NO. _____

In The
Supreme Court of the United States

CHRISTOPHER ROBERT SUEIRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: February 19, 2020

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QUESTION PRESENTED

1. Whether, under 28 U.S.C. § 1291 and the collateral order doctrine, a criminal defendant may appeal an interlocutory order denying the defendant's request for self-representation, prior to the entry of a final judgment.

PARTIES TO THE PROCEEDING

The Petitioner, Christopher Sueiro, is an individual. The Respondent is the United States. No corporate disclosure statement is required under Rule 29.6.

DIRECTLY RELATED CASES

United States v. Sueiro, No. 1:17-CR-284, United States District Court for the Eastern District of Virginia. Order Entered July 16, 2019.

United States v. Sueiro, No. 19-4525, United States Court of Appeals for the Fourth Circuit. Judgment entered January 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Sueiro respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit dismissed the appeal for want of jurisdiction in a published opinion dated January 9, 2020. App. 1a. Mr. Sueiro filed a timely petition for rehearing *en banc* on January 22, 2020. The petition for rehearing *en banc* was denied on February 4, 2020. App. 13a.

JURISDICTION

The Court of Appeals entered the challenged judgment on January 9, 2020. App. 1a. The Petitioner filed a petition for rehearing *en banc* on January 22, 2020, and that petition was denied on February 4, 2020. App. 13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291 provides, in relevant part:

"The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The right to self-representation exists to protect a criminal defendant's vital interest in autonomy and dignity, ensuring that a defendant remains in control of the single most important legal proceeding in his or her life. *See Faretta v. Cal.*, 422 U.S. 806, 834 (1975) ("although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law."). It has deep historical roots in the founding of this nation. *Id.* at 827-829 (noting that right to self-representation existed since the time of the colonies).

The collateral order doctrine is a practical construction of 28 U.S.C. § 1291, which governs appellate jurisdiction. Under the collateral order doctrine, the term "final decision" in § 1291 includes "a small set of prejudgment orders that are collateral to the merits of an action and "too important" to be denied immediate review. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949)). In *Sell v. United States*, this Court held that an order permitting involuntary medication is a type of collateral order subject to immediate appeal, because such orders represent serious intrusions into a person's expectations of privacy and security. *See* 539 U.S. 166, 176 (2003).

The denial of a criminal defendant's right to self-representation fits squarely within the framework established by this Court's collateral order doctrine, and the Fourth Circuit erred by holding otherwise. This Court should grant certiorari in this

case to reaffirm the importance of the role that the right to self-representation plays in our criminal justice system.

I. Background.

In 2014, Petitioner Christopher Sueiro was arrested and charged with various offenses in Virginia state court for allegedly sending threatening emails to a co-worker. In the prosecution of that case, Virginia police officers executed a search warrant at a house shared by Sueiro and several roommates. After seizing electronic devices allegedly belonging to Mr. Sueiro, the police officers discovered child pornography on the devices. They referred the matter to the Federal Bureau of Investigation, and a federal investigation began into Mr. Sueiro's alleged possession of child pornography.

II. The District Court Proceedings.

In November 2017, Mr. Sueiro was indicted in the Eastern District of Virginia on child pornography charges. He was initially represented by an Assistant Federal Defender from the Office of the Federal Public Defender. Beginning in May 2018, Mr. Sueiro repeatedly and unequivocally moved the district court to represent himself, never once wavering in his announced desire for self-representation. In October 2018, the district court granted the Assistant Federal Defender's motion to withdraw, and appointed undersigned counsel under the Criminal Justice Act.

With respect to Mr. Sueiro's motion for self-representation, the district court initially denied that request, but expressly indicated that Mr. Sueiro could renew his motion after a competency evaluation. Following this, a total of a three competency evaluations were performed—two at the request of prior counsel, and one at the

request of undersigned counsel. During the pendency of these competency evaluations, Mr. Sueiro persisted in his motions for self-representation to the district court.

