No. 20-5379

IN THE

Supreme Court of the United States

KEITH ADAIR DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy and avoiding further erosion of the integrity of our criminal justice system through toleration of the empty defense table.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of amicus' intent to file this brief and consented to the filing of this brief.

SUMMARY OF ARGUMENT

A defendant must be afforded the right to meaningfully participate in his own defense, for it is the "defendant, and not his lawyer or the State, [who] will bear the personal consequences of a conviction." *Faretta* v. *California*, 422 U.S. 806, 834 (1975). In accordance with this fundamental precept, the Constitution does not merely grant criminal defendants procedural rights, but also grants them autonomy in the exercise of those rights. This Court has recognized that defendant autonomy underlies the right to self-representation, the right to counsel of one's choice, and the right to make fundamental decisions regarding the defense, including whether to assert innocence at trial, whether to testify on one's own behalf, and whether to appeal a conviction. At core, the principle of autonomy reflects the fact that a defendant, who bears the consequences of a conviction, should have meaningful participation in his own defense.

Yet here, the Washington Supreme Court used language of autonomy to subvert such participation, treating the defendant as a bystander in his own trial. The Washington Supreme Court's ruling starts from the erroneous premise that Keith Davis "voluntarily absented himself" (Pet. App. A at 1), with his blusterous statements that the "kangaroo court" could continue without him—statements made in anger after the court removed water he needed because of his severe medical conditions—when in fact the trial court expressly removed him for his misbehavior. The Washington Supreme Court, relying on this faulty factual premise, erred in ruling that it was permissible for the state to present key witnesses with an empty defense table. Moreover, relying on bluster—even if character-

ized as "voluntary"—to preclude Davis from meaningfully participating in his defense, or indeed from receiving any defense, undermines the autonomy granted to him by the Constitution.

Moreover, the Washington Supreme Court's approach fails to give the appropriate lenience to a *pro se* defendant exercising his constitutional right to self-representation. The choice of self-representation should not put a defendant at peril of losing the right to present any defense at all as a result of a mistake or breach of decorum. Defendant autonomy is not an empty label tolerated at sufferance. To the contrary, defendants' exercises of autonomy should be properly accommodated.

The Washington Supreme Court's decision also threatens to undermine the integrity of our criminal justice system as a whole. The sight of a trial proceeding with an empty defense table is antithetical to the adversarial nature of our justice system and to the role of cross-examination in the search for truth. At the same time, the Washington Supreme Court's privileging the efficient functioning of the justice system over fairness and defendant rights will further damage our vanishing system of jury trials, making them appear less attractive to defendants considering pleas and less fair to those who do choose to proceed.

The Court should grant the petition, taking the opportunity to prevent further erosion of the adversarial system of criminal justice, and reassert the centrality of the defendant to the jury trial process.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION SUBVERTS THE PRINCIPLE OF DEFENDANT AUTONOMY

A criminal defendant's autonomy in the conduct of his or her defense is a core constitutional principle that has been recognized by this Court time and again. The Washington Supreme Court's decision pays lip service to defendant autonomy, casting its conclusions in the language of voluntariness and choice. Pet. App. A at 6 ("But here, Davis expressed his desire to leave the proceedings himself, and the judge allowed him to do so."). But the reasoning of the decision and the ultimate holding are inconsistent with a meaningful understanding of defendant autonomy.

The question of how to analyze the Sixth Amendment rights of a defendant removed from a courtroom is admittedly "an area of law in need of further clarification." *Davis* v. *Grant*, 532 F.3d 132, 149 (2d Cir. 2008). By granting this petition, the Court can provide needed guidance on how to protect a defendant's autonomy under those circumstances. As discussed below, courts should consider a defendant's core interest in presenting a personal defense in determining whether an absence from trial is truly voluntary. And whether a defendant's absence is voluntary or involuntary, courts should take all reasonable steps to protect the defendant's rights and ensure a fair proceeding. As this case puts in stark relief the unfairness of removing a *pro se* defendant from his own trial, it is an ideal opportunity to reaffirm a defendant's right to autonomy. The Court should grant the petition.

A. The Constitution Protects The Autonomy Of Criminal Defendants

The principle of defendant autonomy underlies this Court's decisions in a wide range of contexts, including self-representation, choice of counsel, and the defendant's authority to make fundamental decisions in his case even when represented by counsel. Taken as a whole, this jurisprudence establishes that autonomy is a bedrock principle underlying the Sixth Amendment and due process more generally.

