ORIGINAL

24-6636

No. _____

In the Supreme Court of the United States

KERBET DIXON
Petitioner,

v.

NEW YORK
Respondent.

On Petition for a Writ of Certiorari to the State of New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

PATRICIA PAZNER
DAVID FITZMAURICE
Counsel of Record
HANNAH KON

APPELLATE ADVOCATES
111 John Street
9th Floor
New York, NY 10038
(212) 693-0085
dfitzmaurice@appad.org

Counsel for Petitioner

QUESTIONS PRESENTED

In *Faretta v. California*, 422 U.S. 806, 818 (1975), this Court found that the Sixth Amendment "constitutionalizes" a *pro se* defendant's right "in an adversary criminal trial to make a defense as we know it." But this no longer is the case in New York. Rather, as the decision below shows, New York has become the first jurisdiction to permit, without any restrictions, "the People's monitoring of the telephone calls that [a *pro se* defendant] made to his trial witnesses from jail." Pet. App. 1a. Prior court approval is not necessary. A taint team (or other similar mechanism) need not be established. And the *pro se* defendants do not even need to be told. Indeed, they will remain completely oblivious to this tactical advantage unless the prosecution uses the calls to cross-examine a defense witness—as happened here. Though it should seem obvious, in an adversarial system, a *pro se* defendant is not preparing a defense "as we know it" if the prosecution secretly knows it, too.

The questions presented are as follows:

1. Does the right to self-representation include the right to prepare a defense outside the earshot of the prosecution, or can the prosecution have unfettered and undisclosed access to an incarcerated *pro se* defendant's trial preparation phone calls and use them at trial to gain a tactical advantage?

2. When conducting a *Faretta* hearing, must courts ensure on the record that defendants understand the pitfalls of self-representation—including, specifically, the nature of the charges and range of allowable punishments—before relieving counsel?

RELATED PROCEEDINGS

The People of the State of New York v. *Kerbet Dixon*, No. 2023-00114, 2024 N.Y. Slip Op. 05176, 2024 WL 4535812 (N.Y. Oct. 22, 2024).

The People of the State of New York v. *Kerbet Dixon*, 180 N.Y.S.3d 292 (N.Y. App. Div. Dec. 28, 2022).

The People of the State of New York v. *Kerbet Dixon*, Nos. 498/12 and 54/13 (N.Y. Sup. Ct. Queens Co. Apr. 21, 2014).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

New York was once a leader in respecting the rights of *pro se* defendants. Before this Court's landmark decision in *Faretta v. California*, 422 U.S. 806 (1975), New York believed the right to self-representation "embodie[d] one of the most cherished ideals of our culture" and was both "deeply ingrained in our common law" and "clearly recognize[d]" under the state constitution. *People v. McIntyre*, 324 N.E.2d 322, 325–26 (N.Y. 1974). These sentiments remained the "foundation stone of [New York's] self-representation jurisprudence" throughout the next 50 years. *People v. Crampe*, 957 N.E.2d 255, 262 (N.Y. 2011).

All the while, however, a problem has been lurking under the surface. For security reasons, New York jails record all pretrial detainee phone calls—unless they involve attorneys, religious advisors, or doctors. Upon request, however, the jails immediately hand the recordings over to prosecutors for use at trial. Since no exceptions are made for incarcerated *pro se* defendants, any time such a defendant has used a jail phone to prepare a defense, the prosecution has been able to access these recordings, unbeknownst to the defendant or the court. It's entirely possible that every time an incarcerated *pro se* defendant has called a potential defense witness, expert, or investigator from a New York jail, a prosecutor has secretly heard every word.

For a long time, this Sixth Amendment issue was known to New York courts but considered hypothetical. Indeed, when the New York Court of Appeals first considered the "unwise and imprudent" practice of prosecutors accessing these

recordings, it found that the Sixth Amendment was not directly implicated because the case involved a defendant who was represented by counsel, and the recordings neither involved counsel nor provided any "insight into possible defense strategies and preparation." *People v. Johnson*, 51 N.E.3d 545, 547–50 (N.Y. 2016). Had the defendant been "representing himself pro se," and had the recordings been used to "gain[] advance knowledge of [his] trial strategy and potential witnesses," it would've been a "major distinction." *Id.* at 551–52 (Pigott, J., concurring) (citation omitted).

Yet, as the decision below shows, when this exact issue arose in petitioner's case, this "major distinction" never manifested. Rather, every level of the New York court system believed that the prosecution's decision to (1) seek out an untold number of recordings between petitioner and his defense witnesses, (2) review them for tactical advantages, (3) and use them to cross-examine defense witnesses, was consistent with the Sixth Amendment. That the prosecution never disclosed this monitoring to the court or petitioner was of no moment. Nor did it matter that the trial prosecutor listened to the calls directly instead of having a "taint team" review them first—like prosecutors elsewhere have done.

By allowing the prosecution to have "'unfettered access'" to every defense-related call, New York seemingly accepted the reality that "many" incarcerated *pro se* defendants may have to choose between "prepar[ing] over a recorded phone line or [ ] not prepar[ing] at all," given the "limited alternative options" available in jail. Pet. App. 8a. And though the court maintained that this constitutional dilemma did not affect petitioner based on the "particular facts of this case"—he was at liberty prior

to trial and thus had "ample time to prepare his witnesses," *id.* at 8a–9a—it is undisputed that he was incarcerated for most of this 6-week trial, prepared his defense using the jail phones, and didn't know the prosecution was listening until he heard the calls being used against one of his witnesses.