After a third and final competency evaluation, the district court found Mr. Sueiro competent to stand trial. However, it again denied Mr. Sueiro's motion for self-representation, citing among other things a concern for the fact that Mr. Sueiro could not recall when he last reviewed the Federal Rules of Evidence or Federal Rules of Criminal Procedure. The final order gave no indication that the district court would reconsider its position with respect to Mr. Sueiro's motion for self-representation. App. 11a-12a.

Following the entry of this order, Mr. Sueiro appealed to the Fourth Circuit. His appeal raised two questions: whether a district court order denying self-representation is immediately appealable under the collateral order doctrine, and whether the district court erred by denying his motion for self-representation.

III. The Appeal.

On appeal, the Fourth Circuit addressed only the first question. It held that the denial of self-representation was not immediately appealable, and dismissed the appeal. App. 9a. In addressing this issue, the Fourth Circuit acknowledged that multiple Circuits, including the Third, Fifth, and Eleventh Circuits, have adopted the rule that a civil litigant may immediately appeal the denial of a motion for self-representation. App. 4a. However, the Fourth Circuit distinguished those cases on the ground of a supposed "criminal-civil distinction within the collateral order doctrine." *Id.*

The Fourth Circuit also distinguished this Court's decision in *Sell*, which had held that involuntary medication orders are immediately appealable, on the basis that "the right not to be forcibly medicated is substantively distinct form the right to self-representation" because "criminal defendants and non-defendants alike enjoy a broader right not to be forcibly medicated" but "there is no corresponding, broadly held 'legal right to avoid' counsel." App. 7a. According to the Fourth Circuit, "*Sell* is best read as a narrow addition to the collateral order doctrine, addressing a harm (forced medication) that exists regardless of the trial context, and therefore cannot be fully remedied by a second trial." App. 8a.

Mr. Sueiro filed a motion for rehearing *en banc*, which was denied. App. 13a. He now petitions this Court for a writ of certiorari to review the Fourth Circuit's judgment.

REASONS FOR GRANTING THE PETITION

This petition presents an important question of federal law on which the Fourth Circuit's decision conflicts with authoritative decisions from other circuits, and with this Court's precedents.

I. THE FOURTH CIRCUIT ERRED BY HOLDING THAT THE COLLATERAL ORDER DOCTRINE DOES NOT APPLY TO ORDERS DENYING SELF-REPRESENTATION.

The collateral order doctrine was first established by this Court in *Cohen v. Benefit Indus. Loan Corp*, 337 U.S. 541 (1949). Under the collateral order doctrine, an order is appealable before final judgment if it: (1) conclusively determines a disputed matter, (2) separate from the merits of the action, and (3) which is not effectively reviewable on appeal. *Id.* at 546.

The collateral order doctrine must be narrowly construed. However, this Court has not hesitated to apply the doctrine where necessary, when deferring appeal until final judgment threatens to undermine an important legal right. Applying the collateral order doctrine, this Court has held four types of orders in the criminal context to be immediately appealable: orders denying a Double Jeopardy Clause challenge, orders denying a Speech or Debate Clause challenge, orders denying a motion to reduce bail, and orders for forced medication. *Sell v. United States*, 539 U.S. 166, 175-77 (2003) (forced medication); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (Speech or Debate Clause); *Abney v. United States*, 431 U.S. 651, 655-62 (1977) (Double Jeopardy Clause); *Stack v. Boyle*, 342 U.S. 1, 3-7 (1951) (bail).

In this case, there is no question that an order denying self-representation meets the first two prongs of the collateral order doctrine. Such an order conclusively determines the question of the defendant's ability to represent himself at trial, and the right to self-representation is entirely separate from the merits of the action.

