No.

In the Supreme Court of the United States

ZACHARIAH BRIAN WRIGHT,
PETITIONER,

v.

STATE OF INDIANA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Faretta* v. *California*, this Court held that the Sixth Amendment protects the "fundamental" right of a criminal defendant to "conduct his own defense." 422 U.S. 806, 817, 836 (1975). In order to exercise this right, a defendant must "unequivocally" assert his intention to represent himself and "knowingly and intelligently forgo [the] traditional benefits associated with the right to counsel." *Id.* at 835 (internal quotation omitted). This Court has emphasized that a defendant's lack of legal skill has "no bearing" on whether he may represent himself. *Godinez* v. *Moran*, 509 U.S. 389, 400 (1993). Even if a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored." *Faretta*, 422 U.S. at 834. State high courts and the federal courts of appeals, however, have devised conflicting legal standards for unequivocal invocation and intelligent waiver.

The questions presented are:

1. Whether a defendant's otherwise clear invocation of his right to represent himself becomes equivocal when he prefers representation by an attorney who cannot or will not represent him.

2. Whether courts may override a defendant's right to represent himself in a high-penalty case out of fear that he will be unable to represent himself well.

RELATED PROCEEDINGS

Indiana Supreme Court:

Wright v. *State*, 168 N.E.3d 244 (Ind. 2021)

Indiana Superior Court for Boone County:

State v. *Wright*, No. 06D01-1706-MR-1078 (Mar. 12, 2018, order denying relief upon notice to the court) (Nov. 7, 2019, finding of guilt after bench trial) (Jan. 3, 2020, sentence)

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OPINIONS BELOW

The opinion of the Indiana Supreme Court (App., *infra*, 1a) is reported at 168 N.E.3d 244 (2021). The trial court's Finding of Guilt After Bench Trial (App., *infra*, 56a), Sentence (App., *infra*, 58a), and Order Denying Relief Upon Notice to the Court (App., *infra*, 77a) are unreported.

JURISDICTION

The Indiana Supreme Court issued its opinion on May 4, 2021. This Court's orders of March 19, 2020, and July 19, 2021, have the effect of extending the deadline for any certiorari petition to 150 days after the date of the lower court's judgment when the lower court's judgment issued after March 19, 2020 and before July 19, 2021. These orders extend the deadline for filing a certiorari petition in this case to October 1, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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.

U.S. Const. amend. VI.

STATEMENT

"[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself." *Faretta* v. *California,* 422 U.S. 806, 817 (1975).

The rights to self-representation and to counsel complement one another. The Founders "[n]ever * * * imagined" that one was "inferior" to the other. *Faretta*, 422 U.S. at 832. But, because the exercise of one necessarily forecloses the exercise of the other, a defendant must both "unequivocally" invoke the right to self-representation and "knowingly and intelligently" waive the right to counsel. *Id.* at 835 (quotation omitted). To waive counsel, a defendant must understand the right he is giving up but does not himself need to "have the skill and experience of a lawyer." *Ibid.*

A. State Trial Court Proceedings

In 2017, Mr. Wright was charged with committing a string of violent offenses. App., *infra*, 3a. After a bench trial, the state court found him guilty of murder, among other crimes and sentenced him to life in prison without parole (LWOP) plus 18 years. App., *infra*, 7a.

At the commencement of proceedings against him, Mr. Wright requested and received a court-appointed attorney. App., *infra*, 4a. When the state decided to

seek the death-penalty,[1] however, the court removed his original counsel and appointed new, capital-qualified counsel.[2] *Ibid*. Mr. Wright quickly became dissatisfied with his capital-qualified counsel and requested new counsel in November 2017. *Ibid*.

In January 2018, two years before trial, Mr. Wright "notified the court of his preference to represent himself." App., *infra*, 4a. On multiple occasions, Mr. Wright reminded the court in writing that he wanted to fire his capital-qualified counsel and proceed pro se. App., *infra,* 4a, 30a.

To ensure compliance with *Faretta,* the trial court engaged in "an extended colloquy" with Mr. Wright in February 2018. App., *infra*, 4a. In the exchange, Mr. Wright explained his position to the court:

> Q. Okay. So I guess I'm trying to understand what your position is here. Are you asking to act as your own attorney or—
>
> A. —yes—
>
> Q. —or is it something in the nature that you just would like—
>
> A. —I do not wish to have a State-appointed attorney anymore at this time.

---

[1] The state later withdrew its request for the death penalty and requested LWOP. App., *infra*, 7a.

[2] Under Indiana state law, an indigent defendant must be represented by capital-qualified counsel in all cases in which the state seeks the death penalty. State law details the required qualifications for such an attorney. See Ind. R. Crim. P. 24(B).

Q. Is it these attorneys in particular or that you just would like any other attorneys?

A. I would like no attorney.

Q. Okay. And so at the beginning of this case, you got a full advisement of your rights and I explained to you the right to an attorney.

A. Uh-huh, that's correct.

Q. That if you couldn't afford one, one would be provided for you. I concluded you couldn't afford an attorney. I presume you can't afford an attorney, you don't have the means; is that correct, to hire an attorney?

A. That's correct.

Q. So at that time you asked me to appoint an attorney for you, and I did. I appointed Mr. Reid. Do you remember Mr. Reid?

A. Yes.

Q. You got along okay with Mr. Reid didn't you?

A. Yes.

Q. Okay. So what's changed, then, since then? At one point it seemed like you wanted to have an attorney and then now it seems something seems to be different.

A. What's changed is I believe the attorneys' [*sic*] believed they were acting in my best interest, which wasn't my best interest because my only interest was for a fast and speedy. And if I have an attorney that refuses to give me what I want and is

> violating my constitutional rights, I do not believe, you know, I should have a State-appointed attorney anymore. I was satisfied with Allan Reid's work, but you charged me with the death penalty, so he could not be on my case anymore.
>
> Q. So it's not that you don't want some other attorney, because you understand—
>
> A. —Well, I believe an attorney paid by the court is not going to listen to anything I have to say and is not going to give me what I want, because I do not pay them.
>
> Q. And what sort of information have you developed since I had an attorney appointed for you and have had attorneys appointed for you that's caused you to have this difference of conclusion? What's, what's changed?
>
> A. They refuse to give me access to my rights.
>
> Q. Okay. And so do you want me to get you somebody else or you—
>
> A. —I wish to go pro se—
>
> Q. —to handle it yourself?
>
> A. Uh-huh.

App., *infra*, 51a-52a (Slaughter, J., dissenting).[3]

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[3] Under Indiana law, the transcript of the *Faretta* hearing is sealed. See Ind. Access to Ct. Recs. R. 5(B). The complete transcript has been filed in this Court as a separate appendix under a motion to seal. See Suppl. Pet. App. Any portions the petition itself quotes were published in the opinions below.

Afterward, the trial court held that Mr. Wright's waiver was knowing but was not unequivocal, voluntary, or intelligent. App., *infra*, 6a. First, although the trial court found that Mr. Wright "expressed wishes [to proceed pro se]," App., *infra*, 79a, it held that his invocation was equivocal because he (1) originally had asked the court to appoint him counsel and (2) had speculated that a private lawyer would be desirable but that he could not afford to hire one, App., *infra*, 6a. Second, it held that Mr. Wright's invocation was not voluntary because "'his poverty' precluded him from retaining a private attorney, which he admittedly preferred over court-appointed counsel." *Ibid.* (citation omitted). And third, the trial court held that Mr. Wright's waiver was knowingly but unintelligently made. *Ibid.* It specifically found that his choice "arose from a misunderstanding of his right to a fast and speedy trial in a capital case and confusion over his appointed-attorneys' professional responsibilities." *Ibid.* (cleaned up).

B. Indiana Supreme Court Proceedings

Mr. Wright appealed his conviction to the Indiana Supreme Court, arguing that he should have been allowed to proceed pro se. App., *infra*, 7a.[4] In a split decision, the Indiana Supreme Court affirmed, holding (1) that Mr. Wright's invocation was equivocal and (2)

[4] Mr. Wright also argued that his sentence warranted revision. He does not seek certiorari on this question. See App., *infra*, 36a-40a (upholding sentence as technically corrected).

that his waiver was voluntary and knowing but unintelligent. App., *infra*, 28a.[5]

The Indiana Supreme Court first noted that, while *Faretta* affirmed that the right to self-representation is "fundamental," App., *infra*, 10a, "*Faretta* and its progeny 'have made clear' that this right 'is not absolute.'" App., *infra*, 16a (quoting *Indiana* v. *Edwards,* 554 U.S. 164, 171 (2008)). Pointing to the constitutional guarantee of appointed counsel for indigent defendants and the increased availability of counsel in general, App., *infra*, 14a-15a, the court found "[t]he historical reasons for recognizing the right to self-representation lack the same force today," App., *infra*, 10a.

The Indiana Supreme Court then upheld the trial court's determination that Mr. Wright's invocation was equivocal. It conceded that "at the time of his *Faretta* hearing, Wright seems to have abandoned his desire for court-appointed counsel," noting that "[d]uring the colloquy, he insisted more than once that he did not wish to have a State-appointed attorney anymore at this time." App., *infra*, 31a. The court pointed, however, to Mr. Wright's "acknowledged preference for either private counsel or his original attorney." *Ibid*. This indicated "no strong autonomy interest," leading the court to conclude that there was "little risk of violating his Sixth Amendment right" by denying his request. *Ibid*.

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[5] The Indiana Supreme Court technically "remand[ed the case] for the court to correct a minor oversight in its sentencing order." App., *infra*, 40a.

The Indiana Supreme Court next considered whether Mr. Wright's waiver of the right to counsel was intelligent. It first argued that "[d]eath-penalty and LWOP cases heighten the state's interest in ensuring compliance with constitutional guarantees of fairness." App., *infra*, 19a. In such cases, the trial court must weigh the importance of the personal right to self-representation against the state's interests in "the reliability and integrity" of the trial. App., *infra*, 21a. This "public interest," it explained, "expands or contracts in direct correlation with the severity of a potential punishment a defendant faces at trial." App., *infra*, 19a. And "[i]n capital cases and LWOP cases, a trial court should frame its waiver inquiry with the state's heightened reliability interests in mind." App., *infra*, 26a. "[T]he state's heightened-reliability interest" demands that the trial court "should focus its [*Faretta*] inquiry on": (1) "whether and to what extent the defendant has prior experience with the legal system"; (2) "the scope of the defendant's knowledge of criminal law, legal procedures, rules of evidence, and sentencing"; and (3) defendant's ability to "articulate and present any possible defenses." App., *infra*, 27a.