1. Defendant autonomy received robust consideration and recognition in the Supreme Court's self-representation decisions. In holding that defendants have the right to elect self-representation, the Court in *Faretta* did not merely derive this right from the Assistance of Counsel Clause or defendants' general capacity to waive constitutional rights. *See* 422 U.S. at 819 n.15 ("Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel."). Instead, self-representation was "necessarily implied by the structure of the [Sixth] Amendment," and was recognized as an instance of those constitutional rights that, "though not literally expressed in the document, are essential to due process of law in a fair adversar[ial] process." *Id.* at 819 & n.15.

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle* v. *Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana* v. *Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of individual underlie self-

representation right"). In *Rock* v. *Arkansas*, the Court held that "an accused's right to present his own version of events in his own words" was "[e]ven more fundamental to a personal defense than the right of self-representation." 483 U.S. 44, 52 (1987). And in *Weaver* v. *Massachusetts*, the Court explained that the right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." 137 S. Ct. 1899, 1908 (2017). In other words, the right to a "personal defense"—the defendant's autonomy—is the fountainhead from which flow specific procedural guarantees.

2. Just as a defendant's autonomy guarantees the right to self-representation, it also supports the right to retained counsel of one's choice. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, but the "right to select counsel of one's choice … has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. It is not just a procedural protection for the accused, but rather a reflection of the larger right to a personal defense. This component of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes* to be best." *Id.* at 146 (emphasis added).

3. Even if a defendant chooses to be represented by counsel, a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)). These "fundamental decisions"

include whether to enter a guilty plea[2] (or the functional equivalent of a guilty plea),[3] waive the right to a jury trial,[4] waive the right to be present at trial,[5] testify on one's own behalf,[6] maintain innocence before a jury,[7] and to take an appeal.[8] In a recent case, the Court expressly grounded defendants' retention of these fundamental decisions in autonomy, namely "[a]utonomy to decide … the objective of the defense." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1508 (2018) ("These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.").[9]

4. As evident from these decisions, defendant autonomy is a core constitutional principle, "essential to

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[2] *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969).

[3] *Brookhart* v. *Janis*, 384 U.S. 1, 6-7 (1966) (counsel lacked authority to agree to a "prima facie" trial that was equivalent to a guilty plea).

[4] *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 & n.24 (1988); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 277 (1942).

[5] *Taylor*, 484 U.S. at 417-418 & n.24.

[6] *Jones*, 463 U.S. at 751; *see also Rock*, 483 U.S. at 49 ("[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[7] *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1508 (2018).

[8] *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

[9] It matters not that defendants' exercise of these rights may not be strategically advisable. *See McCoy*, 138 S. Ct. at 1508 (recognizing that admission of guilt, contrary to defendants' wishes, may have represented best strategy for avoiding death penalty).

due process of law in a fair adversar[ial] process." *Faretta*, 422 U.S. at 819 & n.15. Accordingly, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind [the Court's] decisions have called 'structural'[.]" *McCoy*, 138 S. Ct. at 1511. "Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.'" *Id.* (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). Accordingly, a violation of a criminal defendant's autonomy in the conduct of his defense entitles him to a "new trial without any need first to show prejudice." *Id.*; *see also Weaver*, 137 S. Ct. at 1908 ("harm is irrelevant to the basis underlying" rights "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty").

B. Courts Should Consider Autonomy Principles In Assessing Whether A Defendant's Absence From Trial Is Truly Voluntary

The Washington Supreme Court's ruling hinges on the erroneous premise that Davis "voluntarily absented himself," asserting that "Davis's repeated statements that he wished to leave amounted to a waiver" (Pet. App. A at 1, 6), ignoring both Davis's contrary behavior and the fact that, regardless of what he said, the trial court expressly removed him for misbehavior, not based on a factual finding that he had waived his right to be present at trial, much less waived his right to put on any defense. This approach fails to take into account constitutional autonomy principles and effectively eliminated Davis's right to a "personal defense" without properly considering whether his absence from trial was a voluntary exercise of personal choice.

1. The Washington Supreme Court's reliance on Davis's blusterous statements cannot be supported. First, the trial court, in the best position to interpret Davis's statements, did not interpret them in the manner the Washington Supreme Court advocates. Instead, the trial court repeatedly explained that "the defendant was removed from the courtroom due to his behavior." Pet. App. C at 1; *see also id.* at 3 ("The Court then ordered the jail officers to remove him from the courtroom. The officers did so."); *id.* ("The Court informed him that if he continued to behave that way, he would again be removed from the courtroom and trial would proceed in his absence."). Second, throughout the trial, Davis repeatedly stated that he would not attend trial, but each day returned. Pet. App. A at 5-6. Accordingly, his statements made in anger upon learning that his water had been removed—that "You can hold your trial without me," and "Just go ahead with your kangaroo court … I'm done with it" (*id.* at 2)—cannot be read as a voluntary waiver.[10] Indeed, the day after his involuntary removal, he again returned to court. *See id.* at 9.

2. A defendant may exercise his autonomy to waive certain rights, but courts should not presume such an exercise from ambiguous statements and conduct. Courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). And this Court has been "been unyielding in [its] insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelli-

[10] In fact, during Davis's outburst, the trial court made clear Davis was being involuntarily removed: "This is about you disrupting the trial, delaying the trial. … Screaming at the top of his lungs[.]" Pet. App. B at 3.

gent.'" *Illinois* v. *Rodriguez*, 497 U.S. 177, 183 (1990); *see also Faretta*, 422 U.S. at 835. Accordingly, what was, at most, an ambiguous statement by a defendant reflecting Davis's displeasure at the court removing his water despite his medical needs (Pet. App. A at 2 n.1), cannot warrant a finding of waiver. *See Faretta*, 522 U.S. at 835 (waiver where defendant made "clear[] and unequivocal[]" statement); *Emspak* v. *United States*, 349 U.S. 190, 197-198 (1955) (colloquy not "sufficiently unambiguous to warrant finding a waiver"); *see also*, *e.g.*, *Miller* v. *Thaler*, 714 F.3d 897, 903 (5th Cir. 2013) (waiver must be "unequivocal" and "should not be inferred by the court in the absence of a clear and knowing election"); *United States* v. *Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000) (waiver must be "clear and unequivocal," "knowing, intelligent and voluntary").

3. Moreover, there is a critical difference between a considered, strategic decision—-even if thought to be foolish or self-defeating—and a rash outburst, whether prompted by the stress of a trial or contrarian resistance to authority. In a rare case, a defendant may voluntarily and intelligently choose to leave a defense table empty. *See*, *e.g.*, *Clark* v. *Perez*, 510 F.3d 382 (2d Cir. 2008) (political protest). But there is no indication that Davis's exclusion from trial advanced any of his interests or objectives in presenting a defense. Notably, after cooling off, Davis returned the next day, remaining present for the rest of the trial. Pet. App. A at 3.

The Washington Supreme Court did not grapple with this distinction. Instead, it analyzed the case exclusively in terms of Davis's "right to be present." Pet. App. A at 4. While that right was certainly at issue, there are a series of other rights implicated that the court did not meaningfully address, including Davis's

right to control his own defense, to cross examine witnesses, and even to have counsel appointed. Even if Davis voluntarily and intelligently waived his right to be present at his trial, there is no indication that he affirmatively intended to waive these other critical rights and proceed with no defense at all. *Cf. Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969) ("Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. … We cannot presume a waiver of these three important federal rights from a silent record."). Implying waiver of the right to present a defense simply because a disruptive defendant is forced to leave the courtroom is an affront to Davis's autonomy as the "master of his own defense." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 383 n.10 (1979). Likewise, slavishly holding a *pro se* defendant to his earlier decision to forgo counsel—even after circumstances change and he is excluded from the courtroom—does nothing to advance the principle of defendant autonomy embedded in our Constitution.

C. The Washington Supreme Court's Decision Erroneously Fails To Accommodate A Defendant's Right To A Personal Defense

Inherent in the principle of defendant autonomy is the right to a "personal defense": meaningful participation in decisions about how defend oneself. But based on its erroneous interpretation of Davis's statements, the Washington Supreme Court went further than just preventing Davis from exercising his autonomy in representing himself. Allowing a case to proceed with an empty defense table after a defendant's removal completely eviscerates notions of autonomy, as it does not

merely remove the right to a "personal defense" but to any defense whatsoever.

Cross-examination is the hallmark of the adversarial process. *See Crawford* v. *Washington*, 541 U.S. 36, 61 (2004) (evidence must be "test[ed] in the crucible of cross-examination"); *Poller* v. *Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) ("It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."). But under the Washington Supreme Court's rule, a defendant who exercises his constitutional right to self-representation and who is removed from the court due to his behavior (whether due to obstinance, an obstructionist strategy, or mental health issues), can lose his right to challenge the weight and credibility of testimony through the crucible of cross-examination.

In *Illinois* v. *Allen*, 397 U.S. 337 (1970), the Court approved the temporary removal of a defendant from his trial based on his behavior. But there, unlike here, the court had already appointed standby counsel who then stepped in to represent the defendant's interests. *See id.* at 339, 341. Indeed, in concurrence, Justice Brennan directed that, after removing a disruptive defendant, a trial court "should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial." *Id.* at 351 (Brennan, J., concurring).[11]

By considering alternatives, which might include appointing counsel or permitting the defendant to listen from another room and submit questions, courts can

[11] Appointing counsel to stand in for Davis here would not violate his right to autonomy, as he repeatedly requested standby counsel. Pet. App. A at 1-3.

enable a defendant to retain his autonomy and dignity and his right to a personal defense. By contrast, the approach of the Washington Supreme Court puts on thin ice defendants who elect their constitutional right to self-representation, leaving them at risk of losing the right to put on *any* defense as a result of their self-representation.