An order denying self-representation also meets the third prong of the collateral order doctrine: it is effectively unreviewable on appeal. In *Sell*, this Court held that an involuntary medication order is effectively unreviewable on appeal because "[b]y the time of trial [the defendant] will have undergone forced medication—the very harm that he seeks to avoid" and "[he] cannot undo that harm even if he is acquitted." 539 U.S. at 176. The right to self-representation is no different in that regard, for the defendant who is forced to proceed to trial with

unwanted counsel will have undergone "the very harm he seeks to avoid," and that harm cannot be undone even by a reversal of his conviction on appeal.

As other courts of appeals considering this issue have held, the right to self-representation "is effectively lost if not immediately vindicated, because the harm in erroneously denying party leave to proceed *pro se* is that it injures his dignity and autonomy, something that cannot later be repaired." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 230 (3d Cir. 1998). The harm of being denied self-representation "exists quite apart from any prejudice a party might incur from trying his/her case with an unwanted attorney" because "the affront to a litigant's right to conduct the case would persist even if the party were granted a new trial because of an erroneous denial of *pro se* status." *Devine v. Indian River Cty Sch. Bd.*, 121 F.3d 576, 580-81 (11th Cir. 1997).

The rationale of those decisions, although arising out of civil cases, is fully applicable to the criminal context. If anything, it should be stronger in criminal cases because in this context the right to self-representation is Constitutional, as opposed to statutory. Accordingly, the Fourth Circuit's holding that orders denying self-representation is not subject to immediate appeal is in error.

II. THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH AUTHORITATIVE DECISIONS FROM OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

A. Conflict with other circuits.

The Third, Fifth, and Eleventh Circuits have each held that a civil litigant denied self-representation is entitled to an immediate appeal of that order. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 230 (3d Cir. 1998); *Prewitt v. City*

of Greenville, 161 F.3d 296, 298 (5th Cir. 1998); *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 578–81 (11th Cir. 1997). The Fourth Circuit decision is in clear conflict with the decisions from other circuits.

The Fourth Circuit disregarded this circuit split because, according to that court, the collateral order doctrine must be interpreted more strictly in criminal cases. App. 4a. There are two problems with its position.

First, although this Court has sometimes asserted that it interprets the collateral-order doctrine "with the utmost strictness in criminal cases," *Flanagan v. U.S.*, 465 U.S. 259, 265 (1984), there is no actual indication from this Court's decisions applying the collateral order doctrine that a different standard of the doctrine applies based on whether the underlying case is civil or criminal.

For example, in *Flanagan*, a criminal case, this Court held that counsel disqualification disorders in a criminal case are not subject to immediate appeal. A year later, this Court reached the same result in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) a civil case. The *Koller* court paid no heed to a purported distinction between civil and criminal cases, and indeed, rejected the civil-criminal distinction that lower courts drew. *See id.* at 433-434 ("[T]he panel suggests that the societal interest in prompt adjudication of disputes is weaker in civil cases than in criminal cases, and that the 'extraordinary limits on the collateral order doctrine' in the criminal context have not been carried over to civil cases…We do not find these policy arguments persuasive. Although delay is anathema in criminal cases, it is also undesirable in civil disputes, as the Court of Appeals itself recognized.").

This court's subsequent cases applying the collateral order doctrine cases also suggest that the same strict limits to interlocutory appeals apply in civil cases as they do in criminal cases. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009)(discovery orders implicating attorney-client privilege not immediately appealable); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)(denial of class certification not immediately appealable).

Second, the rationale of the cases from the other circuits is not confined to civil cases. As noted earlier, the courts of appeals that have held the collateral order doctrine applicable to orders denying self-representation in civil cases did so on the basis that the denial of self-representation creates an injury to a litigant's autonomy that is independent from the underlying fairness of the trial. Thus, reversal of a judgment on appeal, followed by a new trial in which the litigant represents him or herself, does not cure the injury of the first trial with an unwanted attorney. Indeed, the Eleventh Circuit has applied that rationale to criminal cases, albeit in an unpublished decision, holding that a criminal defendant is similarly permitted to immediately appeal an order denying self-representation. *See United States v. Cobble*, 779 Fed. Appx. 698 (11th Cir. 2019) (holding that the Court has jurisdiction to consider interlocutory from denial of self-representation in criminal prosecution). While *Cobble* is an unpublished decision, it represents a straightforward application of the logic necessitated by that Circuit's earlier case in *Devine*.