Applying these factors, the court expressed fear that Wright would not represent himself well in his capital-turned-LWOP trial. First, it found Mr. Wright's prior courtroom experience inadequate: "[w]hile Mr. Wright had some prior experience with the legal system" and had, in fact, represented himself in a juvenile case, "he conceded to never having tried a jury trial, never having picked a jury, never having cross-examined a witness, and never having made a

closing argument." App., *infra*, 32a. Second, "the scope of Mr. Wright's knowledge of the criminal law, legal procedures, rules of evidence, and sentencing appear[ed] limited at best." App., *infra*, 32a-33a. Third, "Wright articulated no specific defenses to his crimes * * * or potentially useful mitigating evidence." App., *infra*, 33a. In sum, "[w]ith limited experience navigating the legal system, with deficient knowledge of criminal law and procedure, and with no apparent defenses or trial strategy, Mr. Wright's waiver of the right to counsel * * * was not an intelligent one." App., *infra*, 34a. "[T]hese factors," the court noted, "may not have led us to the same conclusion in a case with less at stake, [but] the state has a much stronger interest in ensuring a fair trial in this capital-turned-LWOP case." App., *infra*, 35a.

Justice Slaughter dissented. App., *infra*, 41a. He began by articulating the values underpinning the right to self-representation, namely "respect for the individual" and "the nearly universal conviction that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself." App., *infra*, 42a (quoting *Edwards,* 554 U.S. at 170 (cleaned up)). He then found Mr. Wright's waiver to be intelligent. "Once the defendant understands the consequences of waiving counsel and representing himself," he explained, "the court must allow him to proceed pro se." App., *infra*, 43a. To him, the record showed that Mr. Wright understood those consequences. App., *infra*, 44a. The trial court, he reasoned, had engaged in a "lengthy," "detailed," and "thorough colloquy" with Mr.

Wright and had ensured after "extensive question[ing]" that he was "aware of the dangers and disadvantages of self-representation." App., *infra*, 43a-45a. That court had explained the "myriad ways a lawyer can assist a criminal defendant," including "investigating criminal cases," "gathering evidence, "preparing and filing motions," "responding to motions filed by the State," "evaluating the strengths and weaknesses of the State's case, advising whether seeking a plea might be advantageous, and assisting in negotiating a plea," "pick[ing] a fair and impartial jury," "mak[ing] a favorable opening statement and closing argument," "object[ing] to inadmissible evidence," and "represent[ing] a capital defendant at the sentencing phase." App., *infra*, 45a-46a. *Faretta*, he noted, "rejects" "[a]ny inquiry into a defendant's legal know-how." App., *infra*, 48a (citing *Faretta*, 422 U.S. at 835). Since "an 'intelligent' waiver focuses only on whether the defendant knows the dangers and disadvantages of representing himself[,] 'a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation.'" *Ibid.* (quoting *Faretta*, 422 U.S. at 835). Any such inquiry is "unwarranted." *Ibid.* Because the trial court had so thoroughly explained those dangers and disadvantages, Justice Slaughter concluded that Mr. Wright waived his right to counsel with his "eyes open." App., *infra*, 47a.

Justice Slaughter then argued that Mr. Wright "unequivocal[ly]" invoked his right to represent himself. App., *infra*, 48a. Justice Slaughter noted that Mr. Wright "repeatedly emphasized his desire to

proceed pro se" in his colloquy and had done so even more "emphatic[ally] and "decisive[ly]" than in past cases where the court had found invocation "unequivocal." App., *infra*, 50a. That Mr. Wright may have preferred representation by non-capital-qualified or unaffordable private counsel made no difference to Justice Slaughter. See App., *infra*, 48a-53a.

Justice Slaughter also criticized the court's "*Faretta*-plus test." App., *infra*, 53a. "No Supreme Court precedent," he argued, "holds that the *Faretta* analysis changes when a defendant's decision could be a matter of life or death. Indeed, the Supreme Court has not once espoused today's approach—despite addressing *Faretta* in the context of capital cases a number of times." App., *infra*, 54a (citing *Godinez* v. *Moran*, 509 U.S. 389, 400-401 (1993) and *Patterson* v. *Illinois*, 487 U.S. 285, 297-298 (1988)). "The only issues here should be whether Wright invoked his right to self-representation unequivocally and waived his right to counsel knowingly, intelligently, and voluntarily. Either he did, or he did not. These are binary questions not subject to tailoring." *Ibid*.

Justice Massa concurred in the result. "It is hard to quarrel," he admitted, "with much of the dissenting opinion." App., *infra*, 41a. In particular, he agreed with Justice Slaughter that Mr. Wright's waiver was knowing and intelligent. Justice Massa also criticized the court for "till[ing] new constitutional soil in suggesting the standard for waiving the right to counsel varies depending on the seriousness of the case" and for "weigh[ing] Zachariah Wright's legal skills in assessing the knowing and intelligent nature

of his waiver in a way explicitly rejected by * * * *Faretta*." *Ibid*. He agreed with the court, however, that Mr. Wright's invocation was equivocal because he preferred either to retain private counsel or to get back his former, non-capital-qualified counsel. *Ibid*.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Entrenches A Split Among The Federal Courts Of Appeals And State High Courts On Two Issues

The decision below entrenches a split among the federal courts of appeals and state high courts on two issues central to a defendant's right to self-representation. The first is whether a defendant's request to represent himself must reflect a preference for self-representation over even unavailable alternatives in order to be unequivocal. The second is whether, how, and when a court should override a defendant's right to self-representation when he faces the possibility of severe penalties, like death and LWOP.

Where, as here, there is a split among the federal courts of appeals and state high courts, only this Court's review can provide uniformity and clear guidance.

A. The Decision Below Expands A Conflict Over Whether An Unequivocal Invocation Of The Right To Self-Representation Requires A Defendant To Prefer Self-Representation Over Even Unavailable Alternatives

The decision below expands a split among the federal courts of appeals and state high courts as to whether, in order to be unequivocal, a defendant's request to represent himself must reflect a preference for self-representation over even unavailable alternatives. The issue commonly arises when a defendant who is dissatisfied with his appointed counsel requests to represent himself in the alternative to a request for substitute counsel.

Jurisdictions that have considered the issue have taken three distinct approaches. Indiana holds that a request for self-representation is equivocal, and therefore invalid, if a defendant has an acknowledged preference for other, unavailable options, such as non-capital-qualified counsel in a capital case. Montana, Pennsylvania, and Washington hold that, under a totality-of-the-circumstances approach, a defendant's preference for alternatives, even if they are potentially unavailable, can support a finding that his self-representation request is equivocal. Most jurisdictions that have considered the issue, by contrast, have concluded that a defendant's request to represent himself need not demonstrate a preference for self-representation over even unavailable alternatives in order to be unequivocal. These jurisdictions hold that a defendant's request for self-representation is not

equivocal merely because it is motivated by dissatisfaction with existing counsel—rather than by opposition to representation by counsel generally—or because it is made in the alternative to a request for different counsel.

1. The Indiana Supreme Court Holds That A Request For Self-Representation Is Equivocal, And Therefore Invalid, If A Defendant Has An Acknowledged Preference For Even Unavailable Options

The Indiana Supreme Court holds that a defendant's request for self-representation is equivocal, and therefore invalid, if a defendant has a preference for other alternatives, even when those other alternatives are unavailable or impossible. See App., *infra*, 30a-31a (holding that petitioner's express request to represent himself was not an unequivocal assertion of the right to self-representation because petitioner had an "acknowledged preference for either private counsel," whom he could not afford, "or his original attorney," who was not capital-qualified).

The Supreme Court of Indiana justified its holding on the basis that the Sixth Amendment's right to self-representation protects a defendant's autonomy interest. The court explained that petitioner's "acknowledged preference for either private counsel or his original attorney indicate[d] no strong autonomy interest" and therefore there was "little risk of violating his Sixth Amendment right to self-represent." See App., *infra*, 31a.

2. The Supreme Courts Of Montana, Pennsylvania, and Washington, Under A Totality-Of-The-Circumstances Approach, Will Consider A Defendant's Preference For Alternatives, Regardless Of Their Availability, As Supporting The Equivocal Nature Of A Self-Representation Request

The Supreme Courts of Montana, Pennsylvania, and Washington take a totality-of-the-circumstances approach to determining whether a defendant's request for self-representation is unequivocal. These courts have indicated that a defendant's acknowledged preference for other alternatives, regardless of the availability of those alternatives, can weigh in favor of finding that a request for self-representation is equivocal. See *State* v. *Swan*, 10 P.3d 102, 104, 107 (Mont. 2000) (holding, after reviewing the record as a whole, that defendant's request to represent himself was equivocal because defendant had admitted that he actually wanted access to the law library and substitute counsel); *Commonwealth* v. *Davido*, 868 A.2d 431, 440 (Pa. 2005) (similar); *State* v. *Stenson*, 940 P.2d 1239, 1275-1276 (Wash. 1997) (similar).

The Supreme Court of Washington has explained that, because an unequivocal request for self-representation requires the court to be "reasonably certain that the defendant wishes to represent himself," the trial court must determine both "whether a request for self-representation was made at all and, if so, whether that request reflected a desire to exercise the right to self-representation." *State* v. *Curry*, 423 P.3d 179, 186 (Wash. 2018). A court must examine the "nature of the

request itself" and, although "whether the request was made as an alternative to other, preferable options" is "not dispositive," it is a "[r]elevant consideration[]." *Id.* at 184-186. The Supreme Court of Washington has also emphasized that trial courts must "indulge in every reasonable presumption against a defendant's waiver" of the right to counsel before granting a defendant's request to represent himself. *Id.* at 184 (cleaned up).

