No. _____

In the
Supreme Court of the United States

_____

Paul Rivera,
Petitioner,

v.

United States of America,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether a defendant's constitutional right to a fair trial imposes upon trial courts a duty of inquiry to determine whether a defendant is competent to represent himself at trial under the heightened competency standard in *Indiana v. Edwards,* 554 U.S. 164 (2008), where the record contains abundant evidence that the defendant was likely mentally ill and not competent to proceed *pro se* even though he was competent to stand trial.

2. Whether petitioner Paul Rivera, who was facing a mandatory life sentence if convicted, was denied his constitutional right to a fair trial under *Indiana v. Edwards,* 554 U.S. 164 (2008), when the district court allowed him to represent himself at trial upon a finding of no "wackiness," without the benefit of any psychiatric evaluations and without affording any other meaningful consideration of his mental state, and despite a plethora of evidence in the record indicating that he likely was suffering from mental illness and was not competent to proceed *pro se.*

PARTIES TO THE PROCEEDING

Petitioner Paul Rivera was a defendant before the U.S. District Court for the Eastern District of New York and the appellant before the U.S. District Court for the Second Circuit. Michael Garrett also was a defendant before the U.S. District Court for the Eastern District of New York, but he died before sentencing and therefore, the district court vacated his trial conviction and dismissed the third superseding indictment against him.

Respondent United States of America was the prosecution before the U.S. District Court for the Eastern District of New York and the appellee before the U.S. Court of Appeals for the Second Circuit.

RELATED PROCEEDINGS

United States v. Rivera, Docket No. 13-cr-149, U.S. District Court for the Eastern District of New York. Judgment entered December 29, 2016.

United States v. Garrett, Docket No. 17-59, U.S. Court of Appeals for the Second Circuit. Judgment entered July 28, 2022.

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TABLE OF AUTHORITIES

Cases

Statutes & Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Paul Rivera respectfully petitions for a writ of certiorari to review the July 28, 2022 judgment of the U.S. Court of Appeals for the Second Circuit (Pet. App. 1-15).[2]

OPINION BELOW

The citation for the opinion of the U.S. Appeals for the Second Circuit is *United States v. Garrett,* 42 F.4th 114 (2d Cir. 2022) (Pet. App. 1-15).[3]

JURISDICTION

The Second Circuit issued its opinion on July 28, 2022 (Pet. App. 1-15). On September 30, 2022, the Second Circuit denied Rivera's petition for panel rehearing and rehearing *en banc* (Pet. App. 64). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury …; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ….

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[2] Citations to "Pet. App. __" refer to documents in the appendix submitted with the instant petition. Citations to "A__" and "SA__" refer to the appendices and special appendix submitted on direct appeal in the U.S. Court of Appeals for the Second Circuit, *United States v. Garrett,* Docket No. 17-59 (ECF Nos. 155-162) and citations to "Brief" and "Reply Brief" refer to Rivera's briefs submitted in the same appeal (ECF Nos. 154 and 197, respectively).

[3] Simultaneously with this opinion, the Second Circuit also issued a summary order pertaining to other arguments raised on direct appeal but for which Rivera is not seeking review before this Court. *See United States v. Garrett,* 2022 U.S. App. LEXIS 20846, 2022 WL 2979588 (2d Cir. Jul. 28, 2022).

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. Brief Procedural History

Rivera appealed to the Second Circuit from the judgment of the U.S. District Court for the Eastern District of New York (Hon. Kiyo A. Matsumoto) entered on December 29, 2016, convicting Rivera, following a jury trial, of fourteen counts including RICO, RICO conspiracy, sex trafficking, a narcotics conspiracy, murder while engaged in a narcotics trafficking offense, murder in aid of racketeering,[4] firearms offenses, and other charges (Pet. App. 52-63). The court sentenced Rivera, principally, to life plus twenty years in prison.

2. Brief Overview

On January 18, 2012, Rivera was arrested in Pennsylvania on drug charges and incarcerated in Pennsylvania county/state jails until his transfer to New York fourteen months later. Rivera first appeared in federal court (E.D.N.Y.) on March 1, 2013, and shortly thereafter, was indicted for a narcotics conspiracy relating to the Pennsylvania arrest. During the two years leading up to trial, Rivera was charged in three superseding indictments with his co-defendant Michael Garrett, the ringleader of the criminal schemes. The escalating charges included death

[4] This offense imposes a mandatory sentence of life imprisonment (18 U.S.C. § 1959(a)(1)).

eligible offenses (ultimately the government declined to seek the death penalty) and a charge requiring mandatory life imprisonment.