In addition to the clear conflict with the Third, Fifth, and Eleventh Circuits, the decision below is also incompatible with decisions from the Second Circuit. The

Second Circuit has held that a motion to withdraw by an attorney is subject to immediate appeal. *See United States v. Barton*, 712 F.3d 111 (2d Cir. 2013); *United States v. Oberoi*, 331 F.3d 44, 47 (2d Cir. 2003); *Whiting v. Lacara*, 187 F.3d 317, 319-320 (2d Cir. 1999). In reaching these decisions, the Second Circuit has explained that the denial of a motion to withdraw as counsel satisfies the collateral order doctrine because "the injury to a counsel forced to represent a client against his will is similarly irreparable, and the district court's decision would be effectively unreviewable upon final judgment." *Whiting v. Lacara*, 187 F.3d 317, 320.

Although the instant case involves a motion for self-representation as opposed to a motion to withdraw, the two issues are inextricably intertwined because an attorney appointed to represent a client who wishes to proceed *pro se* has an ethical obligation to move to withdraw. Indeed, both Mr. Sueiro's prior attorney and undersigned counsel have moved to withdraw in this case. Although the district court granted the first attorney's motion to withdraw, it denied the second motion. The denial of undersigned counsel's motion to withdraw is predicated on the district court's decision to not allow Mr. Sueiro to proceed *pro se*. Thus, the Fourth Circuit rule that the denial of a motion for self-representation is not immediately appealable is also in tension with the Second Circuit rule that the denial of a motion to withdraw by counsel is immediately appealable.

B. Conflict with this Court.

The decision below also conflicts with this Court's decision in *Sell v. United States*, which held that involuntary medication orders are immediately appealable. In *Sell*, this Court found that involuntary medication orders are "effectively

unreviewable" because if appeal of an involuntary medication order waited until after trial, the defendant will have undergone the harm caused by an involuntary medication order. That logic dictates the same outcome here, for a defendant who is denied self-representation will be forced to undergo a trial with unwanted counsel.

The Fourth Circuit distinguished *Sell* on the basis that the right to avoid forced medication exists independent of the criminal trial context, while the right to avoid unwanted counsel exists only in the context of a criminal trial. App. 7a. That distinction is untenable.

First, the distinction between whether a right exists only in a criminal context or outside of a criminal context has never mattered to the question of whether that right should be protected by access to an immediate appeal. Indeed, Double Jeopardy, Speech and Debate, and bail rights are all rights that arise only in the context of a criminal case, yet this Court has held that the denial of those rights are subject to immediate appeal.

Second, the Fourth Circuit also erred in its premise that there is no right to avoid unwanted counsel outside of the criminal context. Although this Court has not directly addressed the issue, it surely is the case that the government cannot simply force unwanted attorneys to represent individuals in private matters such as the drafting of a will, or the negotiation of a contract. The right to self-representation proceeds out of the broader liberty interest that all people of this nation share to not have the government impose an agent of the state—even if that agent is designed to "help"—on an individual in the management of his or her own affairs.

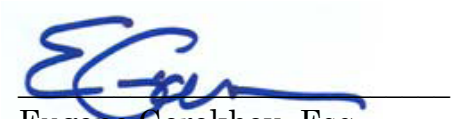
Because the Fourth Circuit decision conflicts with both decisions from other circuits and with decisions from this Court, this Court should grant certiorari to resolve this conflict and reaffirm the importance of the right to self-representation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Date: February 19, 2020

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4525

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER ROBERT SUEIRO,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Rossie David Alston, Jr., District Judge. (1:17-cr-00284-RDA-1)

Argued: October 31, 2019 Decided: January 9, 2020

Before KEENAN, FLOYD, and RICHARDSON, Circuit Judges.