3. Most Jurisdictions That Have Considered The Issue Do Not Require That A Defendant's Request For Self-Representation Demonstrate A Preference For Self-Representation Over Even Unavailable Alternatives In Order To Be Unequivocal

Most jurisdictions that have considered the issue have not required a defendant to demonstrate a preference for self-representation over unavailable alternatives for his request for self-representation to be unequivocal.

The First, Second, and Ninth Circuits and the Supreme Courts of California, Connecticut, Florida, Minnesota, Nevada, New Mexico, North Carolina, and Utah hold that a request for self-representation is not equivocal merely because a defendant has an acknowledged preference for unavailable counsel, such as when a defendant requests to represent himself in

the alternative to a request for substitute counsel and the request for substitute counsel is denied.[6]

The Second, Third, Fifth, and Seventh Circuits and the Kentucky Supreme Court hold, moreover, that a defendant's request for self-representation is not equivocal merely because it is motivated by dissatisfaction with existing counsel rather than by opposition to representation by counsel generally.[7] A defendant could, therefore, prefer some other counsel whom the court would not appoint and still unequivocally invoke his right to represent himself.

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[6] See *United States* v. *Gonzalez-Arias*, 946 F.3d 17, 38 (1st Cir. 2019) (holding that although self-representation was not Gonzalez-Arias' "first choice," as recognized by the judge, his response that it was "fine" to proceed pro se, after rejecting his existing counsel, was "express and firm"); *Williams* v. *Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) (similar); *Tamplin* v. *Muniz*, 894 F.3d 1076, 1084 (9th Cir. 2018) (similar); *People* v. *Michaels*, 49 P.3d 1032, 1055 (Cal. 2002) (similar); *State* v. *Jordan*, 44 A.3d 794, 809 (Conn. 2012) (similar); *Pasha* v. *State*, 39 So. 3d 1259, 1262 (Fla. 2010) (similar); *State* v. *Richards*, 456 N.W.2d 260, 264 (Minn. 1990) (similar); *Gallego* v. *State*, 23 P.3d 227, 236 (Nev. 2001) (similar), abrogated on other grounds, *Nunnery* v. *State*, 263 P.3d 235 (Nev. 2011); *State* v. *Stallings*, 476 P.3d 905, 918-919 (N.M. 2020) (similar); *State* v. *Cunningham*, 474 S.E.2d 772, 775-776 (N.C. 1996) (similar); *State* v. *Bakalov*, 979 P.2d 799, 810 (Utah 1999) (similar).

[7] See *Freeman* v. *Pierce*, 878 F.3d 580, 588-589 (7th Cir. 2017) ("Dissatisfaction with counsel does not make a self-representation request equivocal, and again, *Faretta* forecloses such an argument."); *Wilson* v. *Walker*, 204 F.3d 33, 37 n.3 (2d Cir. 2000) (similar); *Buhl* v. *Cooksey*, 233 F.3d 783, 794 (3d Cir. 2000) (similar); *Batchelor* v. *Cain*, 682 F.3d 400, 408 (5th Cir. 2012) (similar); *King* v. *Commonwealth*, 374 S.W.3d 281, 292 (Ky. 2012) (similar).

Courts have presented practical and doctrinal justifications for holding that a defendant's request for self-representation need not demonstrate a preference for self-representation over all other, even unavailable, options to be unequivocal. The Third Circuit, in *Buhl* v. *Cooksey*, for example, explained that "[c]ommon sense suggests (and experience confirms) that nearly every request to proceed *pro se* will be based upon a defendant's dissatisfaction with counsel." 233 F.3d at 794. The Seventh Circuit has similarly noted that the "right of self-representation would be virtually impossible to invoke if dissatisfaction with counsel meant equivocation since most requests to proceed pro se are premised on precisely those grounds." *Freeman*, 897 F.3d at 588-589. The Ninth Circuit has emphasized that *Faretta* requires the majority approach, as Faretta himself "*wanted* to be represented" and "[h]is only objection was to representation by a public defender." *Tamplin*, 894 F.3d at 1084.

B. The Federal Circuits and State High Courts Are Split Over Whether To Override The Right To Self-Representation In High-Penalty Cases

The decision below also deepens an existing split on whether to override the right to self-representation in high-penalty cases when the court fears the quality of representation will be inadequate. State high courts in Indiana, New Jersey, and Florida reason that heightened state interests in accuracy and reliability in high-penalty cases require courts to evaluate defendants' quality of self-representation. Upon a

finding that the quality of representation has dropped or will drop below the court's standards, courts in these states will override defendants' right to self-representation, either by denying it entirely or by narrowing the extent to which pro se defendants are allowed to control their own defense. The majority position, by contrast, permits defendants to exercise their right to self-representation regardless of the severity of the potential penalties or defendants' quality of self-representation.

1. Indiana, New Jersey, And Florida Override The Right To Self-Representation In Cases With High Penalties When They Fear Poor Self-Representation

The Indiana, New Jersey, and Florida Supreme Courts agree that allowing defendants to self-represent in high-penalty cases poses a severe constitutional challenge. The *Faretta* right can be "difficult to square" with states' interest in accuracy and constitutional guarantees of fair trials and individualized sentencing in capital cases. *Barnes* v. *State*, 29 So. 3d 1010, 1024-1026 (Fla. 2010) (quoting *State* v. *Reddish*, 859 A.2d 1173, 1204 (N.J. 2004). The "tension" between these competing interests "reaches its breaking point" in high penalty-cases, such as "when a defendant faces death or life in prison without the possibility of parole." App., *infra*, 19a; see also App., *infra*, 25a ("[W]ithout meaningful adversarial testing by professionally trained counsel, there are few, if any, safeguards to protect the state's heightened-reliability interest when a pro se

defendant proves unwilling or unable to present the necessary mitigating evidence at trial."). These states therefore balance *Faretta*'s "autonomy interest" in controlling one's own defense against "the State's constitutionally-mandated need for reliability," holding that "the right to self-representation is not absolute. There may be times * * * when the defendant will be required to cede control of his defense to protect the integrity of the State's interest[s] in fair trials and * * * reliability demanded by the Constitution." *Reddish*, 859 A.2d at 1192-1193. In high-penalty cases, when a "defendant's representation of himself falls below minimal standards of acceptability," courts in these states may find that "[t]he right to a fair trial * * * is paramount to the right of self-representation" and thereby override the *Faretta* right. *Id*. at 1203.

Indiana takes an all-or-nothing approach to restricting the right to self-representation in high-penalty cases, raising the standard for "knowing and intelligent" waiver of the right to counsel so high that defendants without demonstrated legal acumen or without an articulated plan for presenting defenses are categorically barred from representing themselves. New Jersey and Florida, meanwhile, allow all defendants to knowingly and intelligently waive the right to counsel, see *Reddish*, 859 A.2d at 1196; *Hooks* v. *State*, 286 So. 3d 163, 168 (Fla. 2019), but tailor self-representation to "correct" any expected shortfalls in its quality. These states hold that in some high-penalty cases standby counsel may override a pro se defendant's insufficiently planned trial strategy. *Reddish*, 859 A.2d at 1204; *Barnes*, 29 So. 3d at 1024.

First, the court below restricted access to the right to self-representation in high-penalty cases by raising the bar for "knowing and intelligent" waiver of the right to counsel so high that only defendants who can demonstrate great legal acumen may self-represent. Employing a "*Faretta*-plus test," App., *infra*, 53a (Slaughter, J., dissenting), the Indiana Supreme Court held that even though Mr. Wright "understood" the risks of proceeding pro se and "knowingly waived his right to counsel," App., *infra*, 29a, "his decision was not made intelligently." App., *infra*, 31a. As the court noted, he had never "tried a jury trial," "picked a jury," "cross-examined a witness," or "made a closing argument," he had no formal legal training, he asked the court for guidance in how to file the five motions he had planned, and he could not—years before trial—outline his intended defenses, mitigating evidence, and trial strategy as part of his request for self-representation. App., *infra*, 32a-34a. The Indiana Supreme Court held his waiver of his right to counsel unintelligent not because he did not make his choice "with eyes open," *Faretta*, 422 U.S. at 835, but because his legal education, legal acumen, and planned trial strategy were, to its eyes, inadequate.

The court explicitly imposed this higher standard of intelligence on Mr. Wright because his case involved the potential for a severe penalty. "[W]hile these factors may not have led us to the same conclusion in a case with less at stake," it noted, "the state has a much stronger interest in ensuring a fair trial in this capital-turned-LWOP case." App., *infra*, 34a-35a. Indeed, in the non-capital, non-LWOP case *Leonard* v.

State, the Indiana Supreme Court held that defendant's waiver was "knowing and intelligent" based on the sufficiency of the trial court's colloquy without ever evaluating the defendant's education, legal acumen, or planned trial strategy. 579 N.E.2d 1294, 1295-1296 (Ind. 1991).

Second, New Jersey and Florida override the right of self-representation in high-penalty cases by sometimes requiring the trial court to appoint stand-by counsel who can present mitigating evidence against a defendant's wishes and even take over the defense. *Reddish*, 859 A.2d at 1204; *Barnes*, 29 So. 3d at 1024 ("[W]e agree with the Supreme Court of New Jersey in *State v. Reddish*."). While *Faretta* expressly holds that a defendant's "technical legal knowledge" is "not relevant to an assessment of his knowing exercise of the right to defend himself," 422 U.S. at 836, these states will curtail that right "if it becomes apparent that the defendant's representation of himself falls below minimal standards of acceptability," *Reddish*, 859 A.2d at 1203. Recognizing that "a pro se defendant is entitled to maintain control over his defense strategy," *ibid.*, the New Jersey Supreme Court nonetheless holds that the Eighth Amendment requires the "active participation by standby counsel" "over the pro se defendant's objections" to ensure that the sentencing jury can "make an individualized judgment based on a fair presentation of mitigating evidence." *Id.* at 1203-1204; see also *Barnes*, 29 So. 3d at 1026 (holding that a defendant's "right to self-representation [is] not violated" by the appointment of mitigation counsel "to assist the court by presenting

mitigation evidence where [defendant] refuse[s] to do so").