Rivera was represented by seven different attorneys. Two attorneys were removed despite Rivera's requests that they continue to represent him: Rivera's first attorney (Steve Zissou) was removed at the government's request due to a conflict which arose from Zissou's wife's representation of a witness (although the court was aware that capital murder charges were imminent, the court removed Rivera's attorney rather than the witness'); Guy Oksenhendler was removed because the government decided not to seek the death penalty and therefore, requested that one of the two attorneys representing Rivera be removed. One attorney (Scott Auster) was replaced by a privately retained attorney (Angelo Picerno), who then withdrew due to a conflict. The remaining three attorneys were relieved when the attorney client relationship disintegrated due to Rivera's mistrust and paranoia (Martin Goldberg, David Stern, Donald duBoulay). *See* Brief, p. 4-13 (detailed chronological history of attorney issues).

Following a *Faretta* hearing (April 27, 2015) just before trial, the district court allowed Rivera to proceed *pro se* after holding that he knowingly and voluntarily waived his right to counsel. *See* Brief 9-12 (*Faretta* hearing described). Rivera represented himself from opening statements (May 6, 2015) until the ninth day of trial testimony (May 19, 2015), when at Rivera's request, his standby counsel (duBoulay) was reappointed.

3. Evidence of Mental Illness Prior to the *Faretta* Hearing

Throughout the pretrial proceedings, there was abundant evidence that Rivera suffered from mental illness. More specifically, prior to trial, Rivera's first attorney (Zissou) informed the district court that Rivera was a drug addict and likely suffered from an undiagnosed mental illness (3/19/13 Zissou letter, A101). A subsequent attorney (Oksenhendler) advised Rivera to have a psychiatric evaluation. (3/14/14 Rivera letter attached to letter to court, A212). In its pretrial submissions, the government described Rivera's long-term substance abuse involving heroin and crack cocaine. *See, e.g.,* Gov't Memorandum of Law (2/13/15), A705-12.

Though not discussed in the district court, it is common knowledge that drug addiction can cause permanent brain damage. The National Institute of Drug Abuse reported on the long-term effects of heroin.

> Repeated heroin use changes the physical structure and physiology of the brain, creating long-term imbalances in neuronal and hormonal systems that are not easily reversed. Studies have shown some deterioration of the brain's white matter due to heroin use, which may affect decision-making abilities, the ability to regulate behavior, and responses to stressful situations.

National Institute on Drug Abuse, "What are the long-term effects of heroin use?" https://www.drugabuse.gov/publications/research-reports/heroin/what-are-long-term-effects-heroin-use (visited 8/14/22) (sources include reports dated 1990-2013); *see* National Institute on Drug Abuse, "What are the long-term effects of cocaine use?" https://www.drugabuse.gov/publications/research-reports/cocaine/what-are-long-term-effects-cocaine-use (visited 8/14/22) (long-term cocaine use impairs

impulse inhibition, decision-making involving rewards/punishments, etc.). The precise abilities essential to represent oneself at trial – to make decisions, regulate behavior, and respond to stressful situations -- are the very abilities damaged by long-term addiction to heroin and cocaine.

In addition, during a suppression hearing,[5] the court was presented with further evidence of Rivera's mental instability. While in a Pennsylvania prison, Rivera was on medical watch due to his condition resulting from substance abuse (9/8/14 Supp.Hrg.Tr.-A352-54). Following an infraction, Rivera requested long-term punishment in solitary confinement, which the warden stated was "[n]ot normal" (9/8/14 Supp.Hrg.Tr.-A359-61). Rivera unreasonably refused to take a chest X-ray for a tuberculosis test (9/8/14 Supp.Hrg.Tr.-A390). And, Rivera had been disciplined for barking (2/4/15 Dist. Ct. Opinion, SA47). During the suppression hearing, the co-defendant's attorney complained that Rivera was "extremely upset and excited" and "emotionally overwrought" and yet, he was making serious decisions affecting the case (9/9/14 Tr.-A412-13).

Other evidence that Rivera was not rationally processing information regarding his case included his repeated failure to understand why he should stop writing *pro se* letters to the court that contained admissions, despite repeated warnings from the court that the damaging admissions could be used against him (7/8/14 Tr.-A298-99; 2/13/15 Tr.-A717; 4/21/15 Tr.-A746; 4/27/15 Tr.-A767-68).[6] In

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[5] Rivera was represented by counsel at the suppression hearing.