Dismissed by published opinion. Judge Floyd wrote the opinion in which Judge Keenan and Judge Richardson joined.

ARGUED: Eugene Victor Gorokhov, BURNHAM & GOROKHOV PLLC, Washington, D.C., for Appellant. Kellen Sean Dwyer, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Ziran Zhang, BURNHAM & GOROKHOV PLLC, Washington, D.C., for Appellant. James E. Burke, IV, Trial Attorney, Child Exploitation & Obscenity Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

FLOYD, Circuit Judge:

Appellant Christopher Sueiro awaits trial on four federal child pornography charges. Throughout over a year of pretrial hearings, Sueiro consistently asked to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Although criminal defendants have a Sixth Amendment right to represent themselves, that right is not absolute. *See Indiana v. Edwards*, 554 U.S. 164, 171 (2008). On July 16, 2019, after a hearing, the district court issued a written order denying Sueiro's *Faretta* motion. Sueiro seeks to appeal that denial so that he may represent himself at trial. For the reasons that follow, this Court does not have subject-matter jurisdiction to consider Sueiro's interlocutory appeal.

I.

Whether we have subject-matter jurisdiction over an interlocutory appeal from the denial of a pretrial *Faretta* motion is a question of first impression. We review our jurisdiction de novo. *See Qingyun Li v. Holder*, 666 F.3d 147, 149 (4th Cir. 2011). Under the final judgment rule, federal appellate court jurisdiction is limited to reviewing "final decisions of the district court." *See Flanagan v. United States*, 465 U.S. 259, 263 (1984) (quoting 28 U.S.C. § 1291). In the criminal context, this means that this Court generally does not have appellate jurisdiction until after the imposition of a sentence. *See id.* (citing *Berman v. United States*, 302 U.S. 211, 212 (1937)); *see also United States v. Lawrence*, 201 F.3d 536, 538 (4th Cir. 2000).

Sueiro argues that the denial of a *Faretta* motion falls within a narrow exception to the final judgment rule: the collateral order doctrine. Under this exception, a collateral

order is immediately appealable if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits," and (3) is "effectively unreviewable on appeal from a final judgment." *Flanagan*, 465 U.S. at 265 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Under the third prong, collateral orders in criminal cases are only "effectively unreviewable" if "an important right . . . would be lost irreparably if review awaited final judgment." *See United States v. Blackwell*, 900 F.2d 742, 746–47 (4th Cir. 1990).[1]

This is not a balancing test; to fall within the collateral order doctrine, a trial court order must satisfy each condition. *Flanagan*, 465 U.S. at 265 ("[A] trial court order must, at a minimum, meet three conditions."). And in the criminal context, the trial court order

[1] "Lost irreparably" is a stricter variant of a phrase originating in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, a civil case, the Supreme Court found that an order was immediately appealable in part because, on appeal from a final judgment, "it w[ould] be too late effectively to review the present order and the rights conferred by the statute, if . . . applicable, w[ould] have been lost, *probably irreparably*." *Id.* at 546 (emphasis added). The Supreme Court later quoted this "lost, probably irreparably" language in criminal interlocutory appeals cases. *See Abney v. United States*, 431 U.S. 651, 658 (1977) (considering whether a motion to dismiss an indictment on double jeopardy grounds was immediately appealable); *see also United States v. MacDonald*, 435 U.S. 850, 860 (1978) (considering whether a motion to dismiss an indictment on speedy trial grounds was immediately appealable). After *Abney* and *MacDonald*, the Supreme Court emphasized that "the collateral-order exception to the final judgment rule" should be applied with "the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 265. In *Blackwell*, we cited to *MacDonald* but omitted the word "probably" from the test, leaving "lost irreparably." *Blackwell*, 900 F.2d at 746–47. Looking back almost thirty years later, it is unclear whether this was an unintentional omission or an intentional heightening of the "effectively unreviewable" standard to fit the criminal context, per the Supreme Court's admonition in *Flanagan*. *See id.* at 747 (citing *Flanagan*, 465 U.S. at 265). Though we adhere to our precedent in *Blackwell*, Sueiro's right to self-representation would not be "lost irreparably" *or* "lost, probably irreparably" if reviewed on direct appeal.