2. The Majority Position Respects A Defendant's Right To Self-Representation Without Considering The Expected Quality Of Representation, Regardless Of The Penalty's Severity

The majority position among federal courts of appeals and state high courts does not adjust the availability of the right to self-representation based on the quality of representation—even in high-penalty cases. Three federal courts of appeals and two state high courts flatly reject the premise that in high-penalty cases, important state interests justify curtailing the right to self-representation for defendants who lack legal acumen.[8] As the Fifth Circuit explained, self-representation is a "personal right" "at the very heart of the Sixth Amendment." *United States* v. *Davis*, 285 F.3d 378, 384 (2002). Although the desire to protect defendants from poor self-representation can be "noble," *ibid.*, it "mischaracterizes the scope of the sixth amendment right granted in *Faretta*." *Silagy* v. *Peters*, 905 F.2d

[8] See *United States* v. *Roof*, 10 F.4th 314, 357 (4th Cir. 2021); *United States* v. *Davis*, 285 F.3d 378, 384 (5th Cir. 2002); *Silagy* v. *Peters*, 905 F.2d 986, 1007 (7th Cir. 1990); *State* v. *Jones*, 568 S.W.3d 101, 126 (Tenn. 2019) (rejecting argument that self-representation in capital trials is "never beneficial" and should be unconstitutional); *People* v. *Coleman*, 660 N.E.2d 919, 937 (Ill. 1995) ("We are not persuaded by defendant's argument that the heightened need for reliability in capital cases justifies forcing the accused to accept representation by counsel").

986, 1007 (7th Cir. 1990). It is "[t]he defendant, and not his lawyer or the State, who will bear the personal consequences of a conviction," and who must therefore be free to choose his own defense. *Davis*, 285 F.3d at 384 (citation omitted). Countervailing constitutional considerations, like the Eighth Amendment, do not "dilute the potency" of the Sixth Amendment. *United States* v. *Roof*, 10 F.4th 314, 356-357 (2021) (noting that the Eighth Amendment does not prohibit defendants from waiving other important procedural protections, like the right to appeal).

Even without specifically addressing Indiana's premise—that high-penalty cases implicate important state interests which justify overriding defendants' right to self-representation—four federal courts of appeals and nine state high courts reject overriding the right to self-representation in high-penalty cases because a lawyer can better represent the defendant.[9] In these jurisdictions, a defendant's lack of "ability to conduct his own defense" does not "invalidate[] a knowing and intelligent waiver." *State* v. *Richards*, 456 N.W.2d 260, 265 (Minn. 1990). To hold

[9] See *Torres* v. *United States*, 140 F.3d 392, 402 (2d Cir. 1998); *United States* v. *Peppers*, 302 F.3d 120, 134 (3d Cir. 2002); *Freeman* v. *Pierce*, 878 F.3d 580, 585-586 (7th Cir. 2017); *Hamilton* v. *Groose*, 28 F.3d 859, 862 n.3 (8th Cir. 1994); *Finch* v. *State*, 542 S.W.3d 143, 146 (Ark. 2018); *People* v. *Butler,* 219 P.3d 982, 990-991 (Cal. 2009); *State* v. *Richards*, 456 N.W.2d 260, 264-265 (Minn. 1990); *Evans* v. *State*, 725 So. 2d 613, 703 (Miss. 1997); *State* v. *Black*, 223 S.W.3d 149, 155 (Mo. 2007); *State* v. *Gunther*, 716 N.W.2d 691, 702-703 (Neb. 2006); *State* v. *Taylor*, 781 N.E.2d 72, 82 (Ohio 2002); *Brown* v. *State*, 422 P.3d 155, 162-163 (Okla. Crim. App. 2018); *State* v. *Hester*, 324 S.W.3d 1, 32 (Tenn. 2010).

otherwise—as Indiana does—"would undermine the constitutional guarantee to self-representation identified in *Faretta*." *State* v. *Taylor*, 781 N.E.2d 72, 82 (Ohio 2002). Consistent with this result, various other federal courts of appeals and state high courts have found knowing and intelligent waiver in high-penalty cases without examining the defendant's ability to self-represent.[10]

Three federal courts of appeals and three state high courts specifically disagree with the New Jersey and Florida approach, holding that standby counsel may not present evidence over defendants' objections—even in high-penalty cases where defendants are not expected to skillfully self-represent.[11] In these jurisdictions, a self-represented defendant facing severe charges is able to choose what case to present to the jury, regardless of whether his choice is wise or whether "society would benefit from having a different presentation of the evidence." *Davis*, 285 F.3d at 385.

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[10] *E.g.*, *Government of the Virgin Islands* v. *Charles,* 72 F.3d 401, 409 (3d Cir. 1995); *Ex parte Ford*, 515 So. 2d 48, 50 (Ala. 1987); *State* v. *Dann*, 207 P.3d 604, 613 (Ariz. 2009); *State* v. *Lovelace*, 90 P.3d 278, 289 (Idaho 2003), on reh'g, 90 P.3d 298 (Idaho 2004); *State* v. *Lankford*, 781 P.2d 197, 202 (Idaho 1989); *People* v. *Haynes*, 673 N.E.2d 318, 337 (Ill. 1996); *State* v. *Rich*, 484 S.E.2d 394, 402 (N.C. 1997); *Commonwealth* v. *Davis*, 388 A.2d 324, 328 (Pa. 1978); *State* v. *Starnes*, 698 S.E.2d 604, 610-611 (S.C. 2010); *Moore* v. *State*, 999 S.W.2d 385, 396 (Tex. Crim. App. 1999).

[11] See *Roof*, 10 F.4th at 356; *Davis*, 285 F.3d at 384; *Silagy*, 905 F.2d at 1007; *Coleman*, 660 N.E.2d at 937; *Bishop* v. *State*, 597 P.2d 273, 276 (Nev. 1979); *State* v. *Arguelles*, 63 P.3d 731, 753 (Utah 2003).

As a result of this conflict, Mr. Wright's ability to waive his right to counsel became contingent on the jurisdiction in which he was charged. If Mr. Wright had been charged in federal court rather than Indiana state court, for example, his lack of legal acumen would not have mattered. See *Silagy*, 905 F.2d at 1008; *Freeman*, 878 F.3d at 584-587 (holding that a defendant with an eighth-grade education and without any legal experience knowingly and intelligently waived the right to counsel and could represent himself against charges of first-degree murder and kidnapping).

II. The Decision Below Misunderstands *Faretta* And Hollows Out The Right To Self-Representation

The Sixth Amendment guarantees every criminal defendant the right to represent himself at trial. *Faretta* v. *California*, 422 U.S. 806, 807 (1975). Even though the amendment also promises the "assistance" of a state-appointed attorney, see *Gideon* v. *Wainwright*, 372 U.S. 335, 339 (1963), "thrust[ing] counsel upon the accused, against his considered wish * * * violates the logic of the [Sixth] Amendment." *Faretta*, 422 U.S. at 820. The weight of English and colonial common law supports this "natural[] read[ing]" of the text. *Id.* at 818-832; see also *Martinez* v. *Court of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment) ("I have no doubt that the Framers of our Constitution * * * would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case.").

This right protects the core constitutional value of individual autonomy. *Martinez*, 528 U.S. at 160. It embodies the "nearly universal conviction" that "forcing a lawyer upon an unwilling defendant" is contrary to the "fair administration of American justice." *Faretta*, 422 U.S. at 817-818. Because a person's life and liberty hinge on the outcome of a criminal proceeding, a defendant facing trial has a right to choose whether he will submit to the representation of state-imposed counsel or plead his own case. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 174 (1984). The defendant, after all, not the state, will "bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Faretta*, 422 U.S. at 834.

Even if a judge thinks that a defendant's choice to represent himself will probably hurt him, the judge must honor it. *Faretta*, 422 U.S. at 834. The defendant's choice, not his likelihood of success, is what matters. See *Godinez* v. *Moran*, 509 U.S. 389, 399-400 (1993). "[R]espect for the individual * * * is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (quoting *Illinois* v. *Allen*, 397 U.S. 337, 351 (1970) (Brennan, J., concurring)). "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment).

A defendant's choice to proceed pro se involves two important but simple components: invocation and

waiver. To invoke his right to self-representation, a defendant must state his decision "unequivocally." See *Faretta*, 422 U.S. at 835. To waive his complementary right to counsel, a defendant's choice must be "knowing[] and intelligent[]." *Ibid.*

Yet the Indiana Supreme Court has misconstrued both of these requirements. First, the court wrongly held that a request for self-representation is not "unequivocal" if it is motivated by a failure to obtain unavailable counsel (either because defendant cannot afford preferred private counsel or his preferred publicly provided counsel is legally unqualified). App., *infra*, 31a. Second, the court refused to let petitioner represent himself against eventual LWOP-charges because he lacked sufficient legal skills and acumen, App., *infra*, 31a-35a, a standard of intelligence that this court has explicitly rejected, see *Godinez*, 509 U.S. at 399-400. These two holdings flout this Court's precedent and impermissibly curtail petitioner's Sixth Amendment rights. Both constitute reversible error.

A. A Preference For Unavailable Counsel Does Not Make A Defendant's Express Desire To Proceed Pro Se Equivocal

Petitioner's preference for unaffordable private counsel or particular counsel who was not capital-qualified and so could not represent him does not obviate his alternative, unequivocal request to represent himself. While this Court has not considered the clarity of a defendant's request to proceed pro se, lower courts routinely hold that a defendant's invocation of Sixth Amendment rights must be unequivocal to be

effective. See, *e.g.*, *United States* v. *Barton*, 712 F.3d 111, 118 (2d Cir. 2013); *United States* v. *Long*, 597 F.3d 720, 724 (5th Cir. 2010); *United States* v. *Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004). This rule makes sense. The court below did more, however, than require clarity. It wrongly conceptualized petitioner's choice as a simple binary: either he wanted counsel or he did not. See App., *infra*, 30a-31a. Thus, since he asserted a preference for some attorney—even an attorney that he could not have—he "indicat[ed]" that there was "no strong autonomy interest" at stake, and there was "little risk" of a forced appointment violating petitioner's rights. App., *infra*, 31a.