[6] When the court warned Rivera about making statements against his interest, Rivera responded, "I was aware when I did it" (4/21/15 Tr.-A746).

addition, Rivera insisted on wearing prison garb so the jury would know he was in prison, which was highly irrational especially since potential jurors commented that his prison uniform made him look like a "thug" and was disrespectful (4/21/15 Tr.-A742-45; 4/27/15 Tr.-A791, A806-07; 4/29/15 Tr.-A865-67).

Furthermore, the court was clearly familiar with the crisis it created when it disqualified Rivera's first attorney (Zissou) at a time when Rivera was about to be charged with a death-eligible murder.[7] Zissou had presciently warned the court that the "potential complication from disqualification of counsel cannot be overstated" and that Rivera was "very difficult," "drug addicted," "likely suffering from some form of undiagnosed psychological instability," and "extremely distrusting of courts and lawyers" (3/19/13 Zissou letter, A101). As predicted, Zissou's disqualification magnified the manifestations of Rivera's unstable mental state and paranoia and made it impossible for Rivera to trust successor counsel.

Indeed, following Zissou's disqualification, in 2013, Rivera informed the court that he lost faith in Goldberg and questioned why the court previously told him that it was in his best interest to disqualify Zissou (9/23/13 Rivera letter, A145). At the hearing where Goldberg was replaced, Goldberg expressed that part of the problem was that Rivera was "enamored" with Zissou. (10/3/13 Tr.-A152). Subsequently, in

[7] The court's decision to disqualify Zissou – which elevated the interests of a witness above those of a death-eligible defendant – was arbitrary, unnecessary, and ultimately disastrous. *See United States v. Manuel Ramos,* 350 F.Supp.2d 413, 427 (S.D.N.Y. 2004) (Lynch, J.) (potential capital case "heightens every interest" including defendant's "interest in being represented by counsel that he has come to trust," and "public interest" that "indigent defendant, on trial for his life" is provided with the "most effective possible defense").

2014, Rivera complained about Stern. When the court asked if there was "anyone on Earth" he trusted, Rivera responded, "Absolutely. I did trust Steve Zissou" (7/8/14 Tr.-A307-08). The court stated that Zissou could not represent him, appointed duBoulay, and insisted that Rivera take a sworn oath that no more attorneys would be substituted (7/8/14 Tr.-A308, A317-22). Then, around the beginning of jury selection, Rivera had a post placed online wherein he (a) complained that the government was conspiring against him and had disqualified, *ex parte,* the only attorney he trusted (Zissou), (b) expressed concern that the court had forced him to take a sworn oath not to request another attorney, and (c) concluded that he would represent himself even though it was suicide (Rivera's post, A830-31, A835).[8]

4. *Faretta* Hearing

Subsequently, Rivera moved to represent himself, not because he wanted to, but because he felt he had no choice (Pet. App. 21-22, 42-43). During the *Faretta* hearing, Rivera understood he would "get fried" if he represented himself (Pet. App. 28).[9]

When the court granted Rivera's request to proceed *pro se,* both co-defendant's attorney and the prosecutor objected. The government expressed its grave concern that Rivera was "not necessarily acting completely rationally," while

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[8] The court obtained this post the day after the *Faretta* hearing (Gov't letter to district court attaching post, A822-35).

[9] At the *Faretta* hearing, the court did not ask about Rivera's education, but according to the Presentence Investigation Report, Rivera had been placed in special education classes, repeated a grade in high school, and had never completed high school or obtained his GED (PSR p. 2, 37 at ¶170).

co-defendant's attorney suggested that Rivera had "mental illness" and had been "wacky" (Pet. App. 49). The court quickly dismissed these concerns by simply stating that it had observed no "wackiness" and that Rivera was physically well, coherent and had knowingly, voluntarily, and rationally, with a full understanding of the risks, decided to proceed *pro se* (Pet. App. 49-50). The co-defendant's attorney warned that Rivera would do everything possible to prejudice the jury against himself and his co-defendant (Pet. App. 51). And, as predicted, Rivera did just that.