As such, to the extent that other New York prosecutors had not already been using similar tactics when facing incarcerated *pro se* defendants, the "facts of this case" now provide them with a roadmap to access this windfall of information. And so long as they stop short of introducing the recordings at trial, neither the courts nor *pro se* defendants will have any idea about this clandestine advantage. The "adversarial process that our system counts on to produce just results," *Strickland v. Washington*, 466 U.S. 668, 696 (1984), will be little more than a pretense, and the Sixth Amendment right "to make a defense as we know it," *Faretta*, 422 U.S. at 818, will no longer apply to those trying to make this defense from a jail in New York.

Finally, this was not the only aspect of the Sixth Amendment that was given short shrift below. On the contrary, New York courts are no longer concerned with ensuring defendants understand the range of possible punishments stemming from their charges before proceeding *pro se*. Rather, courts can simply assume this understanding if, during a *Faretta* hearing, a defendant makes a passing reference to "[his] life" being at stake—like petitioner did. Pet. App. 11a. Treating this constitutional prerequisite so superficially is squarely at odds with this Court's teachings and indicative of the lack of attention afforded to *pro se* litigants in New York. See *Iowa v. Tovar*, 51 U.S. 77 (2004); *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Accordingly, this Court should grant the petition and reverse the New York Court of Appeals' decision.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet reported but is available at 2024 WL 4535812 and reprinted at Pet. App. 1a–12a. The opinion of the New York Appellate Division, Second Department, is reported at 180 N.Y.S.3d 292 and reprinted at Pet. App. 13a–14a.

JURISDICTION

The New York Supreme Court, Queens County, entered judgment on April 21, 2014. The New York Appellate Division, Second Department, affirmed the judgment on December 28, 2022. On July 18, 2023, the New York Court of Appeals granted petitioner leave to appeal and, following merits briefing and oral argument, issued its opinion on October 22, 2024. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. The Right To Self-Representation

The right to represent oneself at trial has never seriously been doubted. Throughout English common law, those accused of crimes were always permitted (and sometimes even required) to represent themselves. See James Fitzjames

Stephen, A History of the Criminal Law of England 341–42 (1883); *Rex v. Woodward*, [1944] 1 All E.R. 159, 160 (under the common law, "no person charged with a criminal offense can have counsel forced upon him against his will").[1]

"The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers," and while they subsequently came to realize "the value of counsel in criminal cases[,] . . . the basic right of self-representation was never questioned." *Faretta*, 422 U.S. at 825–28. The Founders likewise considered self-representation a fundamental right, inherent in "natural law." See 1 Bernard Schwartz, The Bill of Rights: A Documentary History 316 (1971) (referencing Thomas Paine's belief that a defendant "has a natural right to plead his own case" and that the "right of pleading by proxy, that is by a council, [was] an appendage to [that] natural right").

This sentiment was subsequently codified by section 35 of the Judiciary Act of 1789, which was signed into law by President Washington as James Madison was putting the final touches on the Sixth Amendment. When his proposed constitutional amendment was revealed the very next day, it was clear to all that (1) the Sixth Amendment's "right to counsel" was conceived "as an 'assistance' for the accused, to be used at his option, in defending himself," and (2) "the notion of compulsory counsel

[1] The one notable exception was those who appeared before the Star Chamber, a tribunal which "characteristically departed from common-law traditions" and which "has for centuries symbolized disregard of basic individual rights." *Faretta*, 422 U.S. at 821.

[remained] utterly foreign." *Faretta*, 422 U.S. at 831–34.[2]

As history would have it, the right to counsel ended up garnering more attention from this Court and found itself a permanent home within the walls of the Constitution sooner than the right to self-representation. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainright*, 372 U.S. 335 (1963). Indeed, while this Court alluded to self-representation being a "correlative right" to the right to counsel, *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942), it was not until *Faretta* that the right to self-representation became guaranteed by the Sixth Amendment. *Faretta*, 422 U.S. at 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). By this time, most states—including New York—had already established a constitutional right to self-representation. *Id.* at 813–17; see *McIntyre*, 324 N.E2d at 326.

B. The Arrangement Between New York Jails And Prosecutors

For many years, the New York City Department of Correction ("DOC") needed court approval before recording or monitoring any calls placed by pretrial detainees.

In 2008, however, the Rules of the City of New York were changed to provide DOC with the authority to record all calls for security purposes. See 40 R.C.N.Y. 1-10. The only calls exempted and placed on the "Do Not Record" list are those involving

---

[2] It was also clear that the Sixth Amendment would guarantee defendants a "means of obtaining witnesses"—since "compulsory process" was far from a foregone conclusion under English common law. *Washington v. Texas*, 388 U.S. 14, 19–20 (1967); see 9 William Holdsworth, A History of English Law 230–32 (1926).

"[oversight] bodies," "treating physicians," "attorneys," and "clergy." *Id.* at 1-10(h). No exceptions are made for incarcerated defendants who represent themselves and use the phones to speak with possible defense witnesses, experts, or investigators from jail.

All pretrial detainees are informed—in writing, in posted signs, and in a message played at the start of the calls—about DOC recording the calls. The notices stop short of disclosing the fact that, upon request, DOC immediately provides the recordings to prosecutors for use in criminal prosecutions. When this happens, pretrial detainees are not informed; nor are they entitled to a copy of what was given to the prosecution.

The legality of this arrangement between DOC and prosecutors was repeatedly upheld in cases involving represented defendants. In *Johnson*, the New York Court of Appeals found that, although "unwise and imprudent," this arrangement did not violate the Sixth Amendment since calls to attorneys were not recorded and the calls at issue provided no "insight into possible defense strategies and preparation." *Johnson*, 51 N.E.3d at 547–50. It also found that, while the calls were recorded for security purposes, DOC's practice of "automatically disseminating" them to prosecutors for use in "unrelated" criminal prosecutions was not *ultra vires*. *Id.* at 550.

In *People v. Diaz*, 122 N.E.3d 61 (N.Y. 2019), a divided Court of Appeals again upheld the arrangement, this time under the Fourth Amendment. Over a lengthy dissent, it found that pretrial detainees had no expectation of privacy when calling

family and friends, and "there were no additional Fourth Amendment protections that would prevent DOC from releasing the recording[s] to the District Attorney's Office absent a warrant." *Id.* at 66; see also *People v. Vining*, 71 N.E.3d 563 (N.Y. 2017) (permitting the defendant's silence on a recorded jail call to be introduced as an "adoptive admission").

Beyond once noting that it would be a "major distinction" if these recordings were ever used to "gain[] advanced knowledge of the pretrial prisoner's trial strategy and potential witnesses, particularly in situations . . . in which a prisoner is representing himself pro se," *Johnson*, 51 N.E.3d at 551–52 (Pigott, J., concurring) (citation omitted), no New York court had considered the constitutional issue presented by this case.

C. The Factual Background

1. Petitioner Kerbet Dixon, a 47-year-old housing court officer with no prior convictions, was charged, by way of two indictments, with sexually assaulting his three underage nieces and possessing child pornography.

The first indictment charged him with two counts each of "first-degree course of sexual conduct against a child" and "endangering the welfare of a child" (for the first and second complainant); one count each of "third-degree rape" and "third-degree sexual abuse" (for the third complainant); and 300 counts of child pornography, divided into 150 counts of "promoting" and 150 counts of "possessing." Pet. App. 2a–3a. The second indictment added 334 counts of "possessing" child pornography after

more images were retrieved from unallocated computer disk space.[3] *Id.* at 3a.

All told, petitioner's charges across both indictments contained 641 counts, spanning 323 pages. Many had temporal components: the course of sexual conduct charges required two-plus sexual acts across at least three months; the "promoting" pornography counts used the images' acquisition dates; and the "possessing" pornography counts used the arrest date. This combination of charges triggered a statutory maximum of up to 40 years' incarceration under New York law.

2. During the 30 months of pretrial proceedings, petitioner was heavily involved in preparing his defense. With the help of friends and family, he posted bail, remained at liberty, and initially retained counsel. As time passed, however, he could no longer afford counsel and was twice assigned indigent counsel. See *id.*

After working with his most recent court-assigned attorney for over six months, petitioner requested that he be assigned "a different lawyer," adding: "He's a nice guy. I'm not saying I've any malice towards him or anything. He's just not what I need for this case. This is my life on the line, and I need someone who is actually going to represent me." Supp. App. 3a–5a. When the court refused, petitioner asked whether he had "a right to proceed pro se." *Id.* at 8a. Following a brief recess, during which petitioner spoke to his family about representing himself, the court conducted a *Faretta* colloquy.

Though the court initially doubted the sincerity of petitioner's *pro se* request,

---

[3] Though the images neither depicted the complainants nor were possessed at the time of the alleged assaults, all counts were tried together, over petitioner's objection.

it believed that petitioner was the type of person who was "going to have differences" with any lawyer and that "[he], actually, would know the case better than the lawyer would." *Id.* at 10a–11a. After confirming that petitioner had graduated high school and worked as a housing officer in civil court for twenty years, the court addressed the "very serious" downsides of self-representation, stressed the importance of counsel in the adversarial system, and warned that petitioner was going to be "in over [his] head" against a seasoned prosecutor. *Id.* at 12a–19a. It then relieved counsel and permitted petitioner to represent himself, all while likening it to "operat[ing] on [your]self" instead of "get[ing] a doctor." *Id.* at 19a–20a.

At no point during the *Faretta* colloquy did the court address the range of allowable punishments or discuss any of the 641 charges petitioner faced. And rather than explaining that, if remanded, his ability to prepare for trial outside of the earshot of the prosecution would be compromised, the court instead told him the opposite—"*I'm going to treat you like a lawyer*," "*You're in the position of being an attorney*," "*You're going to be like an attorney in the courtroom*," "*I'm going to hold you to the same standards [as counsel] at trial*," and "*You're going to have to conduct yourself as an attorney*." *Id.* at 12a–16a (emphases added).

3. As trial approached, the court's promise to treat petitioner as a lawyer fell by the wayside. After petitioner filed a motion seeking the trial judge's recusal—because he refused to provide petitioner with enough time to work with a defense computer expert and appeared overly familiar with the prosecutor—the judge threatened to "gag" petitioner, held him in contempt, and remanded him. When

petitioner explained that a remand would "destroy" his ability to continue representing himself since he would lose access to his files and jury selection was about to begin, the court offered to lift the remand if petitioner "purged" himself by apologizing.[4] Petitioner apologized and was released the next day.

One week into trial, petitioner was remanded again, and he remained incarcerated for the remainder of his six-week trial.[5] He objected to the remand at every opportunity, insisting that it compromised his ability to "prepare his witnesses for trial because he was in jail with no access to his files or witnesses." Pet. App. 4a. He also moved for a mistrial, or alternatively an adjournment, so he could have sufficient time to prepare from jail. The court denied both applications, telling him instead to "work within these confines." Supp. App. 21a–23a.

4. Three weeks into his remand, petitioner presented his first of 9 defense witnesses. His defense centered on showing that the pornography had been inadvertently downloaded by many of the other family members who used the devices and that the three complainants had been coached by their parents into making false allegations because of a long-running, bitter inter-family feud.

---

[4] To be sure, petitioner's recusal motion contained various unsupported assertions that were better left unsaid. However, he also recounted how, when off the record, the judge and prosecutor would gossip about petitioner's daughter (a professional athlete), and the judge would refer to the prosecutor using a nick-name—all of which petitioner found unnerving. Rather than denying these allegations, the court simply insisted that it never meant to "humiliate" petitioner.

[5] This remand, which occurred on February 7, 2014, was ordered after a blog published the name and photos of one of the complainants the day before she was scheduled to testify. Pet. App. 4a. Though petitioner was not the author—the blog kept updating while he was incarcerated—the court nevertheless believed that he supplied the blog with this confidential information.

While cross-examining petitioner's computer expert, the prosecution revisited an issue it had explored with its own witnesses—namely, the recovery of a 10 gigabyte "TrueCrypt" encrypted hard drive from petitioner's home. Pet. App. 2a, 4a. So big was this hard drive that its contents would fill the back of 10 pickup trucks; so secure, neither the FBI, Secret Service, nor Homeland Security could open it. Though it formed the basis of no charges, the prosecution wanted the jury to think that petitioner was a savvy computer user who potentially had even more images.

In response to the prosecution's questions, the defense expert agreed that only a "fairly sophisticated computer user" could use TrueCrypt but maintained that petitioner did not fit this description. Supp. App. 24a. On the contrary, based on their "multiple conversations," the defense expert assured the jury that petitioner was "unaware of what TrueCrypt was," "doesn't understand" how it worked, and "did not have the password." *Id.* at 24a–25a.

When it came time to cross-examine the next defense witness, the prosecution directed her to "a phone conversation she had with [petitioner] the week before," while he remained incarcerated. Pet. App. 5a. After petitioner's objections were overruled, the witness admitted that, "based on the content of that conversation, [petitioner] was not only familiar with TrueCrypt but also that he gave her the password for it over the phone." *Id.* The court also permitted the prosecution to play a portion of the conversation on re-cross examination, during which petitioner and

his witness were discussing other aspects of the defense case.[6] See Supp. App. 26a–33a.

Realizing what had happened, petitioner repeatedly voiced his concerns—"It's very hard to talk to my witnesses if he's listening in on my conversations" and "phone calls that I am making from jail." *Id.* at 34a–38a. He also pointed to how the prosecutor was seemingly able to know the identity of defense witnesses in advance, all of which created an "unfair advantage":

> I want to object to the District Attorney listening on the phone calls that I'm making from jail . . . He's listening to me talk to my witnesses while I'm talking to them and I notice that he has files, especially when [one of the defense witnesses] came in, he already had files and things set and he doesn't even know this gentleman. He had all these things set so he has an unfair advantage of listening to me talk to my witnesses and I don't think that's fair because if I was in his office while he's talking to his witnesses that wouldn't be fair. So I want to put that objection on the record. *Id.* at 36a–37a.

While the trial court brushed aside these concerns because petitioner "had years to prepare this case" and was afforded some private time to speak with his witnesses in the courthouse, petitioner remained steadfast: "That's five minutes. I'm talking about [what] I would like to talk on the phone. I'm sure [the prosecutor] doesn't speak to his witnesses for five minutes, your Honor." *Id.* at 35a. The court then ruled that calls from jail were not private and pointed to how inmates are advised about the monitoring "ahead of time." *Id.* at 37a–38a.

---

[6] The prosecutor recounted all of this "important testimony" during his summation and argued that it proved petitioner was not the "aww shucks computers kind of guy that he wants you to think he is." Supp. App. 39a–40a.

5. Following a week of deliberations, multiple readbacks, and two *Allen* charges, the jury returned a partial verdict. It convicted petitioner of all 634 pornography counts but reached a verdict for "only one felony sexual assault count." Pet. App. 6a–7a. Petitioner subsequently "entered an *Alford* plea to the deadlocked counts in exchange for concurrent time." *Id.* at 7a.

D. The Decision Below

After the intermediate appeal court affirmed petitioner's conviction and summarily disposed of petitioner's Sixth Amendment claims, *id.* at 13a–14a, the New York Court of Appeals granted petitioner leave to appeal but affirmed on the merits.

1. Despite correctly recognizing that "an incarcerated pro se defendant has a right to prepare and present a defense no less than any other defendant," the court held that "the People's monitoring of the telephone calls [petitioner] made to his trial witnesses from jail" did not violate the Sixth Amendment. *Id.* at 1a, 8a.

In reaching this conclusion, the court fully appreciated this constitutional dilemma. Indeed, it acknowledged that (1) the ability to "communicate confidentially with potential witnesses is essential . . . for an incarcerated defendant exercising the right to self-representation," and (2) *pro se* defendants "who use jail telephones to prepare their witnesses and discuss trial strategies may not fully appreciate that their conversations may be divulged to the prosecution." *Id.* at 8a. It even noted that—given the "limited alternative options" to prepare from jail—the *status quo* in New York puts "many" *pro se* defendants in "a difficult position: prepare over a recorded line or do not prepare at all." *Id.*

Rather than taking the seemingly obvious next step, or even remitting the case to find out what else the prosecution had heard, it instead insisted that the "particular facts of this case" did not violate the Sixth Amendment, since petitioner was at liberty prior to trial (during which he had "ample time to prepare his witnesses") and since his witnesses were apparently free to visit him in jail. *Id.* at 8a–9a. Likewise, while the court agreed that the revelation and use of these recordings creates a "chilling effect" that "threatens" a defendant's ability to continue preparing a defense, the fact that this monitoring was exposed towards the end of trial rendered petitioner's constitutional concerns "negligible." *Id.* at 9a.

2. The court also found that petitioner had been sufficiently warned about the pitfalls of self-representation during the *Faretta* colloquy. Though the record contained no discussion about the charges and range of possible punishments, petitioner's understanding of these complex issues could be inferred from the fact that he worked as a housing court officer and "mentioned twice during the [*Faretta* colloquy] that his 'life' was at stake." *Id.* at 11a.

For support, the court cited its decision in *People v. Blue*, No. 73, 2024 N.Y. Slip Op. 05175, 2024 WL 4535819 (N.Y. Oct. 22, 2024), which was issued earlier that same morning. Pet. App. 11a. There, over a lengthy dissent, the majority of the court held that a *Faretta* colloquy should remain "flexible," that it need not contain a "specific recitation" of the sentencing exposure, and that, based on the record, the defendant seemingly knew "he likely would serve a lengthy prison sentence if convicted." *Blue*, 2024 WL 4535819, at *3–5.

By contrast, the dissent in *Blue* maintained that "[t]here is no way around the Supreme Court's mandate that a constitutionally effective waiver [of counsel] requires that a defendant understand the range of punishments. *Id.* at *8–11 (Rivera, J., dissenting) (citing *Tovar*, 541 U.S. at 81). It further faulted the majority for simply "assum[ing] that, under the circumstances, the defendant *probably* appreciate[d] the risks of going pro se" and stressed that, "for the waiver to be valid, the court must create a record that establishes defendant's knowledge of those risks, including the defendant's sentencing exposure." *Id.* at *9 (Rivera, J., dissenting). To the extent the majority believed that discussing potential sentences was "simply too much to expect and somehow too complex a calculus" for a court to perform during a *Faretta* hearing, "then how can we expect a defendant to be more adept at determining their sentencing exposure." *Id.* at *12 (Rivera, J., dissenting).

Petitioner now asks this Court to review these Sixth Amendment issues to ensure that those who choose to proceed *pro se* in New York do so with "eyes open" and are afforded an adversarial proceeding in which they can—as both a constitutional and practical matter—"make a defense as we know it." *Faretta*, 422 U.S. at 818, 835 (citation omitted).

REASONS FOR GRANTING THE PETITION

I. Allowing The Prosecution Unfettered And Undisclosed Access To An Incarcerated *Pro Se* Defendant's Trial Preparation Phone Calls Undermines The Constitutional Right To Self-Representation And Is Fundamentally Inconsistent With The Adversarial Process

A. The Right To Represent Oneself In An Adversarial Proceeding Assumes An Ability To Prepare A Defense Outside The Earshot Of The Prosecution

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). "When a true adversarial criminal trial has been conducted . . . the kind of testing envisaged by the Sixth Amendment has occurred." *United States v. Cronic*, 466 U.S. 648, 656 (1984). "But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656–57.

Ensuring that criminal proceedings retain their adversarial character does not come easily. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process"). Indeed, there invariably is a wide gulf in resources between the defense and the prosecution that is inherently at odds with an adversarial proceeding—a fact as true today as it was at Founding. See *Kaley v. United States*, 571 U.S. 320, 357 (2014) (Roberts, C.J., dissenting) (the accused "faces a foe of powerful might and vast resources, intent on seeing him behind bars").

Rather than prescribing total parity between both sides—or allowing trials to simply "descend to a gladiatorial level," come what may, *Kyles v. Whitley*, 514 U.S.

419, 439 (1995)—the Sixth Amendment accounts for this disparity and protects the adversarial process by guaranteeing defendants a right to "procedural fairness." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); see *Strickland*, 466 U.S. 684–85 ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"); *United States v. Morrison*, 449 U.S. 361, 364 (1981) ("The Sixth Amendment . . . is meant to assure fairness in the adversary criminal process" (citation omitted)); *Herring*, 422 U.S. at 858 (the Sixth Amendment protects "the opportunity to participate fully and fairly in the adversary factfinding process").

Yes, a government may equip prosecutors with significant means and resources; but the Sixth Amendment equips defendants with a right to "compulsory process for obtaining witnesses in [their] favor"—thereby ensuring that their "version of the facts as well as the prosecution's [can be presented] to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 18–19 (1967). As such, before accepting that a particular outcome was the product of our adversarial process, we must be "certain that [the defense] ha[d] access to the raw materials integral to the building of an effective defense," *Ake*, 470 U.S. at 77, since it is the "equal ability of defense counsel to seek and interview witnesses himself . . . [that] remove[s] any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment." *United States v. Ash*, 413 U.S. 300, 318–19 (1973); *cf. Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (discussing ways the Constitution seeks to achieve "the balance of forces between the accused and his accuser").

Nothing in the Sixth Amendment, however, suggests that defendants who represent themselves are entitled to any less of an adversarial process than those represented by counsel. On the contrary, as *Faretta* made clear, the Sixth Amendment's "right in an adversary criminal trial to make a defense as we know it . . . is given *directly to the accused*." *Faretta*, 422 U.S. at 818–19 (emphasis added). A defendant's right to self-representation, therefore, "plainly encompasses" certain "core" rights, including the right to "have his voice heard" and to "preserve actual control over the case he chooses to present to the jury." *McKaskle v. Wiggins*, 465 U.S. 168, 174, 178 (1984).

To be sure, incarcerated *pro se* defendants face certain practical constraints. While they are expected to conduct themselves "just like a lawyer"—a sentiment repeatedly conveyed to petitioner throughout the *Faretta* hearing—their *pro se* status is but a temporary legal fiction and does not come with the antecedent benefits and privileges of an actual lawyer. As such, consistent with jail safety and security, their movements are restricted, as is their privacy. Their ability to work on their defense at a given time, in a particular way, or with a particular person will depend on the jail's facilities and schedules. And even their presence in the correct courtroom at the correct time depends on factors outside of their control. Challenging as they may be, nobody would seriously contend that these constraints are inherently incompatible with an adversarial process.

By equal measure, a jail's decision to record a *pro se* defendant's trial preparation calls, as part of its security procedures and with adequate notice, is not

something that should jeopardize the adversarial nature of a criminal proceeding. On the contrary, since a jail is not their adversary at trial, since the recordings are for security purposes, and since there are "limited alternative options" to prepare, Pet. App. 8a, there is no reason why a *pro se* defendant shouldn't be able to use these calls to "control the organization and content" of their defense, *McKaskle*, 465 U.S. at 174, safe in the knowledge that, by doing so, they are meaningfully participating in the adversarial process.

But when these recordings are provided to the prosecution—the actual adversary—unbeknownst to either the *pro se* defendant or the court, and when the prosecution uses these recordings to gain an unfair tactical advantage at trial, the outcome can no longer be considered a product of our adversarial system. Indeed, a criminal proceeding where the State knows what a *pro se* defendant will do and say, because it has secretly accessed his preparation materials, would likely be unrecognizable to our Founders. Worse, it would have reminded them of the continental inquisitorial system that they so adamantly strived to avoid. See *Miranda v. Arizona*, 384 U.S. 436, 477 (1966) (recognizing the ways "our adversary system of criminal proceedings . . . distinguish[ed] itself at the outset from the inquisitorial system recognized in some countries").

Never mind the historical notions of an adversarial proceeding, ask anyone on the street to define an adversarial contest and they will surely agree that one side secretly monitoring the other side's preparation should be off-limits. Those who followed last year's Olympics may point to how the Canadian women's soccer team—

the reigning gold medalists, no less—were properly sanctioned after their coach secretly flew a drone over their rival's practice sessions and recorded their tactics and strategies.[7] Fans of baseball would surely recall the disciplinary measures taken against the Houston Astros after their long suspected practice of "sign stealing"—which involved using high-tech cameras and low-tech banging on trash cans to alert the batter to the opposing pitcher's strategy—was finally exposed.[8] If the public is unwilling to tolerate one side having an unfair secret advantage in sports, it's hard to see why they would approve of the State resorting to such tactics in a criminal trial. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring) ("A criminal trial is not a private matter; the public interest is so great"); cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) ("What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, [and] the party with the most resourceful lawyer can play it to win").

Accordingly, if the Sixth Amendment truly provides *pro se* defendants with "the right in an adversarial criminal trial to make a defense as we know it," *Faretta*, 422 U.S. at 818, it must protect their ability to make this defense outside the earshot

---

[7] Mark Puleo and Meg Linehan, *Canada's Olympic soccer spying scandal explained: What we know, who's involved and what's next*, THE ATHLETIC (Jul. 31, 2024), https://www.nytimes.com/athletic/5657110/2024/07/31/canada-soccer-olympic-spying-scandal-explained/ (last visited January 21, 2025).

[8] Ken Rosenthal and Evan Drellich, *The Astros stole signs electronically in 2017 — part of a much broader issue for Major League Baseball*, THE ATHLETIC (Nov. 12, 2019), https://www.nytimes.com/athletic/1363451/2019/11/12/the-astros-stole-signs-electronically-in-2017-part-of-a-much-broader-issue-for-major-league-baseball/ (last accessed Jan. 21, 2025).

of the prosecution.

B. New York's Position Is Starkly At Odds With How Other Jurisdictions Have Handled Similar Prosecutorial Tactics

As a result of the decision below, New York has become the first jurisdiction to hold that, consistent with the Sixth Amendment, the prosecution can (1) have unfettered access to an incarcerated *pro se* defendant's trial preparation calls, (2) indiscriminately review them for tactical advantages, and (3) use them to cross-examine defense witnesses—without ever needing to notify the court or the defendant. Indeed, even when the prosecution has admittedly listened to these trial preparation calls, New York courts are under no obligation to find out what the prosecution has actually heard. A conviction in New York, just like petitioner's, can simply be affirmed without anybody (other than the prosecution) ever knowing. No other jurisdiction has adopted this radical approach.

For instance, when the Third Circuit considered this issue in *United States v. Mitan*, 499 F. App'x. 187 (3d Cir. 2012), it handled the matter very differently. Rather than setting a precedent for unfettered and undisclosed access, the Third Circuit carefully scrutinized what steps had been taken by the Government and what information it had learned—all of which was made possible by an extensive factual record created below. As such, the Third Circuit could see that, upon learning of the defendant's *pro se* status, the Government "stopped reviewing the tapes," "sought advice from the DOJ's Professional Responsibility Advisory Office," and "arranged for a 'taint team' to conduct a preliminary review of the recorded calls." *Id.* at 190. And though the Government's subsequent actions indicated a "lack of candor"—like when

The refusal to have the prosecution ever divulge what it had heard also sharply contrasts with what courts do when a prosecutor has overheard conversations between defendants and their attorneys—an issue frequently considered by this Court. *E.g.*, *Morrison*, 449 U.S. at 363–63; *Weatherford v. Bursey*, 429 U.S. 545 (1977); *O'Brien v. United States*, 386 U.S. 345 (1967); *Black v. United States*, 385 U.S. 26 (1966). Rather than allowing courts to adopt a hear-no-evil-see-no-evil approach when a prosecutor has invaded the defense camp, this Court demands that lower courts do the exact opposite.

As it explained in *Weatherford*, "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Weatherford*, 429 U.S. at 552. A court is, therefore, expected to conduct a factual inquiry into the nature and extent of the prosecution's advantage so it can determine whether the Sixth Amendment has been violated and, if so, craft a suitable remedy. See *Morrison*, 449 U.S. at 365 ("Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances"). Such an inquiry may depend on various "elements," including (1) whether any witness "testified at [ ] trial as to the conversation," (2) whether "any of the State's evidence originated in these conversations," (3) whether the "overheard conversations [had] been used in any other way to the substantial detriment of [the defendant]," and (4) whether conversations included details "about trial preparations." *Weatherford*, 429 U.S. at 554–55.

Though this inquiry does not look the same in every jurisdiction, and "federal courts are divided on important aspects of this analysis," *State v. Robinson*, 209 A.3d 25, 47–50 (Del. 2019), the starting point remains clear: the State must, at the very least, disclose the full content of what it overheard. Failing to do so has been met with severe consequences.[10]

Accordingly, when set against this backdrop, New York's decision to affirm petitioner's conviction and dismiss his Sixth Amendment concerns without even knowing the full extent of what the prosecution heard is radically out of step with how other courts approach these constitutional issues.

C. Monitoring A *Pro Se* Defendant's Trial Preparation Calls Can Result In An Untold Number Of Tactical Advantages

From what little we know, listening to petitioner's trial preparation calls proved immensely helpful to the prosecution. Though petitioner was only incarcerated once trial began, as opposed to the entire pretrial period, it still provided

---

[10] For example, a Florida district court recently asked the Eleventh Circuit to "return jurisdiction to it," after ethics lawyers in the Justice Department uncovered tactical advantages that the Government had shielded from the court. See *United States v. Pisoni*, 15 Cr. 20339 (DPG), ECF No. 767 (S.D. Fla. Nov. 18, 2022) (Pet. App. 17a–36a). Prior to trial, the court learned that a co-defendant, who had secretly begun cooperating with the Government, had continued attending "joint defense agreement" meetings. Pet. App. 18a–19a. Given the serious Sixth Amendment issues, the court conducted a series of evidentiary hearings into what was discussed and whether the Government derived any benefit—ultimately accepting the Government's "repeated" representations that it "did not know about the meetings." *Id.* at 20a–21a. In truth, the Government had "personally approved each of [the] meetings" and had received huge amounts of defense-related materials and notes. *Id.* at 21a–22a. In vacating the conviction, the court summarized this "fairly straightforward" issue as follows: "(1) the prosecution team acted improperly by invading the defense camp; (2) they lied to the Court about it; and (3) the lies affected the Court's rulings and, likely, the jury's verdict." *Id.* at 35a–36a.

the prosecution with enough time to monitor the calls, uncover helpful information, and explicitly use it to cross-examine a defense witness and obtain "important" admissions. Supp. App. 40a. That fact alone should trouble any court serious about upholding a *pro se* defendant's Sixth Amendment rights.

Given the prosecution's decision to eschew any taint team, provide no notice, and use the calls at trial, it's fair to assume that the purpose of monitoring the calls was to gain a strategic advantage. But since no court saw fit to ask the prosecution what else it had heard, there is no way to tell how else the recordings helped its case. Perhaps the prosecution overheard petitioner preparing a defense witness to testify—maybe running through some mock questions and answers or discussing potentially sensitive aspects of their testimony. Maybe the prosecution overheard a defense computer expert admit to certain limitations in their analysis or gaps in their expertise. The prosecution might have even stumbled upon a conversation with a potential witness who no longer wanted to testify on petitioner's behalf for reasons it could exploit. Imagine how overhearing these types of conversations may have helped the prosecution undermine the defense case.

Nor need the potential advantages be limited to attacking the defense case. Equally possible, the prosecution might have overheard a conversation that changed how it approached its own case. For instance, if it knew that a defense witness planned to testify about an important issue, it may have been able to use one of its own witnesses to preempt the issue. Or, if it knew that petitioner planned to cross-examine one of its witnesses about a particular issue, perhaps it tailored its direct

examination to avoid opening the door—lest petitioner land some punches. It's even possible that the prosecution might have known about a defense witness's narrow window of availability and had that in mind as it determined the cadence of its own case.

At bottom, without knowing what exactly the prosecution heard, neither these tactical advantages, nor the myriad of other potential benefits, can be ruled out. What may appear on their face to be a normal series of questions or legal arguments could become a lot less normal, and a lot more malignant, if they were inspired by secret intrusions into the defense camp. Until the true extent of the prosecution's knowledge is exposed, no part of this record should be free from scrutiny.

D. This Case Is A Uniquely Suitable Vehicle

Granting review in this case is the only way to ensure that the right to self-representation in New York does not become unmoored from our common law system of adversarial testing.

If the state court ruling is left intact, prosecutors throughout New York can continue to secretly listen whenever a remanded *pro se* defendant, limited by the lack of alternatives, discusses their trial preparations using jail phones. And since there's no requirement that prosecutors provide any notice, divulge what they heard, or seek any court approval, nobody will be the wiser. Indeed, the only reason we even know about this Sixth Amendment issue is because the trial prosecutor here did what no prosecutor had done before and used the recordings to cross-examine defense witnesses—hence why this case is a uniquely suitable vehicle. If future prosecutors

opt to be a little less obvious, then they can continue reaping the clandestine tactical advantages without triggering any judicial review from a New York court. This may be the only opportunity for this Court to address this Sixth Amendment issue.

The legitimacy of every past, present, and future New York case involving a remanded *pro se* defendant is on the line (and the prosecutors are listening).

II. This Court Should Also Correct New York's Clear Departure From This Court's Cases Requiring That Defendants Understand The Nature Of Their Charges And Potential Sentencing Exposure Before Waiving Counsel

Before permitting any defendant to proceed *pro se*, the Sixth Amendment "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver [of counsel] by the accused." *Zerbst*, 304 U.S. at 465. Absent such a determination, it cannot be said that a defendant's decision to proceed *pro se* was "made with eyes open." *Adams*, 317 U.S. at 279.

Rather than simply warning defendants about the "intricacies of the hearsay rule," or any number of other "technical legal" concepts, courts must instead ensure that defendants understand the true "dangers and disadvantages" of proceeding *pro se* and that they create a "record" of this understanding. *Faretta*, 422 U.S. at 835–36. As aptly put by Justice Black, a waiver of counsel must be preceded by a "penetrating and comprehensive examination" into whether the defendant appreciates "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole

matter." *Von Moltke*, 332 U.S. at 723–24 (plurality).

Though admittedly not enough to carry the day in *Von Moltke*, Justice Black's plurality opinion has been well received in the decades that followed. In addition to being cited favorably by this Court in *Faretta*, it formed the basis of this Court's holding in *Tovar*, 541 U.S. at 81 ("We hold that . . . the Sixth Amendment . . . is satisfied when the trial court informs the accused of the *nature of the charges* against him . . . and of the *range of allowable punishments*" (emphasis added)).

Many courts nationwide have followed suit. *E.g.*, *Herrington v. Dotson*, 99 F.4th 705, 717 (4th Cir. 2024) ("The trial court must simply assure itself that the defendant *knows the charges* against him, the *possible punishment* and the manner in which an attorney can be of assistance." (citation omitted) (emphasis added)); *United States v. Taylor*, 21 F.4th 94, 103 (3d Cir. 2021) ("[A]t a minimum, the [*Faretta*] inquiry must address whether the defendant *understands the nature of the charges*, the statutory offenses included within them, and the *range of allowable punishments* thereunder" (citation omitted) (emphasis added)); *United States v. Hansen*, 929 F.3d 1238, 1249–50 (10th Cir. 2019) (*Faretta* hearing must address the "topics of inquiry [that] stem from Justice Black's plurality opinion in *Von Moltke* . . . [and] may be aptly referred to as the '*Von Moltke* factors.'" (citation omitted)); *Arrendondo v. Neven*, 763 F.3d 1122, 1130–31 (9th Cir. 2014) ("The Supreme Court *has* clearly established that a defendant must have a general understanding of the potential penalties of conviction before waiving counsel to render that waiver valid." (emphasis in original)).

Though the precise contours of the inquiry will depend "upon the particular facts and circumstances" of each case, *Zerbst*, 304 U.S. at 464, it need not be a difficult task for courts to perform. Indeed, a court could start the *Faretta* hearing with a simple question—"do you understand the nature of your charges and the potential sentence you face?" If the defendant answers "yes," the court could ask the defendant to explain their understanding on the record. If the answer is "no" (or if the defendant's explanation leaves a lot to be desired), then the court can explain these issues on the record. Both approaches would result in the same outcome: a "record [which] will establish that '[the defendant] knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 279); see *United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999) (approving of a *Faretta* colloquy in which the defendant "received a realistic picture" regarding these issues).

Since petitioner's *Faretta* hearing contained no discussion whatsoever of these issues, there is no way a court can confirm whether he sufficiently appreciated the nature of his charges and potential sentencing exposure. Likening self-representation to performing "surgery" on oneself, or repeatedly referencing petitioner's job as a housing court officer, Supp. App. 12a–19a, were plainly insufficient to satisfy this Court's mandate—especially since petitioner, who had no prior convictions, was now facing a 323-page indictment containing 641 charges that implicated a specific statutory sentencing scheme.

Lacking any explanation from the court, the only way petitioner could have learned about his potential sentencing exposure was by navigating through New York

Penal Law § 70.30, a byzantine 3,200-word statute complete with 43 sections and subsections. Indeed, as far as the court was concerned, petitioner could simply find Section 70.30 on his own; recognize that his sentence would be controlled by Section 70.30(1); realize that the first four subsections in Section 70.30(1)(a),(b),(c),(d) would not apply; and focus on the fifth subsection, Section 70.30(1)(e). Having made it this far, he could then wade through the sixteen subsections within Section 70.30(1)(e) before stopping at Section 70.30(1)(e)(v)—because he would presumably know that his case would involve the specific combination of a determinate and indeterminate sentence, consecutively imposed for two or more violent felonies, one of which was a Class B violent felony. Now on the home stretch, he could surely read Section 70.30(1)(e)(v)'s two short subsections and conclude that, under either one, his sentence would be subjected to a 40-year statutory cap. *See* N.Y.P.L. §§ 70.30(1)(e)(v)(A),(B).

Nothing in petitioner's career as a housing court officer, and nothing in the court's *Faretta* inquiry, inspired any confidence in petitioner's ability to perform this complicated task. And though he admittedly mentioned that his "life was at stake" during the *Faretta* colloquy—a fact the New York Court of Appeals considered dispositive, Pet. App. 11a—an aphorism cannot excuse the failure to conduct this constitutionally required inquiry.

Accordingly, since neither the nature of the charges nor range of potential punishments were discussed during petitioner's *Faretta* colloquy, this Court breaks no new ground by concluding that petitioner's waiver of counsel was not made "with

eyes open." See *Tovar*, 541 U.S. at 81; *Faretta*, 422 U.S. at 835–36; *Von Moltke*, 332 U.S. at 723–24 (plurality); *Adams*, 317 U.S. at 279; *Zerbst*, 304 U.S. at 465.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

PATRICIA PAZNER
DAVID FITZMAURICE
Counsel of Record
HANNAH KON

APPELLATE ADVOCATES
111 John Street
9th Floor
New York, NY 10038
(212) 693-0085
dfitzmaurice@appad.org

Counsel for Petitioner

By: David Fitzmaurice

JANUARY 2025