This misunderstands *Faretta* and its progeny. This Court has always discussed the choice to self-represent in terms of whether there *was* an invocation; it has not scrutinized the set of preferences that led a defendant to invoke his right. See *Indiana* v. *Edwards*, 554 U.S. 164, 169-172 (2008) (reviewing relevant precedents). In none of this Court's Sixth Amendment cases did a preference for unavailable counsel affect whether the right was properly invoked. See, *e.g.*, *Faretta* 422 U.S. at 834-835; *Godinez*, 509 U.S. at 401-402.

Indiana's rule also ignores the complexities of a criminal defendant's choices. Defendants often choose to represent themselves as a second or third choice, perhaps because they did not see eye-to-eye with previous attorneys or cannot afford their preferred lawyer. See, *e.g.*, *Pasha* v. *State*, 39 So. 3d 1259, 1262 (Fla. 2010); *Barton*, 712 F.3d at 119; *Tamplin* v. *Muniz*, 894 F.3d 1076, 1084 (9th Cir. 2018). But a second or third choice—provided it is the first choice

among the options truly available—is no less clear a choice. A defendant is perfectly free to prefer no counsel to those actually available to him. The Indiana Supreme Court presumed, however, that if a defendant has expressed a preference for a different, unavailable attorney at any point, then he has manifested a desire for any available counsel. App., *infra*, at 30a-31a.

That does not follow. If a defendant says that he prefers unavailable counsel to self-representation but expresses an even stronger preference for self-representation over available counsel, he unequivocally invokes his right to proceed pro se. Of the real options before him, Mr. Wright clearly chose to represent himself. See, *e.g.*, App., *infra*, 4a-5a, 51a ("I would like no attorney."). Once it was clear in this case that representation by his old counsel or private counsel was off the table, petitioner never wavered in his request to proceed pro se. See App., *infra*, at 4a-5a (noting that he made an unconditional request to represent himself two years before trial).

In holding that Mr. Wright did not unequivocally invoke his right to self-representation, the Indiana Supreme Court established a rule that harms indigent defendants. For the poorest individuals, the choice in a criminal trial is between state-appointed counsel and no counsel at all. See *Gideon*, 372 U.S. at 344; Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 707-708 (1996). But, under Indiana's rule, a defendant who admits a preference for unavailable counsel over his present court-appointed counsel can never unequivocally invoke his right to

represent himself given the alternatives actually available.

Furthermore, when a trial court overrides a defendant's clear preference to represent himself, it erodes the perception of procedural fairness. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Faretta*, 422 U.S. at 834. It is, as Justice Frankfurter wrote, to "imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1942). Not only does forced representation cause a defendant to subjectively doubt the legitimacy of his conviction, but it also undermines society's belief in the impartiality of the judicial process. It is "the epitome of both actual and apparent unfairness for the judge to say, I have heard your desire to proceed by yourself and I've denied your request, so your attorney will speak for you from now on." *Edwards*, 554 U.S. at 187-188 (Scalia, J., dissenting) (cleaned up).

Indeed, the entire point of *Faretta* is to respect the choices made by criminal defendants. *Faretta*, 422 U.S. at 834. The right to self-representation is rooted in the "inestimable worth of free choice." *Ibid*. There are, of course, obvious limits to this principle. See *Edwards*, 554 U.S. at 171. A defendant cannot intentionally disrespect or obstruct the proceedings. *Faretta*, 422 U.S. at 835 n.46 (noting there is no right to "abuse the dignity of the courtroom"). Nor can a defendant self-represent as a bad-faith dilatory tactic. *Ibid*. But the simple fact that a defendant wants counsel that he cannot have does not make his choice to self-represent any less clear. When Mr. Wright

clearly insisted that he did "not wish to have a State-appointed attorney anymore," App., *infra*, at 5a, the invocation inquiry should have ended. For the Indiana Supreme Court to conclude otherwise cuts at the very heart of the Sixth Amendment.

B. Waiving The Right To Counsel "With Eyes Open" Does Not Require Specialized Legal Knowledge Even In High-Penalty Cases

In the *Faretta* line of cases, this Court has consistently held that defendants who wish to represent themselves need no specialized legal knowledge to intelligently waive their right to counsel. *Faretta*, 422 U.S. at 835-836 ("[Faretta's] technical legal knowledge * * * was not relevant to an assessment of his knowing exercise of the right to defend himself."). So long as a defendant understands what he is giving up, he can intelligently waive his right to counsel—whether or not he has sufficient legal knowledge and skill to represent himself well. *Id*. at 835.

The court below flouted this rule. Because Mr. Wright faced LWOP, it required him to demonstrate that he could represent himself well rather than that he understood how his defense might be harmed without an attorney.

Looking to whether the defendant understands what he is giving up, rather than to how well he can perform in the courtroom, vindicates the principles of personal autonomy and procedural fairness that undergird the Sixth Amendment right to self-representation. Doing the reverse would bar many

individuals from giving up a right they fully understand, causing them to "believe that the law contrives against [them]." *Faretta*, 422 U.S. at 834. And, in fact, forcing an attorney onto an unwilling defendant does not ensure the attorney's legal training will be valuable because, as this Court has recognized, "where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." *Ibid.*

The "*Faretta*-plus test," App., *infra*, 53a (Slaughter, J., dissenting), the court applied here was not just "heightened," App., *infra*, 26a, which would have been problem enough. Worse still, it transformed the inquiry of whether there had been intelligent waiver into one which tested the defendant's legal knowledge and skill. Because "the state has a much stronger interest in ensuring a fair trial in this capital-turned-LWOP case," App., *infra*, 35a, the court focused on something other than Mr. Wright's understanding of what he was giving up: his capacity to perform in court. But no defendant should have to be a "Perry Mason" to defend himself—even in capital and LWOP cases.

Godinez, another capital-turned-LWOP case, makes this clear. There, this Court considered what standard of *competency* applied to a defendant's choice to represent himself. It held that "while '[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,' a criminal defendant's ability to represent himself has

no bearing upon his competence to *choose* self-representation." 509 U.S. at 400 (cleaned up) (quoting *Faretta*, 422 U.S. at 834). It also laid out how *competence* to waive the right to counsel differs from *intelligence* to do so—the issue in this case. The Court explained:

> The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the "knowing[, *i.e.*, intelligent,] and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.

Id. at 401 n.12 (cleaned up). But a defendant's predicted courtroom performance has no more to do with "whether [he] actually *does* understand the significance and consequences" of giving up his right to counsel than it does with whether he can "understand the proceedings." *Ibid*. Expected courtroom performance bears the same relation to the one inquiry as it does to the other—none at all.

The Indiana Supreme Court's treatment of Mr. Wright's colloquy with the trial judge confirms its mistaken focus on how well Mr. Wright would represent himself. During questioning, Mr. Wright "consistently responded that he understood" what would be expected of him when he represented himself. App., *infra*, 29a. However, because the court determined he did not have a sufficient trial strategy

prepared coming into the colloquy—only a month after he chose to represent himself and two years before the trial, App., *infra*, 4a—and because he did not have a sufficient "familiarity with legal procedures and rules of evidence," App., *infra*, 33a (citations omitted), it deemed his waiver unintelligent, App., *infra*, 34a.

To make matters worse, the court below not only improperly considered Mr. Wright's technical legal acumen, but condemned him for not having the legal experience that even a seasoned attorney might lack. The court lamented that Mr. Wright had never "tried a jury trial," "picked a jury," "cross-examined a witness," or "made a closing argument,"[12] and dismissed the fact that he had previously represented himself in a juvenile case because it was too dissimilar from the case at bar. App., *infra*, 32a. Based on this level of required legal expertise, it is not clear, other than representing oneself in a prior criminal trial—or perhaps even a prior capital or LWOP case—what would satisfy the Indiana Supreme Court's standard for intelligent waiver. This misfocused standard would indeed deny the right of self-representation to many members of this Court.

III. This Case Is An Ideal Vehicle To Address This Important And Frequently Recurring Question

The right to self-representation is as old as the nation itself, *Faretta* v. *California*, 422 U.S. 806, 832

[12] The Indiana Supreme Court's focus on these specific experiences is even more curious given that Mr. Wright waived his right to a jury trial. App., *infra*, 7a.

(1975), and "is based on the * * * principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Because this Court has recognized that the right is "fundamental in nature," *Martinez* v. *Court of Appeal*, 528 U.S. 152, 161 (2000) (quotation omitted), it "is either respected or denied; its deprivation cannot be harmless," *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984). Courts have nevertheless increasingly undermined this right by applying incorrect legal standards for invocation and waiver.

By restricting the right at both ends, the Indiana Supreme Court's transformation of *Faretta* is the most brazen. First, it imposes a high bar for invocation, holding that a defendant has equivocated whenever he has a preference for alternative counsel who are not legally qualified or available to represent him. Indigent defendants who wish to represent themselves because they are unhappy with their appointed counsel but would accept another, whom the court will not appoint, will automatically fail this test. Second, in capital and LWOP cases, the Indiana Supreme Court holds that defendants can intelligently waive their right to counsel only when they have considerable courtroom experience and great legal know-how. Few defendants—indigent or wealthy, uneducated or highly educated—will be able to jump this hurdle.

These confused standards threaten both the personal autonomy of defendants and the legitimacy of the courts themselves. When the state forces an attorney on an unwilling defendant, "the defense

presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Faretta*, 422 U.S. at 821. The defendant is bound to believe that the criminal justice system is engineering his defeat. *Id.* at 834. The government's overriding of defendant's personal choices smacks of a paternalism that can only undermine the public's belief in the legitimacy of the courts themselves.

This case provides an ideal vehicle for resolving these important Sixth Amendment issues. It squarely presents two separate issues dividing the lower courts, both of which are central to the right to represent oneself, and it involves no issues of fact—only pure questions of law.

This Court's review, moreover, would be outcome-determinative. If a preference for unavailable counsel does not render a request for self-representation equivocal and if courts may not override the right to self-representation in high-penalty cases when they fear defendants will not represent themselves well, Mr. Wright must have the right to proceed pro se.

The conflicting approaches of the federal courts of appeals and state high courts on these two issues reflect deep confusion. These issues are ripe for this Court's review and only this Court's review can bring uniformity and clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2021

APPENDIX

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FILED
May 4 2021, 3:26 pm

CLERK
Indiana Supreme Court
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and Tax Court

IN THE
Indiana Supreme Court

Supreme Court Case No. 20S-LW-260

Zachariah Brian Wright
Appellant (Defendant below)

-v-

State of Indiana
Appellee (Plaintiff below)

Argued: November 5, 2020 | Decided: May 4, 2021

Direct Appeal from the Boone Superior Court
No. 06D01-1706-MR-1078
The Honorable Matthew C. Kincaid, Judge

Opinion by Justice J. Goff

Chief Justice Rush and Justice David concur.

Justice Massa concurs in result with separate opinion.

Justice Slaughter dissents with separate opinion.

Goff, Justice.

The Sixth Amendment right to counsel in a criminal trial speaks "an obvious truth." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). It marks the very "foundation for our adversary system," ensures "fundamental human rights of life and liberty," and promotes our "universal sense of justice." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Betts v. Brady*, 316 U.S. 455, 476 (1942) (Black, J., dissenting). But through the looking glass of *Gideon* stands a corollary right—a constitutional paradox—to waive the assistance of counsel and "to conduct one's own defense *in propria persona*." *Faretta v. California*, 422 U.S. 806, 816 (1975). Indeed, despite their common constitutional foundation, the right to counsel and the right to self-representation serve distinct and often conflicting interests—the latter protecting a defendant's personal autonomy, the former guarding the integrity of our criminal justice system. We confront this tension in the case before us today.

The defendant here insists that the trial court erred by denying his request to self-represent. We agree that his waiver of the right to counsel was knowing and voluntary. But because his waiver was neither unequivocal nor intelligent, we hold that the trial court properly denied his request to self-represent. And because neither his character nor the

nature of his offenses dictates otherwise, we hold that the defendant's sentence was not inappropriate. Thus, we affirm the trial court's decision on both grounds.

Facts and Procedural History

During the early morning hours of June 18, 2017, Zachariah Wright, a nineteen-year-old on probation for felony burglary, committed a string of offenses in Lebanon, Indiana. The crime spree began with Wright's theft of a bike from the home of Darrin Demaree. From there, Wright broke into the home of Lynnetta Boice and Rick Barnard, where he stole another bike, along with sundry items he found in the garage and in a car parked in the home's driveway.

Meanwhile, an elderly couple, Sonja and Max Foster, lay asleep just a block away in the home they had shared for nearly fifty years. Sometime just after sunrise, Sonja awoke to find a tall, obscure figure—later identified as Wright—standing in the doorway to their bedroom. Before Sonja could react, Wright walked quickly across the room, leaned over the bed, and stabbed Max repeatedly. As Max struggled to deflect the blade, Sonja retaliated, striking Wright on the back with a baseball bat. Wright turned to Sonja in response, slashing her across the face. In shock, Sonja fled downstairs, bleeding profusely and unsure of where to turn. Wright followed Sonja downstairs to confront her. Sonja, having gathered her wits, escaped through the front door after distracting her attacker. But Wright caught up with her once again, pushing her to the ground and attempting to set her clothes on fire with a cigarette lighter. Unsuccessful, Wright fled the scene, disposing of his boots in a nearby pond. Sonja made her way to a neighbor's house to call for

help. Max, however, succumbed to his wounds, having been stabbed over thirty times.

The State charged Wright with, among other things, murder, level-3 felony criminal confinement, level-6 felony theft, level-5 felony burglary, and level-2 felony attempted burglary.[1] At his initial hearing in late June 2017, Wright requested and received a court-appointed attorney. When the State sought the death penalty a few months later, the trial court appointed new, capital-qualified counsel. *See* Ind. Crim R. 24(B). Wright initially raised no objection to his newly appointed lawyers. But in November 2017, he wrote several letters and motions to the court demanding a speedy trial, seeking to withdraw a motion for continuance that his attorneys had filed, and asking the court to appoint new counsel. In a pro se "Application for Pauper Counsel," Wright demanded that his "new attorney" visit him immediately and to refrain from filing motions without his permission. The court denied each of these requests.

In January 2018, Wright, by counsel, notified the court of his preference to represent himself. At a hearing the following month, the court engaged in an extended colloquy with Wright. When asked to explain his position, Wright expressed having had no problem with his first appointed attorney, with whom he admittedly "got along." Tr. Vol. 4, p. 45. But his new lawyers, he believed, "were [not] acting in [his] best interest." *Id*. According to Wright, they had "refused"

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[1] *See* Ind. Code § 35-42-1-1(1) (2017) (murder); I.C. § 35-42-3-3(a), I.C. § 35-42-3-3(b)(2)(A) (criminal confinement); I.C. § 35-43-4-2(a) (theft); I.C. § 35-43-2-1 (burglary); I.C. § 35-43-2-1, I.C. § 35-43-2-1(3)(A), I.C. § 35-41-5-1 (attempted burglary).

to request a "fast and speedy trial." *Id*. at 43. When asked to clarify, Wright stated that any "attorney paid by the court is not going to listen to anything [he had] to say." *Id*. at 45.

The court, in turn, advised Wright that an attorney "is trained by education" and possesses the skills necessary to investigate a criminal case, to "pick a fair and impartial jury," to interrogate witnesses, to file motions, to "properly present substantive defenses," to object to evidence, to preserve the record for appeal, and to offer mitigating arguments at sentencing. *Id*. at 46–49. What's more, the court stated, "death-penalty-qualified attorneys" have special training and experience. *Id*. at 46. The court also warned Wright that the prosecution had its own trained attorneys and that, should Wright decide to represent himself, he would not "receive any special treatment from the court" and would be held "to the same standard" as a practicing attorney. *Id*. at 49, 50. Proceeding without professionally trained counsel, the court emphasized, "to be blunt, can turn out to be a very bad decision in many cases." *Id*. at 50.

Wright responded repeatedly that he understood each of these points. He acknowledged, however, that attorneys "can be of some assistance in negotiating on [his] behalf," can "evaluate the strengths and weaknesses of [his] case," and can even give "expert advice as to whether or not seeking a plea deal might be advantageous." *Id*. at 48. Still, he insisted, he met "all the qualifications for going pro se," and did "not wish to have a State-appointed attorney anymore at this time." *Id*. at 43, 44.

The court then inquired about any "knowledge or skill" Wright thought he could use to represent

himself. *Id*. at 51. In response, Wright cited his independent study of law at the county jail and his experience in the criminal and juvenile justice system. *Id*. He admitted, however, to never having tried a jury trial, never having picked a jury, never having cross-examined a witness, and never having made a closing argument. *Id*. at 51–52. While insisting that his "attorneys ha[d]n't even challenged the death penalty," he agreed that it was "a little bit premature" to conclude "whether the death penalty could be challenged or not in this case." *Id*. at 46–47. At the conclusion of this colloquy, Wright referred to "five motions" he had prepared and asked the court for instructions on how to file them. *Id*. at 53.

The trial court denied the petition, explaining that —based on "his request that the Court appoint him counsel at the beginning of the case" and his "speculation that a private lawyer would be desirable"—Wright equivocated in his desire to self-represent. App. Vol. 2, p. 172. And while acknowledging that Wright's request was "knowingly made," the court concluded that it was "based upon a misapprehended understanding of the law, not an intelligent one." *Id*. at 173. Specifically, the court noted, Wright's preference to self-represent arose "from a misunderstanding of his right to a fast and speedy trial in a capital case" and confusion over his appointed-attorneys' professional responsibilities. *Id*. Finally, the court concluded that Wright's desire to represent himself wasn't voluntary, as "his poverty" precluded him from retaining a private attorney, which he admittedly preferred over court-appointed counsel. *Id*.

The State eventually withdrew its death-penalty request, seeking instead a sentence of life in prison without parole (or LWOP). In support of its LWOP request, the State cited several aggravating factors: (1) Wright's probation status when committing murder, (2) the commission of murder while committing or attempting to commit burglary, and (3) the commission of murder while committing or attempting to commit rape. *See* I.C. § 35-50-2-9(b)(1)(B), (F); I.C. § 35-50-2-9(b)(9)(C).

Wright waived his right to a jury and the trial court found him guilty of the offenses listed above, sentencing him to an aggregate term of LWOP plus 18 years.[2] In sentencing Wright, the trial court found the State had established each of its proposed aggravating factors. The court also noted the severity of the murder and the number of crimes Wright had committed. And while finding no statutory mitigators, the court acknowledged Wright's "very disadvantaged childhood" and considered his young age and "hard upbringing" as mitigating factors. App. Vol. 5, pp. 196, 205.

Wright, by counsel, sought direct appeal, arguing (1) that the trial court erred by denying his request to proceed pro se, and (2) that his sentence warrants revision under Appellate Rule 7(B).

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[2] The trial court and the parties calculated Wright's aggregate sentence as LWOP plus 20.5 years. App. Vol. 5, p. 208; Appellant's Br. at 5; Appellee's Br. at 5–6. But that result fails to account for the sentencing split in Wright's attempted-burglary conviction, a portion of which the court ordered Wright to serve concurrent with his 2.5-year sentence for burglary. *See* App. Vol. 5, p. 211. We remand to the trial court only to correct this minor oversight.

Standards of Review

The trial court is uniquely situated to assess whether a defendant has waived the right to counsel. *Poynter v. State*, 749 N.E.2d 1122, 1128 (Ind. 2001) (citation omitted). And when that court "has made the proper inquiries and conveyed the proper information," and then "reaches a reasoned conclusion about the defendant's understanding of his rights and voluntariness," an appellate court, after a careful review of the record, "will most likely uphold" the trial court's "decision to honor or deny the defendant's request to represent himself." *Id*. (citation omitted).

A trial court's sentencing decision likewise enjoys general deference on appeal. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). But this Court may, under Indiana Appellate Rule 7(B), revise a sentence if "compelling evidence" shows that it's "inappropriate in light of the nature of the offense and the character of the offender." *Id*.

Discussion and Decision

Our decision below proceeds in two parts. We first consider Wright's claim that the trial court erred by denying his request to self-represent, ultimately concluding that, because his waiver of the right to counsel was neither unequivocal nor intelligent, the trial court properly denied his request. We then address Wright's claim that his sentence warrants revision under Appellate Rule 7(B). Our analysis of Wright's offenses and his character leads us to conclude that his sentence was not inappropriate.

I. The trial court properly denied Wright's request to represent himself.

In reaching our conclusion on the first issue here, we begin our discussion by analyzing a defendant's Sixth Amendment right to self-representation. *See infra* Section I.A. Here, we survey the history and scope of that right—from its colonial-era origins, to its express recognition by the United States Supreme Court, to its limitations under our modern jurisprudence. *See infra* Sections I.A.1–2. With this context in mind, we then examine the inherent tensions between a defendant's right to self-representation and the state's obligation to ensure a fair and meaningful trial—a tension that often reaches its breaking point when a defendant faces death or life in prison without the possibility of parole. *See infra* Section I.B.1. Recognizing the potential for constitutional impasse, we offer guidance to trial courts on how best to frame the self-representation inquiry—one that acknowledges these competing interests. *See infra* Section I.B.2. Finally, we apply our analytical framework to resolve the issue here, concluding that Wright failed to show that his desire to proceed pro se was either unequivocal or intelligent. *See infra* Section I.C.

A. The right to self-representation, though deeply rooted in our legal system, is not absolute.

Under *Faretta v. California*, the seminal case on the right to self-representation, a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. Respect for individual choice is the

"lifeblood of the law," the Court reasoned, and the state must honor that choice, even if the accused "may conduct his own defense ultimately to his own detriment." *Id.* at 834 (quotation marks omitted). Of course, few people would disagree "that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Wallace v. State*, 172 Ind. App. 535, 540, 361 N.E.2d 159, 162 n.3 (1977). But unless the defendant acquiesces to representation, any "advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." *Id.* After all, to "force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Id.*

The right to self-representation, the *Faretta* Court concluded, is a "fundamental" right, implicit in the structure of the Sixth Amendment and supported by a long history of customary practice and legal protections. 422 U.S. at 817, 818, 831–32. But, while deeply rooted in our legal culture, the right to self-representation is not absolute.

1. The historical reasons for recognizing the right to self-representation lack the same force today.

The right to self-representation, as the *Faretta* Court pointed out, emerged from a long line of legal protections dating back to the nation's founding. *Id.* at 812–17. During the colonial period, American settlers "brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers." *Id.* at 826. Independence from England did little to moderate this anti-lawyer sentiment. Rather, "a nearly universal conviction" emerged, "on the part of our people as well as our courts, that forcing a lawyer

upon an unwilling defendant is contrary to his basic right to defend himself." *Id.* at 817. To preserve this sense of autonomy, lawmakers codified the right to self-represent, "along with other rights basic to the making of a defense," in our nation's earliest laws—from state statutes and state constitutions, to the federal Judiciary Act of 1789.[3] *Id.* at 828–31.

Of course, the fledgling states would gradually come to realize "the value of counsel in criminal cases," and some courts during the early national period "allowed accused felons the aid of counsel for their defense." *Id.* at 827. But a lawyer's advice remained largely out of reach for most Americans.[4] *Id.* at 827-28 n.35. And so it was for the inhabitants of the Indiana Territory at the turn of the nineteenth century. Indeed, lawyers were so scarce that territorial officials, in 1801, repealed a one-year residency requirement for the practice of law. John D. Barnhart & Dorothy L. Riker, Indiana to 1816: The Colonial Period 323–24 (1971).

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[3] *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C.A. § 1654) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

[4] Citing mid- to late-eighteenth century court records from New Jersey, one legal scholar estimates that lawyers represented criminal defendants in only fifteen to twenty-five percent of cases, suggesting "both a custom of self-representation and an economic reality" that "most citizens could not afford the services of a lawyer and no system existed for the state to pay legal fees for indigent defendants." George C. Thomas, III, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 573.

Little changed in the years following statehood, prompting efforts at expanding access to the law for ordinary Hoosiers. During the late 1820s, Indiana witnessed growing demands for a concise and uniform system of law, aiming to "render justice plain and accessible to all." H. Journal, 12th Gen. Assemb., Reg. Sess. 415 (1827) (statement of Rep. Stephen Stevens). Delegates to the state constitutional convention at mid-century expressed similar views as they debated the "idea of making every man his own lawyer, by simplifying the rules of practice." 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1754 (Ind. Hist. Coll. Reprint 1935) [hereinafter *Debates*]. Such a proposed reform, of course, wouldn't fully "dispense with the services of the [legal] profession." *Id.* at 1749 (statement of Delegate Borden). But "until the principles of the law" were "collected in a systematic code" and "rendered in plain language," the delegates insisted, it would remain impossible "for a person of only ordinary intelligence to prepare himself to appear in Court, either as plaintiff or defendant, in his own case." *Id.* at 1748.

On the other side of this debate stood the contemporary legal literati, among whom "there was a feeling of disallowance toward" interference by persons neither "learned in the profession" nor "experienced in the administration of justice." 1 *Debates* at 174 (statement of Mr. Biddle). But this sentiment did little to discourage reformist-minded delegates. The new Indiana Constitution entitled "[e]very person of good moral character, being a voter,"

to "admission to practice law in all courts of justice."[5] Ind. Const. art. 7, § 21 (repealed 1932). And to further democratize the law, the constitution instructed that "[e]very act and joint resolution shall be plainly worded, avoiding as far as practicable, the use of technical terms." Ind. Const. art. 4, § 20.

While the state's new fundamental law stopped short of expressly guaranteeing a right to self-representation,[6] this Court has long respected a person's preference to proceed pro se. "As in a Court of justice, so in a Legislative committee or assembly," we declared in 1863, "a person may, if permitted, appear by himself or attorney to openly and fairly present the facts and arguments upon which he relies." *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 481–82 (1863). A party has the right to make a "full appearance *in propria persona*," we acknowledged just over twenty years later. *Pressley v. Lamb*, 105 Ind. 171, 180, 4 N.E. 682, 688 (1886). This Court echoed a similar refrain well into the twentieth century. "The

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[5] The county bar associations decided whether an applicant possessed "good moral character." S. Hugh Dillin, *The Origin and Development of the Indiana Bar Examination*, 30 Ind. L. Rev. 391, 391 (1997). These applicants, however, consisted only of men, as the phrase "being a voter" excluded women from admission to the bar—that is, until this Court decided otherwise in 1893. *See In re Leach*, 134 Ind. 665, 34 N.E. 641 (1893).

[6] Article 1, section 13 of the Indiana Constitution guarantees to a criminal defendant the opportunity "to be heard by himself **and** counsel." Ind. Const. art. 1, § 13 (emphasis added). While recognizing that section 13 as a whole offers "broader rights than the Sixth Amendment," we've concluded that these rights neither "addressed the right of self-representation" nor amounted to an "unlimited right" for a pro se defendant "to conduct all trial proceedings on his own." *Edwards* v. *State*, 902 N.E.2d 821, 828, 829 (Ind. 2009).

services of an attorney appointed by the court may not be forced upon a pauper defendant," we opined nearly thirty years before *Faretta*, "but if the defendant declines such services he must find some way to employ counsel of his own selection or proceed in *propria persona*." *Schuble v. Youngblood*, 225 Ind. 169, 173, 73 N.E.2d 478, 47–80 (1947). Despite "the burden and hazards incident to his position," we noted in yet another opinion, a "defendant may represent himself if he so desires." *Blanton v. State*, 229 Ind. 701, 703, 98 N.E.2d 186, 187 (1951).

The past, then, is replete with affirmations of the right to legal self-representation. But many of the historical reasons for recognizing this right lack the same force today. To begin with, self-representation for many during the nineteenth century (and well into the twentieth) "was the only feasible alternative to asserting no defense at all." *See Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 156–57 (2000). Indeed, few Hoosiers had access to legal counsel—whether competent or not. As one constitutional delegate lamented, lawyers simply did "not become generally known to the people of the State." 2 *Debates* at 1720 (statement of Mr. Dunn). What's more, despite long-standing efforts at rendering "justice plain and accessible to all," the law became progressively more complex, and with more at stake, especially for the criminal defendant—a change due in no small part to the shifting maze of procedural rules and ever-expanding (and often overlapping) body of statutory offenses.[7] *See Wadle v. State*, 151

[7] Perhaps as a result of this increasing complexity, the state's liberal bar admission standards eventually fell into disfavor. But despite numerous attempts at repealing article 7, section 21, the

N.E.3d 227, 238 (Ind. 2020) (discussing this evolution in the law). Finally, the U.S. Supreme Court has since recognized an indigent criminal defendant's constitutional right to the assistance of counsel. *Gideon*, 372 U.S. at 344–45.[8] Today, then, "an individual's decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation." *Martinez*, 528 U.S. at 158.

2. *Faretta* and its progeny expressly limit the right to self-representation.

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formidable amendment process under article 16, combined with strict judicial interpretation of article 16's ratification clause, prevented repeal until 1932. Ryan T. Schwier, *The Marshall Constitution and the Jurisprudence of Article 16*, 52 Ind. L. Rev. 79, 84, 92 (2019) (citing *In re Todd*, 193 N.E. 865, 875 (Ind. 1935) (upholding the Lawyer's Amendment on grounds that a plurality of votes cast at the general election of 1932 constituted ratification)).

[8] Of course, more than a century before *Gideon*, this Court recognized an indigent criminal defendant's right to counsel at public expense. *See Webb v. Baird*, 6 Ind. 13, 18 (1854) ("It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid."). But the basis on which this decision stood was less than clear. The Court cited section 21 of the Indiana Bill of Rights, but only as grounds to compensate the attorney for his services. *Id.* at 15. Subsequent case law clarified that, while a defendant may have a **statutory** right to counsel at public expense, he "has no [such] right guarant[e]ed to him by the constitution." *Houk v. Bd. of Comm'rs of Montgomery Cty.*, 14 Ind. App. 662, 663, 41 N.E. 1068, 1068 (1895). And even a statutory right to counsel may have been limited, depending on the court in which a defendant found himself. *See id.* at 663–64, 41 N.E. at 1068–69 (construing statute to exclude justice-of-the-peace courts from appointing pauper counsel at public expense).