must *strictly* satisfy each condition. *See id.* ("Because of the compelling interest in prompt trials, the [Supreme] Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases.").

On appeal, Sueiro relies heavily on civil cases holding that the denial of self-representation is subject to interlocutory appeal. [2] Sueiro argues that if a civil litigant may immediately appeal the denial of self-representation, when they have no constitutional right to self-representation, then surely a criminal defendant with a Sixth Amendment right must be able to do the same. Although that argument may have some instinctive appeal, it overlooks the criminal-civil distinction within the collateral order doctrine. As discussed, the Supreme Court has recognized that the final judgment rule is "at its strongest in the field of criminal law," because of the compelling interest in the speedy resolution of criminal cases. *Flanagan*, 465 U.S. at 264–65 (internal quotation mark omitted). We are bound by this stricter interpretation and therefore rely solely on collateral order jurisprudence within the criminal context.

[2] Although this Circuit has not so held in a published opinion, other circuits have held that the denial of self-representation in civil litigation is immediately appealable. *See, e.g.*, *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 230 (3d Cir. 1998), *overruled in part on other grounds by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Prewitt v. City of Greenville*, 161 F.3d 296, 298 (5th Cir. 1998); *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 578–81 (11th Cir. 1997), *overruled in part on other grounds by Winkelman*, 550 U.S. 516. We do not answer this question today.

II.

Given the narrowness of the collateral order doctrine in criminal cases, the Supreme Court has only held that four types of orders are immediately appealable: orders denying a Double Jeopardy Clause challenge, orders denying a Speech or Debate Clause challenge, orders denying a motion to reduce bail, and orders allowing for the forced medication of criminal defendants. *See Sell v. United States*, 539 U.S. 166, 175–77 (2003) (forced medication); *Helstoski v. Meanor*, 442 U.S. 500, 506–08 (1979) (Speech or Debate Clause); *Abney v. United States*, 431 U.S. 651, 655–62 (1977) (Double Jeopardy Clause); *Stack v. Boyle*, 342 U.S. 1, 3–7 (1951) (bail).

Although the Supreme Court has not ruled on whether the denial of a *Faretta* motion is subject to immediate appeal, it has held that a pretrial order disqualifying counsel in a criminal case is not immediately appealable. *See Flanagan*, 465 U.S. at 260. In *Flanagan*, the Supreme Court distinguished such a counsel-related order from other criminal contexts in which the collateral order doctrine already applied. Unlike denial of bail, the Court explained, an order disqualifying counsel may be challenged in an appeal from a final judgment, so it is therefore not "moot upon conviction and sentence." *Id*. at 266. And, unlike rights under the Double Jeopardy and Speech or Debate Clauses, which are "*sui generis*" rights "not to be tried," the "right not to have joint counsel disqualified is . . . merely a right not to be convicted in certain circumstances." *Id*. at 267.

Albeit in dictum, the Supreme Court in *Flanagan* also discussed the interplay between a presumption of prejudice in an appeal from a final judgment and the third prong of the collateral order doctrine—whether an order would be "effectively unreviewable on

appeal from a final judgment." 465 U.S. at 265. In *Flanagan*, it was an open question whether prejudice would be presumed upon post-conviction appeal from a disqualification order. *Id*. at 267–68. But the Court stated that if prejudice were presumed, a disqualification order would not be "effectively unreviewable on appeal from a final judgment" and, therefore, would not be immediately appealable. *Id*. at 268. Today, there is no question that if Sueiro's *Faretta* motion were wrongly denied, this Court would presume prejudice on appeal from a conviction. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review."). In fact, the Court in *Flanagan* even stated that post-conviction review of the "Sixth Amendment right to represent oneself" is "fully effective," because it carries a presumption of prejudice on appeal from a final judgment. *See* 465 U.S. at 267–68 (noting that the petitioners had "correctly conceded" this point).