REASONS FOR GRANTING THE WRIT

WHEN THE RECORD IS REPLETE WITH EVIDENCE OF A DEFENDANT'S MENTAL ILLNESS, THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PRINCIPLES IN *INDIANA V. EDWARDS*, 554 U.S. 164 (2008) AND CONDONES AN UNFAIR TRIAL BY RELIEVING THE TRIAL COURT OF ANY DUTY TO INQUIRE INTO WHETHER A DEFENDANT IS COMPETENT TO REPRESENT HIMSELF AT TRIAL UNDER THE HEIGHTENED *EDWARDS* STANDARD

Introduction

Finding no "wackiness" (Pet. App. 49), the district court allowed Rivera – who suffered from a decades-long addiction to heroin and cocaine, exhibited signs of mental illness evident throughout the record, and was facing a mandatory life sentence if convicted – to proceed *pro se* at trial despite objections by both the prosecutor that Rivera was not making decisions "fully rationally" and co-defendant's counsel that Rivera was suffering from "mental illness" and had been "wacky." (Pet. App. 49-50). The court had no psychiatric reports, ordered no psychiatric evaluation, and took no further steps to determine whether Rivera was competent to represent himself at trial. On appeal, the Second Circuit affirmed

Rivera's conviction, holding that "where a defendant has been found competent to stand trial, *Edwards* does not *require* a court to conduct a further competency hearing or order psychiatric evaluations before permitting a defendant to proceed pro se" (Opinion, Pet. App. 13).

The Second Circuit's decision violates the principles in *Edwards,* 554 U.S. 164. *Edwards* explicitly held that a court is *permitted* to deny a *pro se* request by a defendant, who due to mental illness, does not possess the *higher level of competency necessary to represent himself at trial,* even if he has the lower level of competency to stand trial. The Court in *Edwards* was not presented with the question of whether circumstances could *require* a court to deny such a request. However, *Edwards* recognized that a mentally ill defendant's *pro se* status could "undercut[] the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77.

To give practical effect to the Supreme Court's pronouncement regarding a fair trial, when a court is presented with evidence of a defendant's mental illness and the defendant requests to proceed *pro se,* the court must, at the very least, give meaningful consideration to whether the defendant is competent to conduct his own trial under the heightened standard in *Edwards*. To hold otherwise, effectively, would condone unfair trials. The district court's utter failure to conduct *any* mental illness inquiry here was error and its cavalier finding of no "wackiness" was clearly erroneous.

Rivera's *pro se* representation was not harmless. Beginning with his opening statement that led to the admission of his devastating proffer statement, Rivera's irrational strategy was suicidal. At one point, the district court described Rivera's trial performance as "excruciating" (A1171), while co-defendant's counsel deemed it "painful" and "cringe worthy" (A1171, A2805). Rivera had viable defenses that could have resulted in a less-than-life prison sentence, but his self-destructive, ineffectual, and alienating performance precluded a full and fair consideration of the evidence by the jury.[10] Rivera was denied his constitutional right to a fair trial and he is entitled to a new one.

This issue has broad significance to the criminal justice system because it is recurring and involves the critical intersection of mental illness and a defendant's right to a fair trial, right to counsel, and limited right represent himself. Six other circuit courts have narrowly interpreted the *Edwards* holding, as the Second Circuit did. But three circuits have acknowledged (without deciding) that to provide a fair trial, there may be situations where a court may be *required* to deny *pro se* representation to a mentally ill defendant who is not competent to represent himself at trial, even though he is competent to stand trial. A court cannot secure a fair trial if it has no duty of inquiry to determine whether a defendant is competent to represent himself. Given the importance of this issue, Rivera respectfully requests that this Court grant his petition for a writ of certiorari.

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[10] Rivera's Second Circuit briefs include a harmless error analysis. *See* Brief 62-67; Reply Brief 15-18. The Second Circuit's decision did not address this analysis because it found no error. Therefore, harmless error is not addressed further in this petition.

Rivera's Petition for a Writ of Certiorari Should Be Granted

Under the Sixth Amendment, a defendant has the right to counsel or the right to waive counsel and proceed *pro se* if he voluntarily and intelligently decides to do so. *See Faretta v. California,* 422 U.S. 806, 807 (1975). However, the right to self-representation is not absolute. Courts can deny or revoke that right if, for example, a defendant engages in "serious and obstructionist misconduct" (*id.* at 834 n. 46) or is not competent to represent himself (*see Edwards,* 554 U.S. 164).

