. But the analogy is inapt. Deprivation-of-counsel and ineffective-assistance-of-counsel claims are not relinquished by an unconditional guilty plea because the presence of effective counsel itself helps ensure that the plea was made “knowingly”—that is, with an understanding of the charges and the possible consequences of the plea. *Brady*, 397 U.S. at 748 n.6.

By contrast, the denial of a defendant’s right to *forgo* the assistance of counsel, standing alone, does not call into question the defendant’s ability to understand the charges against him, the possible consequences of his plea, or that a subsequent plea is otherwise knowingly made. If anything, it cuts the other way, by helping to ensure that the defendant *does* have a full understanding of all of the relevant considerations. The right of self-representation protects a defendant’s “individual autonomy,” not his understanding of the charges or the consequences of a conviction. *Martinez*, 528 U.S. at 160. The right is afforded even though, as a general rule, *pro se* representation is neither “wise, desirable, [n]or efficient.” *Id.* at 161. And a defendant’s own “technical legal knowledge” is irrelevant to his assertion of that right. *Indiana v. Edwards*, 554 U.S. 164, 173 (2008) (citation omitted).

2. Petitioner correctly identifies (Pet. 9-12) some disagreement among the courts of appeals regarding whether an otherwise valid guilty plea precludes a defendant from raising a self-representation claim on appeal. Most courts of appeals to consider the question, including the court below, have recognized that an otherwise knowing and voluntary guilty plea precludes a defendant from raising a claim of self-representation on appeal or on collateral review. See Pet. App. 1a-11a;

Moussaoui, 591 F.3d at 279; *Gomez v. Berge*, 434 F.3d 940, 943 (7th Cir.), cert. denied, 547 U.S. 1168 (2006). As noted, however, the Ninth Circuit has concluded to the contrary. See *Hernandez*, 203 F.3d at 627. But that lopsided conflict does not warrant this Court’s review at this time.

As explained above, the Ninth Circuit’s reasoning is unsound and inconsistent with this Court’s decisions. See pp. 12-13, *supra*. As the Fourth Circuit and court below have since observed, the Ninth Circuit’s conclusion is “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.” Pet. App. 7a (citing *Moussaoui*, 591 F.3d at 280); see *Moussaoui*, 591 F.3d at 280 (“With all due respect, we are not persuaded by the analysis in *Hernandez*.”). And as both the Fourth and Seventh Circuit have noted, it places undue weight on this Court’s description of the denial of self-representation as “structural error.” See *Jackson v. Bartow*, 930 F.3d 930, 934 (7th Cir. 2019) (per curiam); *Moussaoui*, 591 F.3d at 280 n.12. Not even petitioner defends the Ninth Circuit’s reasoning. See Pet. 20-21.

Although the Ninth Circuit reiterated its holding from *Hernandez* in a 2001 decision, it has not done so with the benefit of the Fourth Circuit’s reasoning in *Moussaoui*, the Seventh Circuit’s reasoning in *Gomez* and *Jackson*, or the reasoning of the decision below. Nor did it have the benefit of this Court’s recent guidance in *Class*, discussing the implications of a guilty plea on a defendant’s right to raise various constitutional claims on appeal. And every court of appeals to have decided the issue since *Hernandez* has reached the same result.

3. Finally, even if the question presented otherwise warranted this Court's consideration, this case would be an unsuitable vehicle in which to consider it.

First, the circuit conflict identified by petitioner concerns the effect of the guilty plea *itself* on a defendant's ability to raise a self-representation claim on appeal or collateral review. But petitioner not only pleaded guilty to the charged offense, he entered a plea agreement that expressly waived "his right to appeal or collaterally attack a finding of guilt following the acceptance of th[e] plea agreement," except on grounds that do not apply here. Plea Agreement 9. During the plea colloquy, petitioner personally confirmed that he understood he was waiving those rights. See Pet. App. 82a. And he accepted the benefits of the agreement negotiated by his appointed counsel, including the government's promise not to bring any additional related charges and a sentence that was half the statutory maximum he could have otherwise received. See 18 U.S.C. 924(a)(2).

This Court has recognized that a defendant may knowingly and voluntarily waive statutory or constitutional rights in conjunction with a guilty plea in a criminal case. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 8-10 (1987) (upholding express waiver of right to raise a double-jeopardy defense); *Town of Newton v. Rumery*, 480 U.S. 386, 389 (1987) (affirming enforcement of defendant's waiver of right to file an action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. *Ibid.* The express appeal waiver in petitioner's plea agreement and petitioner's

acceptance of the benefits of that agreement provides thus further basis to conclude that he knowingly and voluntarily waived his self-representation claim here. See *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir.), cert. denied, 426 U.S. 908 (1976). And it makes this case a poor vehicle for resolving any disagreement about the preclusive effects of the guilty plea alone.

Second, petitioner's self-representation claim lacks merit. A criminal defendant's expression of interest in self-representation implicates two mutually exclusive constitutional rights: the Sixth Amendment right to be represented by an attorney, and the right to self-representation established by *Faretta v. California*, 422 U.S. 806 (1975). To guard against the inadvertent waiver of the right to counsel and prevent defendants from "taking advantage of and manipulating the mutual exclusivity of the rights," an assertion of the right of self-representation must be "clear and unequivocal." *United States v. Frazier-El*, 204 F.3d 553, 558-559 (4th Cir. 2000); see *Faretta*, 422 U.S. at 835 ("Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel.")^{*} And courts must "indulge in every reasonable presumption against waiver" of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

^{*} See also, e.g., *United States v. Campbell*, 659 F.3d 607, 612 (7th Cir. 2011), vacated on other grounds, 568 U.S. 802 (2012); *United States v. Mackovich*, 209 F.3d 1227, 1236 (10th Cir.), cert. denied, 581 U.S. 905 (2000); *Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir. 2000); *Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986).

Petitioner did not clearly and unequivocally invoke his right to self-representation in this case. To the contrary, petitioner indicated that he wanted to be represented by counsel, that he did not understand legal rules or processes, and that his *pro se* status was a byproduct of the denial of his request for substitute counsel. See p. 3, *supra*. And when petitioner did invoke his right to self-representation at the pre-trial hearing, he did so purely on the mistaken premise that Ms. Allen had previously “quit” and could not be reappointed by the district court. See Pet. App. 32a (“I’ll represent myself like I have been doing, because she quit.”). That statement was reasonably understood by the court as a conditional, not unqualified, request for self-representation. The court’s immediate reaction was to underscore that Ms. Allen was willing to represent petitioner and that the court could, and in fact had, reappointed her, directly addressing petitioner’s concerns. See *ibid*. Although petitioner expressed continued disbelief of the court’s authority to make such a reappointment, he never unequivocally expressed a desire to proceed *pro se* if the court possessed such authority. See *id.* at 42a (“MS. ALLEN: I don’t know if [petitioner] would still be choosing to go pro se if I were representing him.”).

Although the government’s brief below “conceded [petitioner’s] conduct did not justify the district court’s denial of [petitioner’s] right to proceed pro se,” it “argued the reappointment of counsel was warranted because [petitioner] did not unequivocally assert his right to self-representation when asked by the district court during the pretrial evidentiary hearing.” Pet. App. 4a-5a. The court of appeals did not address the merits of petitioner’s claim that he was erroneously deprived the

right of self-representation. See *id.* at 9a (“[W]e decline to address the merits of this Sixth Amendment argument.”). But lack of merit in the claim is additional reason counseling against further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO

Solicitor General

BRIAN A. BENCZKOWSKI

Assistant Attorney General

PAUL T. CRANE

Attorney

APRIL 2020