To avoid application of *Flanagan*'s apposite dictum, Sueiro argues that a more recently decided forced medication case should control. Like the right not to be forcibly medicated, the right to represent oneself protects the autonomy and dignity of criminal defendants. *See McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused."). In that regard, Sueiro believes that his *Faretta* right is more akin to the right not to be forcibly medicated than to other counsel-related rights, such as the right to appointed counsel. Because *Flanagan* was decided before *Sell*, the Supreme Court did not differentiate counsel-related rights from forced medication. We do so here, and we find that this comparison fails in two respects.

First, the right not to be forcibly medicated is substantively distinct from the right to self-representation. In *Sell*, the Supreme Court found that the forced administration of antipsychotic medications is "effectively unreviewable on appeal from a final judgment," because "[b]y the time of trial [the defendant] will have undergone forced medication—the very harm that he seeks to avoid." *See* 539 U.S. at 176–77. The Court emphasized that forced medication cannot be undone, even through acquittal. *Id*. at 177. That is to say, acquitted defendants will still have lost their "legal right to avoid forced medication." *Id*. Although forced medication has particular fair-trial implications in the criminal context, criminal defendants and non-defendants alike enjoy a broader right not to be forcibly medicated. Therefore, it makes sense that a second, unmedicated trial experience, though it may result in a fairer trial, would not cure the experience of wrongfully being medicated. By contrast, the Sixth Amendment right to self-representation arises *only* in the context of a criminal case. Put another way, there is no corresponding, broadly held "legal right to avoid" counsel. In that sense, violation of the right to self-representation is more like other trial rights, for which the cure is a second trial.

Second, and relatedly, *Sell* did not introduce an irreparable harm test into the collateral order doctrine. Sueiro contends that, if forced to proceed with counsel in the first instance, he would suffer an ongoing harm to his autonomy that could not be vindicated in a second trial. But under the collateral order doctrine, irreparable harm is simply not the test—even when it is irreparable harm to one's autonomy or dignity. For example, the Supreme Court has held that the denial of a motion to dismiss an indictment based on prosecutorial vindictiveness is not immediately appealable, even though a vindictive

indictment surely causes irreparable harm to one's dignity. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982). Accordingly, *Sell* is best read as a narrow addition to the collateral order doctrine, addressing a harm (forced medication) that exists regardless of the trial context, and therefore cannot be fully remedied by a second trial.

Given the above, we are left with strongly worded dictum from *Flanagan*, in which the Supreme Court specifically cited a *Faretta* order as an example of a decision that would be effectively reviewable on appeal from a final judgment. *See* 465 U.S. at 267–68 ("[P]ost-conviction review of a disqualification order is fully effective to the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself."). As explained above, the later-decided forced medication case does not undermine our application of *Flanagan*'s dictum in the instant appeal. If Sueiro's *Faretta* motion has been wrongly denied, he will enjoy a presumption of prejudice. Additionally, Sueiro has not alleged that he will be unable to represent himself in a second trial, if he is convicted and succeeds on appeal. He does assert that if *acquitted* with counsel, he will never be able to represent himself. But if we were to find jurisdiction based on this acquittal theory, then all trial rights would be subject to immediate appeal, and the collateral order doctrine exception would swallow the final judgment rule. Therefore, we hold that the denial of Sueiro's *Faretta* motion cannot meet the third prong of the collateral order doctrine exception, and that this Court does not have subject-matter jurisdiction over Sueiro's appeal.[3]

[3] Because the third condition is not met, we need not address the first and second conditions.