In *Godinez v. Moran,* 509 U.S. 389 (1993), the Supreme Court held the level of competency required to waive the right to counsel and to plead guilty was the same as that required to stand trial. *See Edwards,* 554 U.S. at 173-74. A defendant is competent to stand trial if he has the capacity "to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri,* 420 U.S. 162, 171 (1975), *quoted in Edwards,* 554 U.S. at 170, 174; *see Dusky v. United States,* 362 U.S. 402, 402 (1960). However, "'the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right,* not the competence to represent himself.'" *Edwards,* 554 U.S. at 172 (quoting *Godinez,* 509 U.S. at 399). In *Edwards,* the Supreme Court held that a court is permitted to deny a *pro se* request by a "gray-area" defendant who suffers from mental illness if he is not competent to represent himself at trial, which requires a higher level of competence than that necessary to stand trial. *Edwards,* 554 U.S. at 173-74, 177-78 (trial court held three competency hearings and found that although defendant suffering from

schizophrenia was competent to stand trial while represented by attorney, he was not competent to defend himself at trial; therefore, court denied *pro se* request and Supreme Court upheld decision).

The *Edwards* Court relied on four principles for its holding. First, *Dusky* and *Drope* (competency to stand trial) addressed the level of competency required to assist and consult *with counsel,* but a different standard may apply when a defendant has *no counsel*. *See id.* at 174-75. Second, because mental illness "interferes with an individual's functioning at different times in different ways," a single standard may not be appropriate since a defendant "may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* at 175-76. Third, allowing a defendant to proceed *pro se* may not "'affirm the dignity'" of a defendant if he lacks the capacity to represent himself and is humiliated. *Id.* at 176. And finally, proceedings must appear fair to observers. *See id.* at 177.

While *Edwards* held that a court was *permitted* to deny a *pro se* request of a mentally ill defendant if he was competent to stand trial but not competent to represent himself at trial, it did not explicitly hold that a court was *required* to do so. *See, e.g., United States v. Siddiqui,* 699 F.3d 690, 705 (2d Cir. 2012) (recognizing *Edwards* holding), *cert. denied,* 569 U.S. 986 (2013). However, the *Edwards* Court concluded that "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient."

Edwards, 554 U.S. at 177. And significantly, it also recognized that "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77. Thus, this Court clearly indicated – at the very least, implicitly -- that there may be situations where a court is *required* to deny *pro se* representation for a defendant suffering from mental illness. A contrary interpretation would sanction an unfair trial.

Indeed, it is axiomatic that it is "the duty of the court … to see that [the defendants] [are] denied no necessary incident of a fair trial." *Powell v. Alabama,* 287 U.S. 45, 52 (1932). A federal judge "is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." *Brown v. Walter,* 62 F.2d 798, 799 (2d Cir. 1933); *see United States v. Jones,* 381 F.3d 114, 121 (2d Cir. 2004) ("trial court's primary obligation is to ensure that defendant receives a fair trial"), *cert. denied,* 543 U.S. 1072 (2005).

Thus, if a defendant suffers from mental illness rendering him incapable of self-representation, then the court fails in its duty to secure a fair trial if it allows him to proceed *pro se.* But the court cannot carry out its duty to secure a fair trial if it has no obligation whatsoever – when faced with evidence of mental illness -- to determine whether a defendant's mental illness renders him incapable of self-representation.

Nevertheless, the Second Circuit held that "where a defendant has been found competent to stand trial, *Edwards* does not *require* a court to conduct a further competency hearing or order psychiatric evaluations before permitting a defendant to proceed pro se" (Opinion, Pet. App. 13).[11] While six other circuits have reached a similar conclusion,[12] three other circuits have acknowledged that this is an open question. *See United States v. Brugnara,* 856 F.3d 1198, 1213-14 (9th Cir.) (court recognized strength of defendant's argument that extension of *Edwards* principles can impose "duty" on court to terminate self-representation, but declined to decide issue; based on, *inter alia,* psychologist's declaration, the defendant was not suffering from severe mental illness), *cert. denied,* 138 S.Ct. 409 (2017); *United States v. McKinney,* 737 F.3d 773, 777 (D.C. Cir. 2013) (court declined to decide whether *Edwards* requires that court "must" deny *pro se* representation; defendant had psychiatric evaluations to determine competency to stand trial and to represent himself; appellate court upheld district court's decision allowing *pro se* representation); *United States v. Posadas-Aguilera,* 336 Fed.Appx. 970, 976 n. 5

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[11] Citing *Faretta,* 422 U.S. 806, the Second Circuit found the district court did not "abuse[] its discretion in failing to sua sponte order a psychiatric evaluation prior to determining that Rivera 'knowingly and intelligently' waived his right to counsel" (Opinion, Pet. App. 13). Rivera does not challenge his competency to stand trial or to knowingly and intelligently waive his right to counsel, which are subject to a lower competency bar than the heightened *Edwards* standard for self-representation at trial (Reply Brief 13 n. 6).

[12] *See* Opinion, Pet. App. 11-13 & n. 2 (citing cases): *United States v. Stafford,* 782 F.3d 786, 791 (6th Cir. 2015); *Panetti v. Stephens,* 727 F.3d 398, 414 (5th Cir. 2013), *cert. denied,* 574 U.S. 827 (2014); *Wright v. Bowersox,* 720 F.3d 979, 986 (8th Cir. 2013); *United States v. Bernard,* 708 F.3d 583, 590 (4th Cir.), *cert. denied,* 571 U.S. 1010 (2013); *United States v. DeShazer,* 554 F.3d 1281, 1289-90 (10th Cir. 2009); *United States v. Berry,* 565 F.3d 385, 391 (7th Cir. 2009), *cert. denied,* 563 U.S. 968 (2011).

(11th Cir. 2009) (for defendants "suffering from severe mental illness," *Edwards* "appears" to limit defendants' right to self-representation and "require" counsel; psychiatric evaluations were conducted to determine defendant's competency to stand trial; Eleventh Circuit upheld district court's decision allowing *pro se* representation), *cert. denied,* 568 U.S. 900 (2012).[13]

The practical reality of the Second Circuit's decision is that it would allow the trial court to stick its head in the sand and avoid the mental illness issue altogether even if that would deprive the defendant of a fair trial. This is contrary to the above-described Supreme Court and Second Circuit precedent regarding a defendant's right to a fair trial, a court's duty to facilitate that right, and the fact that mental illness can render a defendant incapable of self-representation and thus, deprive him of a fair trial if he proceeds *pro se.* Therefore, while a court need not hold a competency hearing whenever a defendant seeks to proceed *pro se,* when it is presented with evidence that the defendant suffers from mental illness, it must provide meaningful consideration of this issue to determine if self-representation will deprive the defendant of a fair trial. Here, the trial court failed to conduct *any* inquiry regarding Rivera's mental competency to represent himself *pro se* and given the evidence of mental illness, he was denied his right to a fair trial.

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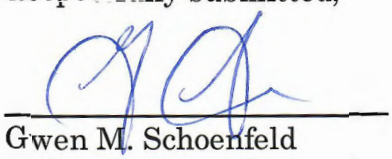
[13] In *United States v. Jackson,* 859 Fed.Appx. 389, 390 (11th Cir. 2021), the Eleventh Circuit noted that *Posadas-Aguilera* found that a court is not required to block a defendant's *pro se* request "*outside of* instances of severe mental illness" (emphasis added). Thus, contrary to the Second Circuit's opinion (Pet. App. 13 n. 2), the Eleventh Circuit in *Jackson,* appears to continue to recognize the *Posadas-Aguilera* court's suggestion that in cases of severe mental illness, a court may be required to deny *pro se* representation.

Finally, even if this Court concludes that the Constitution does not require meaningful consideration of a defendant's competency to represent himself *pro se* under the heightened *Edwards* standard, at the very least, in order to preserve judicial integrity, this Court should exercise its supervisory powers and impose a procedural duty upon trial courts to conduct such an inquiry when there is evidence that a defendant is mentally ill. *See United States v. Hasting,* 461 U.S. 499, 506 (1983) (purposes underlying use of supervisory powers include "preserv[ing] judicial integrity" to ensure conviction "rests on appropriate considerations validly before the jury"); *State v. Connor,* 292 Conn. 483, 518-19, 527 (Conn. Sup. Ct. 2009) (based on court's supervisory authority over administration of justice and *Edwards'* reasoning, the Connecticut Supreme Court imposed a duty of inquiry on trial courts to determine whether a defendant is competent to represent himself at trial under a heightened competency standard; "when a mentally ill … defendant is permitted to represent himself at trial despite his or her lack of competence to do so, the reliability of the adversarial process, and thus the fairness of the trial itself, inevitably is cast in doubt" (*id.* at 527)). "The system of criminal justice should not be available as an instrument of self-destruction." *Faretta,* 422 U.S. at 840 (Burger, J. dissenting).

CONCLUSION

For the reasons above, Rivera respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,



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