Defendants should not be irrevocably punished with the denial of a trial defense for a mistake or breach of decorum. Yet here, Davis lost his right to cross-examine two key witnesses, who testified to "crucial elements of the State's case against Davis … including details of his behavior, his statements to officers, the nature of the evidence against him, and more." Pet. App. A at 11. Cross-examination of those witnesses may well have been the difference between acquittal and conviction on two of three counts he faced. Pet. App. C at 9.

Self-representation is a fundamental right granted to defendants by the Constitution. This right must be reasonably accommodated, not tolerated at sufferance. To be sure, this Court has recognized that courts may take action to ensure the "dignity, order, and decorum" of proceedings, and that a defendant's right to appear personally is not absolute. *Allen*, 397 U.S. 337. This Court has not held, however, that the broader right to put on a defense may be lost in its entirety as a result of a defendant's disruptive conduct; the remedy for disruption should be exclusion from in-person attendance, nothing more. Whether to abandon the right to put on a defense should be a considered choice, not a secondary consequence of a breach of decorum. The Constitution demands that more steps be taken to ensure the protection of a defendant's rights before continuing a trial without him.

II. ALLOWING CRIMINAL TRIALS TO PROCEED WITH AN EMPTY DEFENSE TABLE UNDERMINES THE INTEGRITY OF THE JUDICIAL PROCESS

In addition to being an effective vehicle for reaffirming and clarifying defendant autonomy rights, the petition should be granted because the integrity of our criminal justice system is as stake.

The adversarial process is the core of our justice system, and cross-examination is recognized to be the "'greatest legal engine ever invented for the discovery of truth.'" *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore, *Evidence* § 1367 (3d ed. 1940)). Yet the Washington Supreme Court approved the trial court's decision to allow the proceedings to continue in the absence of Davis or any counsel representing him because, among other reasons, "Davis intended to delay proceedings by increasing his water intake and increasingly using the restroom facilities." Pet. App. A at 6. As a result of this decision, the jury and the public were presented with an unseemly display of government witnesses providing testimony without cross-examination.

Aside from the obvious prejudice to Davis, this outcome undermines the broader public interest in ensuring that trials are not only fair, but also "appear fair to all who observe them." *Wheat* v. *United States*, 486 U.S. 153, 160 (1988). It is hard to imagine a situation more likely to make an observer question the fairness of a trial than the sight of an empty defense table. That Davis's own conduct contributed to the situation does not alleviate the harm; loss of the right to defend oneself is hardly the appropriate remedy for disruptive conduct. As Stephen commented on the procedures of the Star Chamber, "'There is something specially re-

pugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence.'" *Faretta*, 422 U.S. at 821-823 (quoting 1 Stephen, *A History of the Criminal Law of England* 341-342 (1883)).

The message sent by the Washington Supreme Court is that the criminal justice system is an assembly line for turning suspects into convicts—a message that, unfortunately, too often comports with reality. Under this approach, the defendant is not necessary to the process, and the State's machine will continue to conviction regardless. The primary objective, in the view of the Washington Supreme Court, is not ensuring that a defendant has a fair trial but preventing the defendant from interfering with the operation of the machine. *See* Pet. App. A at 5 n.5 ("By reversing his conviction, when he was fully capable of conforming his conduct when he wanted to, the dissent would give Mr. Davis exactly what he sought—further delays in his trial.").

This image of a justice system on autopilot will only further jeopardize our already-vanishing system of jury trials for criminal defendants. *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). The prospect of involuntary exclusion from the courtroom, and the court's readiness to proceed without any defense, makes the jury trial less attractive than it already is. This will further increase the likelihood of pleas, empowering prosecutors to effectively adjudicate guilt and pass sentences, with little if any oversight by judges. *See* Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014),

http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719 (2020).

And for the few jury trials that are still conducted, their legitimacy will be gravely undermined. The way our system now works, defendants without representation are significantly more likely to proceed to a jury trial—but under the Washington Supreme Court's approach, they are also the most likely to lose their right to a defense due to running afoul of court procedures. *See* Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 448 tbl. 1, 452 tbl. 2 (2007) (finding that *pro se* state and federal defendants are about twice as likely as represented defendants to proceed to trial). Jury trials should be encouraged "as a valuable safeguard to liberty," or indeed "the very palladium of free government," The Federalist No. 83 (Hamilton), not seen as a vestigial option for disruptive cranks who do not take their lawyers' advice to plead guilty.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted.

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SEPTEMBER 2020