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

REPLY BRIEF FOR PETITIONER

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The government does not dispute the two points that warrant a grant of certiorari in this case. It outright concedes that the courts of appeals have split on the question whether a guilty plea waives a challenge on appeal to the denial of a defendant's Sixth Amendment right to represent himself. And the government fails even to respond to petitioner's arguments about the significance and recurring nature of the question. And while the government invokes two purported vehicle issues, neither presents any obstacle to review.

The government focuses its brief in opposition on the merits of the question presented. But its preview of its

merits argument underscores the substantial nature of the question presented. In the government's view, a denial of the Sixth Amendment right to self-representation is a mere procedural error that can be waived by a guilty plea. In petitioner's view, a denial of that right is akin to a denial of the right to counsel, which renders a resulting guilty plea invalid. Which of those positions is correct is an important question of constitutional dimension that only this Court can resolve.

This case cleanly presents an undisputedly important and recurring question of criminal law on which the courts of appeals have divided. This Court should grant certiorari.

I. The Government Concedes That the Circuits Are Divided

The government acknowledges (at 10, 14) that the circuit courts disagree on the question presented. On the one hand, the Ninth Circuit has repeatedly held that right-to-self-representation claims survive a guilty plea. *United States v. Hernandez*, 203 F.3d 614, 627 (9th Cir. 2000), *overruled in part on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008); *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001). District courts continue to apply the Ninth Circuit's rule, *see Malmo v. Ryan*, No. CV-14-2396, 2016 WL 492136, at *10 (D. Ariz. Jan. 8, 2016), and other courts follow it as persuasive authority, *see Michigan v. Hoffman*, No. 266560, 2007 WL 397224, at *2 (Mich. Ct. App. Feb. 6, 2007).

On the other hand, four federal courts of appeals have now held that guilty pleas waive objections to a denial of the right to self-representation. *See* Pet. 10-11 (citing cases). And courts have acknowledged that "fairminded jurists could (and do) debate" the waiver question. *Werth v. Bell*, 692 F.3d 486, 496 (6th Cir. 2012); *see also United*

States v. Moussaoui, 591 F.3d 263, 279-80 (4th Cir. 2010); Pet. App. 6a.

The government argues the Ninth Circuit may resolve the disagreement on its own. That is wishful thinking.

First, the government argues (at 15) that the Ninth Circuit might reconsider its position in light of subsequent decisions by other circuits disagreeing with *Hernandez*. There is no reason to think the Ninth Circuit will do so. When it created the split, the Ninth Circuit had before it the Tenth Circuit's contrary guidance in *United States v. Montgomery*, 529 F.2d 1404, 1406-07 (10th Cir. 1976), which the government addressed in its brief, Br. for U.S. 12, *Hernandez*, 203 F.3d 614 (No. 98-50206).

Second, the government argues (at 15) that the Ninth Circuit might reverse its position in light of this Court's decision in *Class v. United States*, 138 S. Ct. 798 (2018). But *Class* concerns what claims survive "a *valid* guilty plea." 138 S. Ct. at 805 (emphasis added). The question presented in *Hernandez*—and here—is whether a defendant's guilty plea is valid when a court denies the defendant's request for self-representation and forces the defendant to hand over his defense to unwanted counsel. 203 F.2d at 262.

The division over the question presented will not abate without this Court's guidance. Five courts of appeals have weighed in; there is no reason to await further percolation.

II. The Case Cleanly Presents an Important Question

1. The government does not challenge the importance of the question presented. Nor could it reasonably do so. In *Faretta v. California*, 422 U.S. 806 (1975), this Court made clear the "fundamental nature" of the right to self-representation, which the Founders wove into the very

"structure of the Sixth Amendment." *Id.* at 817, 818-20. This Court also emphasized the practical stakes, since "appointed counsel manages the lawsuit and has the final say in all but a few matters of trial strategy," no matter how much a defendant may object. *Id.* at 812 n.8.

The Court also observed that "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Id.* at 834. This case proves the point: the district court observed that it had appointed counsel (against petitioner's wishes) "to get this plea worked out." Pet. App. 90a. And the lawyer appointed to represent him inexplicably negotiated a binding above-Guidelines sentence. App. 4a. When, as here, a defendant is led to "believe that the law contrives against him," 422 U.S. at 834, it should come as no surprise that he would plead guilty. In fact, "[r]oughly 95% of felony cases in the federal and state courts are resolved by guilty pleas. Therefore it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas." *Class*, 138 S. Ct. at 807 (Alito, J., dissenting) (footnote omitted). The government presents no argument to the contrary.

2. The government offers two arguments why this case is supposedly an inappropriate vehicle for resolving the question presented. Neither has merit.

a. The government asserts (at 17-18) that petitioner's self-representation claim "lacks merit" because petitioner did not "unequivocally" demand to proceed pro se when the court reappointed counsel. *See* Pet. App. 4a-5a.

This argument presents no vehicle problem because it goes to the merits of petitioner's Sixth Amendment claim, *not* to the threshold question whether the guilty plea waived that claim. Pet. 16-17. The government admits (at

18-19) that the court of appeals declined to address this question, resting its decision entirely on its holding that petitioner had waived the claim by pleading guilty. Pet. App. 9a. If this Court grants certiorari and rules in petitioner's favor on the waiver issue, the Eighth Circuit would address the *Faretta* question on remand.

In any event, the government's equivocation argument fails on the facts. The government argues (at 18) that petitioner did not clearly reject appointed counsel and ask to represent himself, but was only confused whether representation by that counsel remained an option. This is nonsense, and the district court record refutes it entirely. Petitioner demonstrably understood that standby counsel could resume her representation; the district court previously had explained to petitioner that he had the option of "request[ing] that the public defender resume representation," and petitioner elected to represent himself. Pet. App. 2a.

Moreover, petitioner emphatically demanded to represent himself and objected to counsel's reappointment both before and after the court ordered that reappointment. When the court raised the prospect of reappointing counsel, petitioner objected, stating, "No, she can't represent me because what happened prior [petitioner firing the lawyer over strategic disagreements] is relevant." Pet. App. 31a. When the court indicated that it would reappoint counsel, petitioner responded, "Then I'll represent myself like I have been doing," a request the court denied. *Id.* at 31a-32a. To remove any doubt, counsel herself asked "to clarify": "Is the Court denying any desire [petitioner] has to go pro se and appointing me next week?" *Id.* at 42a. The court responded, "Yes. . . . I'm denying his request to go pro se, and I'm reappointing

you." *Id.* Petitioner immediately responded, "I can't even defend myself now." *Id.*

The government's assertion that petitioner was merely confused about counsel's willingness to represent him or the court's ability to reappoint counsel strains credulity against this record. Indeed, Judge Kelly, concurring in the judgment, rejected it out of hand. Pet. App. 9a ("In my view, the record makes clear that the district court violated [petitioner's] right to self-representation when it reappointed counsel to represent him.").[1]

b. The government also argues (at 16-17) that this case is unsuitable for review because petitioner not only pleaded guilty but also entered a plea agreement containing an appeal waiver. That appeal waiver, which commonly appears in plea agreements, hardly renders petitioner's case atypical. The appeal waiver has no bearing on this case for several reasons.