III.

Without offering our thoughts on the merits of Sueiro's motion, we recognize the difficult positions of everyone involved in this case. Our jurisdiction over interlocutory appeals is limited, especially in the criminal context. Because Sueiro *will* be able to represent himself if he is convicted and we ultimately reverse the denial of his *Faretta* motion, Sueiro's right to self-representation will not be "lost irreparably if review await[s] final judgment." *See Blackwell*, 900 F.2d at 746–47. We therefore dismiss Sueiro's appeal for lack of jurisdiction.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	
	)	Case No. 1:17-cr-284 (RDA)
	)	
CHRISTOPHER ROBERT SUEIRO,	)	
	)	
Defendant.	)	

ORDER

This matter came before the Court for a hearing on July 16, 2019, after receiving the results of Defendant's sealed competency evaluation, previously ordered by Judge Trenga and completed on June 10, 2019. Based upon the results of said evaluation, the Court hereby finds the Defendant competent to stand trial.

This matter also came before the Court on the Defendant's motion to proceed *pro se* at his jury trial pursuant to *Faretta v. California*. *See* 422 U.S. 806, 821 (1975). The Court attempted to place the Defendant under oath for the purpose of conducting the *Faretta* inquiry. However, the Defendant refused, citing religious grounds.

The Defendant then argued his own motion. Defense counsel deferred, and the government, through its counsel, objected to the motion.

In considering the motion, the Court conducted an extensive colloquy with Defendant to determine whether Defendant is voluntarily, willingly, and knowingly waiving his right to counsel, and most importantly, whether he is ultimately capable of representing himself. During the colloquy, the court inquired of Defendant's education and experiences in representing himself. Defendant answered the Court's question. After further inquiry, Defendant also

advised the Court that he was "aware" of the many applicable rules and procedures attendant to a jury trial. When questioned further whether he would follow those rules, Defendant at first hesitated, and then indicated he was inclined only to follow those rules he thought to be fair to him. Upon further inquiry, Defendant stated that he was "familiar" with the Federal Rules of Evidence, and that he read the Federal Rules of Criminal Procedure "some years ago."

The Court then ensured that Defendant was fully aware of the severity of the charges against him and their potential ranges of punishment. Nevertheless, Defendant continued to state that he "definitely wants to" represent himself at trial.

In light of the *Faretta* factors and upon observing Defendant's demeanor, assessing his credibility, and most importantly discerning his hesitancy to commit to follow the Rules of Court, the Court finds that Defendant has not met the applicable standards to establish that he is capable of representing himself at trial. Among other things, Defendant could not state with certainty when he reviewed the Federal Rules of Evidence nor could he remember specifics about the Federal Rules of Criminal Procedure, both of which are highly complex and have a significant impact during the course of a jury trial. Finally, and most significantly, during many of the Defendant's responses to the Court's inquiries, the Defendant pointedly vacillated whether he would be adherent to the applicable Rules of Court, both evidentiary and procedural.

Accordingly, for the reasons stated by the Court both in this Order and in open court, the *Faretta* motion is hereby **DENIED**.

NOW, THEREFORE, it is HEREBY ORDERED that:

1. This case is set on August 12, 2019 at 9:00 a.m. for a 3-day JURY trial.

2. This case is set on July 19, 2019 at 2:00 p.m. for a hearing on all pending motions *in limine*.

3. The Defendant's court-appointed counsel shall personally deliver or cause to be personally delivered to the Defendant a copy of this Order.

The Clerk is directed to forward copies of this Order to all counsel of record and to the Defendant.

It is **SO ORDERED.**

/s/

Alexandria, Virginia
July 16, 2019

Rossie D. Alston, Jr.
United States District Judge

FILED: February 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4525
(1:17-cr-00284-RDA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHRISTOPHER ROBERT SUEIRO

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk