No. 19-_____

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In the

Supreme Court of the United States

TORRENCE DAVIS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Faretta v. California*, this Court held that criminal defendants have the right to represent themselves in criminal prosecutions. *Faretta v. California*, 422 U.S. 806 (1975). Since then, however, courts have split on two key components of *Faretta*.

First, to trigger the right, a defendant's request must be unequivocal. Courts have split, however, as to what constitutes an equivocal invocation. Some courts have held that any conditional demand for self-representation is equivocal. Others have held that a conditional demand can still be unequivocal. Thus, when a defendant's motion to proceed pro per is conditioned upon the trial court's denial of a motion for new counsel (or counsel's refusal to submit motions, as in this case), courts have reached inconsistent results.

Second, to ensure defendants enter self-representation with open eyes, courts are required to advise defendants of the risks and dangers of self-representation. However, courts have split over how to address the issue when trial courts fail to conduct this advisement. Some courts have concluded the defendant has abandoned the request to proceed pro per if it is not re-urged or refiled, focusing largely upon subsequent events. These cases, however, had strong dissenting views that believed it was improper to find abandonment without a colloquy to determine if the defendant knowingly and intelligently waived the invoked right to self-representation. New Jersey has adopted this latter approach.

This case raises the following two issues:

1. Under *Faretta*, is a conditional request to proceed pro per automatically equivocal?

2. Under *Faretta*, must a defendant re-urge a request to proceed pro per after the trial court does not rule on the motion or else it is considered abandoned?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Torrence Davis, petitions this Court for a writ of certiorari to review the judgment of the Arizona Court of Appeals affirming conviction in his case.

DECISIONS BELOW

The decision below is unpublished. However, Arizona makes its unpublished dispositions through standard reporting companies, including Westlaw. On Westlaw, the decision is available at 2019 WL 273099. The decision is also available on the Court of Appeals website. *See* https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2019/1%20CA-CR%2017-0529.pdf. While the decision is unpublished, Arizona allows for citation to unpublished decisions for persuasive value. Ariz. R. Supreme Ct. Rule 111(c)(1)(C).

JURISDICTION

The Arizona Court of Appeals issued its decision on January 22, 2019. Davis timely filed a Petition for Review to the Arizona Supreme Court. The Arizona Supreme Court denied that petition and Davis is timely filing this Petition for Writ of Certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defense.

STATEMENT

Torrence Davis appeared in court for a pretrial conference on February 16, 2017. Reporter's Transcript ("R.T.") 2/16/17 at 1-2 (Appx. 7). Present during this hearing were Judge Justin Beresky, Deputy County Attorney Matthew Elias, and the attorney for Mr. Davis, Nicholas Dehner. Judge Beresky asked both parties for an update. *Id.* at 3. Mr. Dehner responded that he believed he was ready for trial, but Mr. Davis was not. *Id.* Judge Beresky addressed Mr. Davis and asked for his reasons. *Id*. at 4. Judge Beresky and Mr. Davis had the following discussion:

> Court: Why aren't you ready to go to trial?
>
> Mr. Davis: Because I have some motions I want to be turned in. I have some things I asked to be, like body cams, dash cams, that were never given.
>
> Court: Okay.
>
> Mr. Davis: And I know he came late on my case. So the first two lawyers, I didn't fire. The State got rid of them. And I've been asking for things—
>
> Court: The State got rid of them?
>
> Mr. Davis: Well, the first one, I guess, because of the arraignment, or whatever, they got rid of him. Then the other lady, she quit on her own saying conflict of interest. And then I got him. So I've been asking for the body cams, the dash cams. I never got—I got the last dash cam out of 15 officers. So that happened. I asked for a special action on my violation of my *Miranda* rights, which were never given.
>
> Court: Well, he can only file motions that he believes there's a valid basis for. You're not in charge of strategy. You're not in charge of what motions get filed. He is.
>
> Mr. Davis: I understand that. But if I don't file this motions now, even if they're denied, if I lose in trial, I have no appeal basis on them. And I know this for a fact. That's why I'm ready to file the motions now before I go to trial.
>
> Court: Well, he's the one that files the motions, not you.
>
> Mr. Davis: Well, if he doesn't want to, then I'm willing to put in the motions to go pro per myself if I—
>
> Court: Okay.

> Mr. Davis: I'm not going to sit here and be railroaded no more.
>
> Court: Well, you can go pro per if you want to, but at this point, your attorney is the one that decides strategy. Your attorney is the one that decides what motions get filed and what motions don't get filed. He's not going to file a motion that he doesn't think there's a legal basis for.
>
> Mr. Davis: I do. So if that's the case, I have to file, I have to go pro per, then that's what I want to do.

Id. at 4-6.

At this point in the hearing, Mr. Dehner interrupted, "And, your honor, before the Court makes a ruling, there is one issue I was speaking with Mr. Elias this morning potentially one of the witnesses that we were going to be interviewing, the State is no longer intending on calling them, so that might put a wrench in my plans. I might have to locate him, find him, and interview him. So a brief continuance, I guess, at this point I'm not objecting to if the State doesn't have an issue with that, and obviously Mr. Davis is not ready to go next week, so I don't know, maybe two weeks or something like that." *Id.* at 6.

A discussion regarding the witness and the scheduling of the trial ensued. *Id.* Mr. Davis interrupted to ask about dash and body cams. *Id.* at 7. Mr. Elias for the State said there were no additional videos. *Id.* Mr. Davis then complained he had not received video of his interrogation. *Id.* Mr. Dehner said he had the audio, but he had no information about a video. *Id.* at 8. Mr. Elias said he would look into it. *Id.* The trial was continued for one week. *Id.* at 9. The hearing immediately adjourned. *Id.* No further mention was made of Mr. Davis's request for self-representation, either that day or throughout the remainder of the pretrial and trial process.[1]

[1] Mr. Davis did re-urge the motion after trial, but the right to self-representation as structural error changes to harmless error after trial, per *United States v. Maness*, 566 F.3d 894, 896-97 (9th Cir. 2009).

Mr. Davis went to trial and was eventually convicted. On appeal, Davis argued the trial court erred when the trial court did not grant Davis's request to represent himself. The Arizona Court of Appeals, in a Memorandum Decision, denied Davis's appeal. Appx. 1. The court reached two pertinent decisions.

First, the court found Mr. Davis's request was equivocal. Because Davis's request was premised upon his desire to file motions his attorney did not wish to file, the court concluded Davis's request was conditional. The court further concluded that a conditional request is not unequivocal.

Second, the court found Mr. Davis had abandoned his request. When the trial court moved on and never brought the issue back up, Davis did not re-urge the issue. The Arizona Court of Appeals concluded that Davis abandoned the issue when he never raised his request again, relying primarily on *State v. McLemore*, 288 P.3d 775 (Ariz. App. 2012).

Davis filed a Petition for Review with the Arizona Supreme Court. Appx. 5. The Arizona Supreme Court declined review. Appx. 6.

Because the decision of the Arizona Court of Appeals rested upon two issues that 1) involve important questions regarding the right to self-representation and, 2) courts across the country have split when resolving these two issues, this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THIS PETITION

In *Faretta v. California*, this Court concluded that criminal defendants have the right to represent themselves in criminal prosecutions. *Faretta v. California*, 422 U.S. 806, 807 (1975). This right to self-representation is grounded in the Sixth Amendment. *Id.* at 819-20. "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." *Id.* at 819. The right to self-representation is therefore "necessarily implied by the structure of the Amendment." *Id.* at 820. To ignore this right and thrust counsel upon a defendant "violates the logic of the Amendment" and converts counsel from an assistant to a master. *Id.* Because it is the defendant who "will bear the personal consequences of a conviction," it is the defendant "who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834.

Because the Sixth Amendment protects both the right to assistance of counsel and self-representation, when a defendant makes a timely and sufficiently clear demand to represent himself, the trial court must proceed to determine if the defendant is knowingly, intelligently, and voluntarily deciding to proceed pro per. *Id.* at 835-36. This colloquy should involve a discussion "of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting *Adams v. U.S.*, 317 U.S. 269, 279 (1942)).

Here, Mr. Davis moved to proceed pro per when he learned his attorney would not file motions he wanted filed. The trial court failed to conduct the necessary *Faretta* hearing. On appeal, however, the Court of Appeals found Davis's request was equivocal and abandoned. This case thus presents two issues related to the right to self-representation that have repeatedly arisen and proved difficult to solve. First, this Court should resolve whether a conditional request for self-

representation is always equivocal. Second, this Court should resolve whether a defendant abandons a request to proceed pro per when the trial court fails to conduct a *Faretta* hearing to address the motion.

1. This Court should grant review to resolve a split regarding whether conditional demands to proceed pro per are automatically equivocal.

In *Faretta*, this Court noted self-representation was proper for that defendant because he "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." *Faretta*, 422 U.S. at 835. From this language, courts have characterized *Faretta* as requiring an unequivocal demand for self-representation. *E.g. Meeks v. Craven*, 482 F.2d 465, 467 (9th Cir. 1973); *State v. Henry*, 189 Ariz. 542 (1997).

However, courts have not reached consistent decisions regarding when a demand to proceed pro per is unequivocal. One particular difficulty is when requests for self-representation occur during the course of a discussion with the trial court.

a. Courts across the country have split when deciding whether a conditional demand to proceed pro per is automatically equivocal. Some courts, including Arizona, have concluded a conditional request is equivocal, regardless of the condition. Other courts, including the Ninth Circuit, have concluded a conditional request can still be unequivocal.

On one side, courts have found motions for self-representation equivocal when they are conditional. The Supreme Court of Missouri faced a textbook example of when conditions make a request to proceed pro per equivocal in *State v. Davis*, 318 S.W.3d 618 (Mo. 2010). There, whenever the defendant requested to proceed pro per, he "always conditioned his invocation of his right to represent himself on the court providing him the many resources that he requested; unless those tools were provided to him, he did not *want* to represent himself." *Id.* at 631 (emphasis original). When a defendant's request for self-representation is couched in such conditions, it is understandable that a court would conclude the request is equivocal.

The answer becomes less clear when the defendant's demand to proceed pro per is responsive to a trial court's ruling on other issues.

For example, in *Jackson v. Ylst*, the defendant had requested a new attorney. *Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990). When the trial court denied the motion, the defendant became frustrated and said that if the motion to substitute counsel was going to be denied, the defendant wanted to represent himself. *Id.* at 888-89. The Ninth Circuit concluded that a trial court can "deny a request for self-representation that is 'a momentary caprice or the result of thinking out loud.'" *Id.* at 888 (quoting *Adams v. Carroll*, 875 F.2d 1441, 1445 (9th Cir. 1989)). The Ninth Circuit believed the defendant's comments "did not demonstrate unequivocally that he desired to represent himself. Instead, it is quite clear that he wanted to be represented by a different attorney in his efforts to demonstrate that his trial counsel was incompetent." *Id.* at 889.

One year later, in *Reese v. Nix*, the Eighth Circuit considered a similar situation where the defendant requested a new attorney. *Reese v. Nix*, 942 F.2d 1276, 1277-80 (8th Cir. 1991). When the trial court denied the request for new counsel, the defendant responded, "Well, I don't want no counsel then." *Id.* at 1279. On habeas review, the Eight Circuit concluded the statement was equivocal, relying in part upon *Jackson*. *Id.* at 1280-81. But the *Reese* decision also garnered a dissent on these very grounds. Judge Arnold believed the "petitioner made a clear, unequivocal, and unmistakable request to be allowed to proceed as his own lawyer," and "[t]he trial court just as clearly, unequivocally, and unmistakably rejected this request." *Id.* at 1282 (Arnold, J., dissenting).

Other courts have reached the opposite conclusion and found that even conditional demands to proceed pro per can still be unequivocal. Indeed, even the Ninth Circuit has reached conclusions inconsistent with *Jackson*. Just one year before *Jackson*, the Ninth Circuit decided

Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989). There, the defendant requested a new attorney, or, in the alternative, to proceed pro per. *Id.* at 1442-43. The court noted the defendant "made his preference clear from the start: He wanted to represent himself if the only alternative was representation by Carroll." *Id.* at 1444. Rather, the two requests stemmed from a single position--the defendant did not want to be represented by the appointed attorney. *Id.* at 1444-45. Thus, the Ninth Circuit concluded, "While his requests no doubt were *conditional*, they were not equivocal." *Id.* at 1445.

The Ninth Circuit distanced itself from *Jackson* and returned to *Adams* in *U.S. v. Hernandez*, 203 F.3d 614, 621-22 (9th Cir. 2000), *overruled on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008). Like *Jackson* and *Adams*, *Hernandez* dealt with a defendant who asked to proceed pro per after the court denied his request for new counsel. *Hernandez*, 203 F.2d at 621. The Ninth Circuit concluded that the "fact that Hernandez's request may have been conditional--that is, the fact that he requested to represent himself only because the court was unwilling to grant his request for new counsel--is not evidence that the request was equivocal." *Id.* at 621-22.

Similarly, the California Supreme Court rejected the conclusion that conditional arguments are inherently equivocal in *People v. Michaels*, 49 P.3d 1032 (Cal. 2002). There, the defendant argued the trial court had improperly granted his motion for self-representation because the request was equivocal. *Id.* at 1054. The defendant argued the request to proceed pro per was equivocal "because he made it clear that he only wanted to represent himself if the court refused to remove Grossberg as his attorney." *Id.* The California Supreme Court got straight to the point: "Defendant confuses an 'equivocal' request with a 'conditional' request. There is nothing equivocal in a

request that counsel be removed and, if not removed, that the defendant wants to represent himself." *Id.* at 1055.

With Mr. Davis, Arizona has joined the first set of courts, and concluded that Davis's request was equivocal because Davis "conditioned his demand on his attorney's unwillingness to file requested motions." Decision, ¶ 6. To illustrate this point, the Arizona Court of Appeals looked to phrases to support the conclusion that the request was conditioned:

- "if [the attorney] doesn't want to [file the requested motions], then I'm willing to put in the motions to go pro per myself." *Id.*
- "if [he does not think there is a legal basis for the requested motions], I have to file, I have to go pro per." *Id.*

The court concluded that such "conditions" rendered Davis's request to proceed pro per equivocal. *Id.*

b. This Court should find a conditional request can still be unequivocal. This decision best comports with this Court's prior holdings and best preserves a defendant's right to represent himself.

Courts have split on the issue presented in Mr. Davis's case--whether certain conditions such as the denial of a motion for new counsel or an attorney's refusal to file motions renders a request to proceed pro per equivocal. However, only one side of the split makes reasoned sense. This Court should therefore adopt the view that a conditional request can still be unequivocal.

Foremost, the conclusion that a conditional request can still be unequivocal best comports with this Court's jurisprudence. Indeed, the request in *Faretta* was a "conditional" request. In *Faretta*, this Court noted the defendant "also urged without success that he was entitled to counsel of his choice, and three times moved for the appointment of a lawyer other than the public defender." *Faretta*, 422 U.S. at 810 fn. 5. Those requests were denied. *Id.*

Faretta's request to proceed pro per, taken in context with these requests for different lawyers, was therefore conditional. The defendant wanted different counsel. If different counsel was not going to be forthcoming, then the defendant wanted to represent himself.

This is the rationale that has been reached by several courts in the latter camp. As the Second Circuit succinctly framed the issue, "A request to proceed *pro se* is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel." *Johnstone v. Kelly*, 808 F.2d 214, 216 fn. 2 (2d Cir. 1986) (citing *Faretta,* 422 U.S. at 810 n. 5; *United States v. Denno,* 348 F.2d 12, 14 n. 1 (2d Cir.1965)).

It also defies logic to punish a defendant for framing arguments in the alternative. Alternative arguments are considered good advocacy. Ross Guberman, *Point Made*, 103-04 (Oxford Press 2014); *see also* Wes Hendrix, *From Good to Great: The Four Stages of Effective Self-Editing*, 14 J. App. Prac. & Process 267, 275 (2013) ("Alternative arguments can be highly effective, and you must ensure that you have considered those available to you."). A defendant should not be punished merely because he tiers his requests.

Finally, recognizing the nature of tiered requests best enforces the entirety of the Sixth Amendment. As this Court noted in *Faretta*, there are two rights involved: the right to assistance of counsel and the right to self-representation. In many circumstances--including the one at issue here--tiered requests operate as a way to argue for effective assistance of counsel while defaulting to the right of self-representation. A defendant may want different counsel for good reason, but conclude self-representation is preferable to continuing with the present attorney thrust upon them for trial. Endorsing the view that conditional requests for self-representation can still be unequivocal best preserves the Sixth Amendment.

c. Applying the correct standard, the Arizona Court of Appeals erred.

While Davis's request to represent himself was conditional, it was not equivocal. Foremost, Davis's request was not conditional in the sense that the request in *Davis* in the Supreme Court of Missouri was conditional. Here, Mr. Davis did not demand resources or accommodations. Rather, Mr. Davis's request for self-representation was conditional solely because it was premised upon his attorney's refusal to file discovery motions that Mr. Davis believed were appropriate.

But such disagreement does not render Davis's request equivocal. As this Court noted in *Jones v. Barnes*, none of this Court's cases suggest "that the indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Here, Davis wanted his attorney to file certain motions and believed they were not frivolous. Under *Jones*, Davis could not force his attorney to file those motions. Indeed, that was the very conclusion the trial court reached.

In this context, Davis's request makes sense. Davis's requests were focused upon one singular objective: to ensure certain motions that he believed were not frivolous were filed. If he could not convince his attorney to file those motions, then Davis wanted to proceed pro per to ensure the motions would be filed.

This is akin to the motions to proceed pro per that followed motions for new counsel in *Adams* and *Hernandez* and *Michaels*. Just as there is nothing equivocal with asking for new counsel and defaulting to self-representation, there is nothing equivocal with asking counsel to file motions and defaulting to self-representation when that counsel refuses.

Had the Arizona Court of Appeals applied the correct standard, they would have found Davis's request unequivocal.

2. This Court should grant review to resolve a split regarding when and how a defendant abandons a request to proceed pro per.

In *Faretta*, this Court required trial courts to conduct a hearing to determine whether a defendant knowingly and intelligently waived counsel. *Faretta*, 422 U.S. at 835. During this hearing, the trial court is responsible for advising the defendant "of the dangers and disadvantages of self-representation." *Id.*

A problem arises, however, when trial courts do not conduct this hearing. And courts across the country have had trouble in resolving the issue. Three general approaches have been developed for evaluating a trial court's failure to conduct such a hearing--two of which shift blame to the defendant and construe a defendant's failure to re-urge a motion to proceed pro per as an abandonment.

a. Courts across the country have split when deciding when a defendant abandons a request to proceed pro per. Some jurisdictions, including the Fifth Circuit, have concluded the failure to re-urge a motion to proceed pro per constitutes abandonment. Some jurisdictions, including Arizona, have expanded the Fifth Circuit's holding to a totality of the circumstances review. And still other jurisdictions, including New Jersey, have rejected the Fifth Circuit's view and concluded a defendant's demand to proceed pro per triggers the right.

While not the first case to address the question, the Fifth Circuit's decision in *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982), is the common origin case for many cases discussing a trial court's failure to conduct a *Faretta* hearing.

In *Brown*, the defendant asked to represent himself. *Id.* at 609-10. The trial court, however, was reluctant to grant the request, believing the defendant lacked the intelligence and skill to conduct the defense. *Id.* at 609. The judge deferred ruling on the motion. *Id.* Sometime after the initial hearing, the defense attorney advised the judge that the defendant had acquiesced to the

attorney's representation. *Id.* at 609-10. The defendant did not subsequently renew the motion for self-representation until the middle of trial, just before closing argument. *Id.* at 610.

The majority in *Brown* concluded the defendant waived his waiver of counsel. The majority noted that the right to self-representation is considered automatically waived at the outset of a case in favor of the right to counsel. *Id.* at 610-11. From this, the majority concluded, "Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived at a later point, after assertion." *Id.* at 611.

This premise--that the right to self-representation is more easily waived than other rights--was the foundation of the majority's decision. *See id.*; *see also id.* at 613-14 (Hill, J., dissenting), 614-15 (Hatchett, J., dissenting). Because self-representation can be waived more easily, "[a] waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." *Id.*

The majority also concluded that the trial court was not required to engage in a colloquy to assess whether the defendant had abandoned or subsequently waived his right to represent himself. *See Id.* at 611-12. Because a trial court can accept an attorney's representations, "and the defendant is bound thereby, except upon a showing of counsel's bad faith or gross negligence," the trial attorney's avowals that issues had been resolved was sufficient. *Id.* at 612.

Nonetheless, the majority warned that the ruling "should not be read to imply that a trial court may unduly defer a ruling on a firm request by defendant to represent himself in the hopes the defendant may change his mind." *Id.* Nor did the majority want its opinion to "be read to indicate that a defendant, to avoid waiver, must continually renew his request to represent himself even after it is conclusively denied by the trial court." *Id.*

The *Brown* court was deeply divided, and two dissenting opinions disagreed with the foundational premise reached by the majority.

Judge Hill pointed out that once the demand for self-representation was made, the right attached. *Id.* at 612-13 (Hill, J., dissenting). Because the right to self-representation had attached, any subsequent waiver or abandonment needed to be done knowingly and intelligently. *Id.* at 613. Thus, the trial court should have gone through a colloquy to determine if the defendant had intended to forego the right, consistent with this Court's prior decisions regarding waiver. *Id.* (discussing *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Brady v. United States*, 397 U.S. 742 (1970); and *Johnson v. Zerbst*, 304 U.S. 458 (1938)). "It follows, as a matter of course, that a thing so valuable as a constitutional right may not be waived by proxy." *Id.* Thus, once the right attaches, "as the majority seems to agree that it did, the defendant ought not be found to have waived it until and unless there is a dialogue between the judge and the defendant showing a knowing and intelligent voluntary waiver." *Id.*

Judge Hatchett similarly was concerned by the lack of a hearing--the *Faretta* hearing: "Where is the 'knowing and intelligent' waiver required by *Faretta*? Where in the record is Brown 'made aware of the dangers and disadvantages of self-representation'?" *Id.* at 615 (Hatchett, J., dissenting). Without such a hearing, Judge Hatchett believed "it is improper to find that Brown waived his right to self-representation." *Id.* Judge Hatchett also took issue with the base premise of the majority, believing it "unsupported by precedent or commentary." *Id.* Instead, Judge Hatchett opined that "[t]he important lesson is that whatever constitutional right is waived, it must be waived on the record after a full explanation of the advantages and disadvantages of following the desired course of action." *Id.*

Courts deciding to follow *Brown* have since taken two paths.

The California Court of Appeals found that a defendant's failure to re-urge a motion to proceed pro per demonstrated waiver and abandonment of that motion in *People v. Kenner*, 272 Cal.Rptr. 551 (Cal. App. 1990). Both the Arizona Court of Appeals and Supreme Court of Idaho have characterized this as a per se test. *State v. McLemore*, 288 P.3d 775, ¶ 29 (Ariz. App. 2012); *State v. Meyers*, 434 P.3d 224, 228 (Idaho 2019).

Like in *Brown*, one judge dissented in *Kenner* on the grounds that the failure to hold the *Faretta* hearing was error that could not be overcome by the mere failure to reassert a request to proceed pro per. *Id.* at 555-60 (White, J., dissenting).

Arizona and Idaho have adopted a totality of the circumstances test. *McLemore*, 288 P.3d 775, ¶¶ 29, 35; *Meyers*, 434 P.3d at 228. In this test,

> Informative factors include but are not limited to a consideration of the defendant's opportunities to remind the court of a pending motion, defense counsel's awareness of the motion, any affirmative conduct by the defendant that would run counter to a desire for self-representation, whether the defendant waited until after a conviction to complain about the court's failure to rule on his or her motion (thus indicating the defendant was gaming the system), and the defendant's experience in the criminal justice system and with waiving counsel.

McLemore, 288 P.3d 775, ¶ 35; *accord Meyers*, 434 P.3d at 228.

More recently, the New Jersey Superior Court, Appellate Division, rejected *Brown* in *State v. Rose*, 206 A.3d 995 (N.J. Super. 2019). While the *Rose* court concluded a defendant could waive the right of self-representation by conduct, the evidence of such waiver "must clearly demonstrate that the defendant intentionally relinquished the known right of self-representation." *Id.* at 1000-01. The court's discussion of *Brown*, however, was more illuminating.

The *Rose* court found "persuasive the reasoning of the several dissenters in *Brown*, who would have applied the *Johnson v. Zerbst* principle requiring proof of an intentional relinquishment of a known right." *Id.* at 1010. This approach departed from prior cases (including

Brown), which had not discussed "whether the defendant's conduct evidenced an intentional relinquishment of a known right." *Id.* But that was the key issue: "The critical question here is whether defendant clearly intended to relinquish a known right." *Id.* While the defendant may have resolved his differences with counsel, the defendant also may have believed the court's inaction constituted a denial of his request. *Id.* at 1011. Thus, the court remanded for an evidentiary hearing to assess whether the defendant intended to relinquish his asserted right to self-representation.

Courts have thus split along the lines of the majority and dissent in *Brown*. But in resolving this split, the dissent in *Brown* is the more reasonable approach to preserve the rights to a defense under the Sixth Amendment.

b. This Court should adopt the dissent in *Brown* and conclude a defendant's motion to proceed pro per triggers the right and a defendant need not re-urge the motion to preserve that right. This conclusion best comports with standards of preservation and best empowers the defendant's right to proceed pro per.

First, the subsequent split in how to interpret and construe the majority opinion in *Brown* provides ample evidence as to why the dissenters in *Brown* present the more reasonable approach. Courts attempting to follow the *Brown* majority have not even been able to develop a consistent approach. California has developed a per se rule, where the failure to reassert the motion to proceed pro per constitutes abandonment. Arizona and Idaho have developed a totality of the circumstances approach, but under that approach the failure to reassert is presumed to constitute a malicious gaming of the system.

The only reason this has repeatedly become a problem is because trial courts have repeatedly decided not to conduct the colloquy required by *Faretta*.

Given that scenario, a question posed by the California Court of Appeals becomes important: "who should bear the burden of the omission--the trial court or the mysteriously silent defendant?" *Kenner*, Cal.Rptr. at 553. While the California Court of Appeals majority

characterized the defendant's silence as mysterious, the question is not as simple as the majority might suggest.

To accurately answer the question, the defendant has not, in fact, been silent. The defendant has already affirmatively asked for new counsel. The defendant has not caused an omission. The trial court is solely responsible for the omission when the trial court refuses to engage in the required *Faretta* colloquy.

Second, the split noted above explains why the dissent in *Brown*, and the majority in *Rose*, is more consistent with this Court's jurisprudence. The principle that a right must be knowingly and intelligently waived is well-established. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Once the defendant has asserted the right to self-representation, it is incumbent upon the trial court to inquire as to which variation of the Sixth Amendment right the defendant seeks to exercise. The only reliable way to accomplish this review was already established in *Faretta*: the burden rests with the trial court to conduct a colloquy. *See Faretta*, 422 U.S. at 835.

Third, the approach of the *Brown* dissent--placing the burden upon the trial court to conduct the *Faretta* hearing--is also most consistent with standard presumptions regarding the effect of a trial court's indecision. When a trial court does not rule on a motion, that failure operates as a denial. The *Rose* majority pointed out that it is reasonable for a defendant to believe that a trial court's refusal to rule on a motion constitutes a denial. *Rose*, 206 A.3d at 1010. This makes sense as the failure to rule on a motion operates as a denial of the motion. *See Mosier v. Federal Reserve Bank of New York*, 132 F.2d 710, 712 (2d Cir. 1942). Indeed, Arizona subscribes to this rule. *See Atchison, T. & S.F. Ry. Co. v. Parr*, 391 P.2d 575, 577 (Ariz. 1964) (holding that motions not ruled upon "were therefore denied by operation of law").

Because the failure to rule on a motion legally operates as a denial, imposing a burden upon the defendant to re-urge the motion is problematic. A defendant is not responsible for deciding the issue, the trial court is. And in the context of a trial court's failure to rule on a motion, only the trial court can know whether its intent is to deny or delay the determination.

But in either case, the defendant has done what is required of him--the defendant has brought his motion to the trial court and asked for a ruling. The defendant has not tried to game the system or obtain an advantage. To blame the defendant for the trial court's failure to rule improperly shifts the burden for exercising a fundamental constitutional right.

Fourth, the abandonment approach of the majority in *Brown* is inconsistent with general principles of preservation. For example, in the context of an objection to instructions, this Court has noted an attorney preserves a claim if the attorney "inform[s] the court of the specific objection and the grounds for the objection." *Black v. United States*, 561 U.S. 465, 473 (2010). The goal is to ensure the attorney puts "the court on notice as to his concern." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988).

Where a defendant has made an unequivocal request to proceed pro per, the defendant has informed the court of their desire with sufficient specificity as to put the court on notice of the concern. To shift the burden to the defendant to repeatedly re-urge the motion deviates from basic preservation standards for no reason.

The approach advocated by the dissent in *Brown* and the opinion in *Rose*, however, do not deviate from any of these principles. When a defendant has asked to proceed pro per, the defendant has comported with the duties placed upon them. The burden then shifts to the trial court to perform the function it is meant to perform--to decide the motion.

When a motion to proceed pro per is made, the trial court must conduct a *Faretta* colloquy. Requiring such a colloquy is the only way to ensure any waiver (either the waiver of counsel or the abandonment and waiver of the motion to proceed pro per) is knowingly and intelligently entered. From a preservation perspective, the defendant has done what is needed--they have made the motion. If the trial court refuses to rule, the law interprets that refusal as a denial. There is no need for courts to impose higher standards upon the defendant in the context of a *Faretta* claim and demand that the defendant re-urge the motion they already presented and the court and counsel are already aware of.

Fifth, the case of Mr. Davis illustrates the problem inherent with the *Brown* majority decision--speculation. When an appellate court--which reviews the case in a post-hoc position--engages in the review presented by the *Brown* majority, the appellate court ultimately speculates as to the defendant's intent. In *Brown*, the majority believed the problems between the defendant and counsel had resolved in light of the attorney's statements to the court that the two "had worked out their differences." *Brown,* 665 F.2d at 611.

Here, the appellate court went even further. Unlike *Brown*, there were no competing statements or avowals that would have led the trial court to believe that the problems Mr. Davis saw were resolved. Yet the court expressed its belief that the trial court's order for discovery and lack of any re-urging meant Davis's "requests had been fulfilled, and he had abandoned his *Faretta* motion." Decision, ¶ 7. This is nothing more than speculation. Had the trial court gone through the colloquy required by *Faretta*, the trial court would have actually known whether Mr. Davis abandoned his motion. Mere speculation should not be sufficient to overcome a defendant's timely and clear demand of his constitutional right to represent himself. As the error here belonged to the

trial court and not Mr. Davis, it is nonsensical to demand more of him, clearly showing the wisdom of the *Brown* dissent and *Rose* approach.

Accordingly, this Court should accept certiorari and conclude that, once a defendant requests to proceed pro per, the trial court is required to conduct a *Faretta* hearing, and any failure to do so is reversible error unless the record shows the defendant knowingly and intelligently waived his known right to self representation.

c. Applying the correct test, the Arizona Court of Appeals erred.

Had the Arizona Court of Appeals applied the correct test, they would have reached a different decision.

Here, Davis timely and properly asked to represent himself. The trial court, the State, and the appointed attorney were all present for this demand. As noted above, while this demand was conditional, it was unequivocal. The trial court, however, failed to rule on the motion and never revisited it. On appeal, the most important factor relied upon by the appellate court was that Davis never re-urged his motion to proceed pro per. Decision, ¶ 7. As noted above, however, this is incompatible with this Court's jurisprudence, inconsistent with legal principles regarding preservation, and allows courts to disregard a defendant's right to self-representation based upon nothing more than speculation. The factor should not have been considered.

Applying the correct test, as announced in the dissenting decisions in *Brown*, the resolution of this case is simple: the trial court failed to conduct any colloquy to determine if Davis knowingly and intelligently waived his invoked right to self-representation. Without this colloquy, it was error to deny Davis's request to represent himself.

3. This case is an ideal vehicle to resolve both issues.

Finally, this case presents the perfect opportunity to address each issue.

First, this case squarely presents both issues. The decision below is not insulated by a decision on state grounds, it squarely rests upon federal constitutional questions. Moreover, the Arizona Court of Appeals in each of the issues has unambiguously applied the law in a manner that aligns with one side of the splits established above.

Second, the resolution of each issue is dispositive in this case. As noted in each section above, resolution of the proper test dictates the resolution in this case. Resolution of the test is not merely academic in decision of the Court of Appeals regarding this case, it is the difference between affirmance and reversal.

Third, this case is appropriately timed. Each split has had adequate time to germinate and develop. The cases have not consolidated to a single approach; the cases have developed a deeper and wider split over time. Thus, this case presents each split after sufficient time has passed to determine the underlying reasons for the split and assess the logic of each side.

CONCLUSION

For the reasons explained herein, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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