First, the government did not argue below that the appeal waiver in the plea agreement had independent legal effect relevant to the question presented. To the contrary, the government rested its arguments on the cases on the majority side of the circuit split discussed above, which concerned the effect of guilty pleas. Gov't CA8 Br. 47-54 (Dec. 27, 2018). To the extent the government now suggests that the waiver in the plea agreement waived petitioner's right to appeal even if the guilty plea did not,

[1] The government points (at 18) to counsel's statement, "I don't know if [petitioner] would still be choosing to go pro se if I were representing him." Pet. App. 42a. But as the full statement makes clear, counsel merely sought "to clarify" whether the court was "denying any desire [petitioner] has to go pro se and appointing me." *Id.* In other words, counsel was ensuring that the record reflected that she, and not petitioner, controlled the defense notwithstanding petitioner's repeated objections.

that argument has been waived. *See Garza v. Idaho*, 139 S. Ct. 738, 745 (2019) ("[E]ven a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver.").

Second, this Court has already observed that a defendant cannot waive the question whether a "waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary." *Id.* Petitioner's argument is that the district court's violation of his right to self-representation rendered his guilty plea—including the plea agreement—unknowing and involuntary. That the plea agreement contained a generic appeal waiver presents no obstacle to consideration of that question.[2]

III. The Government's Merits Preview Provides No Basis To Deny Review

The government spends the bulk of its brief in opposition arguing the merits of the waiver issue. The government's preview of its merits argument only emphasizes

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[2] The government cites (at 16) *Ricketts v. Adamson*, 483 U.S. 1 (1987), and *Town of Newton v. Rumery*, 480 U.S. 386 (1987), for the proposition that "a defendant may knowingly and voluntarily waive statutory or constitutional rights in conjunction with a guilty plea." Neither case has any bearing on the question presented. In *Ricketts*, the defendant entered an undisputedly valid guilty plea, part of which waived double jeopardy protections if the defendant failed to comply with his cooperation agreement. 483 U.S. at 3-4. The case does not suggest that a rights waiver in a plea agreement is valid when the guilty plea itself is invalid.

Rumery does not involve a guilty plea at all. That case involved the question "whether a court properly may enforce an agreement in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges." 480 U.S. at 389.

the substantial nature of the question presented and the need for this Court's guidance.

"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). A conviction resulting from an involuntary and thus invalid plea must be reversed. *See id.*

As this Court has already explained, right-to-counsel and ineffectiveness-of-counsel claims survive guilty pleas, because the violation of these Sixth Amendment rights interferes with the requirement that a guilty plea "be the voluntary expression of [the defendant's] own choice." Pet. 20 (citing cases and quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Lower courts have applied this same principle to choice-of-counsel claims. Pet. 20.

The same is true of self-representation claims. The right to reject unwanted counsel and to control one's own defense are the flip side of the right-to-counsel coin. Pet. 20-21. In *Faretta* this Court held that counsel should not be "an organ of the State interposed between an unwilling defendant and his right to defend himself personally." 422 U.S. at 820. As this Court put it, "[i]n such a case, counsel is not an assistant, but a master." *Id.* at 820. A guilty plea negotiated and entered into in such circumstances, where the defendant's right to mount his own defense has been unconstitutionally eliminated, is invalid.

The government's arguments to the contrary are unconvincing. First, the government asserts that the right to self-representation is a "procedural," "[c]ase-related" right that a valid guilty plea waives. Br. in Opp. 8 (quoting *Class*, 138 S. Ct. at 804-05 (majority)); *id.* at 10. The gov-

ernment uses the wrong analytical frame. *Class* considered which claims survive a "*valid* guilty plea." 138 S. Ct. at 805 (emphasis added). In that context, this Court explained that a valid guilty plea waives claims that are inconsistent with the defendant's admission of factual guilt—for example, evidentiary objections to the prosecution's case that are mooted by the defendant's admission. On the other hand, claims "consistent" with a valid admission of factual guilt, such as a claim that the government lacked the power to criminalize the conduct alleged, survive a valid plea. *Id.* at 803-04. But the question presented in this case concerns whether a violation of the right to self-representation renders a plea *invalid*. *Hernandez*, 203 F.3d at 626. The right to self-representation is no more or less "procedural" or "case-related" than the right to counsel; the correct question is whether the denial of the right prevents the defendant's guilty plea from embodying "the voluntary expression of his own choice." *Brady*, 397 U.S. at 748.

Second, while the government concedes (at 13-14) that guilty pleas do not waive right-to-counsel claims, the government attempts to distinguish the right to self-representation. The government argues (at 14) that "effective counsel itself helps ensure that the plea was made 'knowingly,'" such that forcing counsel upon unwilling defendants "help[s] to ensure that the defendant *does* have a full understanding of all the relevant considerations." Even accepting this factual premise, it speaks only to whether a violation of the right to self-representation affects whether a plea is "knowing"—not whether it is voluntary. In any event, the government's factual premise cannot be squared with *Faretta*. As this Court observed, unwanted counsel "'represents' the defendant only through a tenuous and unacceptable legal fiction," and "is not an assis-

tant, but a master." 422 U.S. at 820-21. Under those circumstances, where representation has been unconstitutionally compelled and the attorney-client relationship is an "unacceptable legal fiction," forcing a defendant to rely on unwanted counsel to protect his legal rights does not ensure a knowing and voluntary plea.

Third, the government argues that a defendant whose right to self-representation has been denied has not been deprived of a lawful alternative to pleading guilty, because he possesses the "sensible" option of proceeding to trial with unconstitutionally compelled counsel, risking conviction, and then filing an appeal or collateral proceeding to vindicate his self-representation right. Br. in Opp. 12-13 (citing *McMann v. Richardson*, 397 U.S. 759, 768 (1970), and *Moussaoui*, 591 F.3d at 280).

This argument misapprehends the enormous consequences of the denial of self-representation.[3] In *McMann*, the Court held that counseled defendants who believe that their confessions were unconstitutionally obtained waive such claims by pleading guilty, and usually cannot later claim the confession coerced their plea. The Court observed that such defendants should proceed to trial, argue for the suppression of the confession, and urge the issue through appeal and collateral review if necessary. 397 U.S. at 768.

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[3] The government asserts (at 15) that petitioner does not defend the Ninth Circuit's invocation of structural error as part of its involuntariness analysis. Contrary to the government's characterization, the Ninth Circuit did not hold that a guilty plea is involuntary simply because of a preceding structural error. Instead, the Ninth Circuit used the structural nature of the error to illustrate the degree to which it undermined the defendant's free choice. *Hernandez*, 203 F.3d at 626-27.

That circumstance bears little resemblance to the circumstances facing petitioner and similarly situated defendants. In *McMann*, the defendants benefitted from constitutionally appointed counsel and the Court required only that the defendants, with the assistance of such counsel, rely upon the normal legal process to adjudicate the merits of their coerced confession arguments. *Id.* at 767-68. Petitioner's position is altogether different. As this Court noted in *Faretta*, when a court denies a defendant's right to self-representation, the unwanted counsel "imprison[s]" the defendant, serves as his "master," and "has the final say in all but a few matters of trial strategy." 422 U.S. at 812 n.8, 815, 820. A defendant in this position does not face the same fair choice, aided by constitutionally appointed counsel, as the defendants in *McMann*. If the government is right, such a defendant must sit silently and watch the counsel he fired conduct an unapproved defense before the very judge that unconstitutionally forced the lawyer upon him in the first place—hoping that the unwanted lawyer will pursue a trial strategy that will result in acquittal. And if that lawyer makes decisions that forego other of the defendant's legal rights, there is nothing he can do about it; according to the government, he must simply hope that the justice system will help him reclaim his right to self-representation following conviction.[4] That is a far cry from *McMann*. This Court should decide this important and substantial question.

[4] The government's suggestion (at 13) that such a defendant simply enter a conditional guilty plea fares no better. Federal Rule of Criminal Procedure 11(a)(2) permits such pleas only with "the consent of the court and the government"—and a defendant is in no position to demand it when unwanted counsel controls the plea negotiations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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