Aside from the shifting historical precedent on which the right to self-representation stands, *Faretta* and its progeny "have made clear" that this right "is not absolute." *Indiana v. Edwards*, 554 U.S. 164, 171 (2008).

To begin with, a trial court need not inform a defendant of his right to self-represent. *Russell v. State*, 270 Ind. 55, 60, 383 N.E.2d 309, 313 (1978). Whereas the right to counsel implements "the other constitutional rights of the accused" and ensures "the accuracy of trial outcome in our adversary system," the right to self-represent "may actually hinder such interests." *Id*. For this reason, the constitutional standards governing waiver of the right to counsel find no counterpart governing a defendant's waiver of the right of self-representation. *Id*. at 59, 383 N.E.2d at 312–13. If a defendant proceeds to trial with counsel "without ever having properly asserted the right to self-representation," a court will deem the defendant to have voluntarily waived that right. *Id*. at 61, 383 N.E.2d at 313.

Once a defendant invokes the right to self-represent, that assertion triggers strict procedural requirements for the trial court to ensure compliance with basic constitutional guarantees of fairness. Prior to *Faretta*, Indiana courts found it "reasonable to presume" that a pro se defendant himself had weighed "the implications and consequences" of his decision before making "a conscious election to assume the risks incident to a trial conducted without benefit of counsel." *Placencia v. State*, 256 Ind. 314, 317, 268 N.E.2d 613, 614 (1971). Today, by contrast, a trial court must ensure the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*,

422 U.S. at 835. This requires an admonishment of "the dangers and disadvantages of self-representation." *Hopper v. State*, 957 N.E.2d 613, 618 (Ind. 2011). And, once informed of these risks, a pro se defendant's waiver of the right to counsel "must be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

In addition to these requirements, this Court (as with most others) recognizes an untimely request for self-representation as "a proper limitation of the right." *Russell*, 270 Ind. at 61, 383 N.E.2d at 314. *See also Martinez*, 528 U.S. at 162 (observing that "most courts" require a timely request). By requiring a defendant to assert his right "within a reasonable time prior to the day on which the trial begins," a trial court can avoid a "rushed procedure," thereby decreasing "the chances that the case should be reversed because some vital interest of the defendant was not adequately protected." *Russell*, 270 Ind. at 62, 383 N.E.2d at 314.

Indiana courts also require an "unequivocal" assertion of the right to self-representation. An "unequivocal" assertion is one that's "sufficiently clear" in that, when granted, "the defendant should not be able to turn about and urge that he was improperly denied counsel." *Id.* at 61, 383 N.E.2d at 313. "Half-hearted expressions of dissatisfaction with counsel and general references by the defendant to self-representation" ultimately "fail to meet this requisite." *Id.* Absent this condition, trial courts subject themselves to potential manipulation "by defendants clever enough to record an equivocal request to proceed without counsel in the expectation

of a guaranteed error." *Id.* at 61, 383 N.E.2d at 313–14.

Beyond these limitations, there are case-specific circumstances in which the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162. To begin with, the *Faretta* Court itself recognized that the "right of self-representation is not a license to abuse the dignity of the courtroom," to engage in "serious and obstructionist misconduct," or to avoid compliance with "relevant rules of procedural and substantive law." 422 U.S. at 834–35 n.46. States may also insist on representation by counsel for persons who, though competent to stand trial, "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178. Trial courts may also appoint stand-by counsel over a pro se defendant's objection, so long as counsel's intrusions aren't "substantial or frequent enough to have seriously undermined" the appearance of self-representation. *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984).[9] What's more, a criminal defendant enjoys no right to self-representation on direct appeal. *Martinez*, 528 U.S. at 163. In that context, the reasoning goes, the "autonomy interests that survive" a conviction at trial are "less compelling" than a

[9] The *McKaskle* Court added that a pro se defendant "must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense," from counsel representing co-defendants, "or from an amicus counsel appointed to assist the court." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.7 (1984).

state's continued "interest in the fair and efficient administration of justice." *Id*.

In short, while a defendant enjoys a right to self-represent, it "does not inevitably follow" that such right precludes the appointment of counsel over the defendant's objection "to protect the public interest in the fairness and integrity of the proceedings." *United States v. Taylor*, 569 F.2d 448, 452 (7th Cir. 1978). And this public interest, we believe, expands or contracts in direct correlation with the severity of a potential punishment a defendant faces at trial.

B. Death-penalty and LWOP cases heighten the state's interest in ensuring compliance with constitutional guarantees of fairness.

As the preceding discussion makes clear, a defendant's right to self-representation often stands in tension with the state's obligation to ensure a fair and meaningful trial. *See Sherwood v. State*, 717 N.E.2d 131, 137 (Ind. 1999) (Selby, J., concurring). *See also Martinez*, 528 U.S. at 164 (Breyer, J., concurring) (observing that the right to self-representation often, "though not always, conflicts squarely and inherently with the right to a fair trial"). And this tension reaches its breaking point when a defendant faces death or life in prison without the possibility of parole.

1. Few procedural safeguards protect the state's heightened-reliability interest against an ineffective pro se defendant.

In 1972, the U.S. Supreme Court declared several state death-penalty statutes unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). With no clear sentencing standards, the Court concluded, the arbitrary manner in which the states imposed the

death penalty amounted to "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[10] *Id.* at 240. Four years later, the high court endorsed "a system that provides for a bifurcated proceeding" in which a defendant, after having been found guilty, "is accorded substantial latitude as to the types of evidence that he may introduce" at sentencing. *Gregg v. Georgia*, 428 U.S. 153, 164, 195 (1976).

Indiana's Death Penalty Act, adopted in its current form in 1976, is a product of the General Assembly's response to these cases. *See* Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 Ind. L. Rev. 1349, 1366 (2016). Under the Act, a capital-murder trial proceeds in two distinct stages: a guilt phase (to determine innocence or guilt) and, if necessary, a penalty phase (to determine the appropriate punishment). I.C. § 35-50-2-9(d). Should the trial reach the penalty phase of this bifurcated proceeding, the judge (in a bench trial) or the jury (in a jury trial) must, before imposing a death sentence, find that at least one aggravating circumstance outweighs any mitigating circumstances. I.C. § 35-50-2-9(l).

As a further safeguard against the arbitrary imposition of punishment, we've held that, whether or

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[10] Although "Indiana's statute was not among those challenged," one of our former colleagues on the bench has noted, "it was sufficiently similar to those invalidated that there was no question but that it was unconstitutional." Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 Ind. L. Rev. 1349, 1366 & n.147 (2016) (citing *Adams v. State*, 284 N.E.2d 757, 758 (1972)).

not a defendant challenges her underlying conviction, the Death Penalty Act "precludes any waiver of a review of the *sentencing* in a death penalty case." *Vandiver v. State*, 480 N.E.2d 910, 911 (Ind. 1985). This mandatory review, we've observed, reflects the state's interest in assuring "consistency, fairness, and rationality in the evenhanded operation of the death penalty statute." *Judy v. State,* 275 Ind. 145, 169, 416 N.E.2d 95, 108 (1981) (citations and quotation marks omitted).

It's clear, then, that when society—by way of its elected officials in office—seeks to impose the ultimate form of punishment, it's not simply the defendant's interests at stake. Rather, the state has a vested interest in—indeed, a constitutional **duty** to ensure—the reliability and integrity of a capital-murder trial. *See id.* at 157–58, 416 N.E.2d at 102 (emphasizing that a death sentence must comport with "principles of our state and federal constitutions"); *Lowrimore v. State*, 728 N.E.2d 860, 864 (Ind. 2000) (observing that the death penalty "maximize[s]" the state's already "strong interest in the proper conduct of every trial"); *Smith v. State*, 686 N.E.2d 1264, 1275 (Ind. 1997) ("Society does have an interest in executing only those who meet the statutory requirements and in not allowing the death penalty statute to be used as a means of state-assisted suicide.").

Today, this heightened-reliability interest extends to LWOP sentences.[11] *See* Pub. L. 158-1994, § 7, 1994

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[11] Although often deemed "qualitatively different from the death penalty, the punishment of life imprisonment without hope of release has been regarded by many as equally severe." *Smith* v. *State*, 686 N.E.2d 1264, 1273 (Ind. 1997) (citations and quotations marks omitted). Indeed, when "a person is doomed to spend his

Ind. Acts 1849, 1854 (amending the Death Penalty Act to authorize an LWOP sentence in lieu of capital punishment) (codified at I.C. § 35-50-2-9(e)). At trial, these sentences are subject to the same statutory standards and the same evidentiary requirements as death sentences.[12] *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012). And, as with capital punishment, this Court exercises mandatory and exclusive jurisdiction over all criminal appeals from an LWOP sentence. App. R. 4(A)(1)(a).

The effectiveness of these legal safeguards depends largely—if not entirely—on meaningful adversarial testing by professionally trained counsel. The appearance of a pro se defendant—potentially unwilling or unable to investigate, let alone present, the mitigating evidence necessary to ensure an appropriate punishment—threatens to undermine the state's heightened-reliability interests.[13] *See Mills v. Maryland*, 486 U.S. 367, 375 (1988) (quoting *Eddings*

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final years imprisoned, with no (or few) prospects of release," one may reasonably "argue that the oppressive confines of a prison constitute as great an infringement of his basic human rights as a death sentence." *Id.* (citations and quotation marks omitted).

[12] While these standards apply to both the death penalty and LWOP, only the death penalty triggers the appointment of specially qualified counsel, along with "adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase." Ind. Crim. Rule 24(B), (C)(2).

[13] The investigation of mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence," including, among other things, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (cleaned up).

v. Oklahoma, 455 U.S. 104, 117 n. (1982)) (O'Connor, J., concurring) (the "[sentencer's] failure to consider **all** of the mitigating evidence risks erroneous imposition of the death sentence") (emphasis added). And this destabilization, in turn, threatens to diminish public confidence in the integrity of the judicial system. After all, criminal "proceedings must not only be fair, they must appear fair to all who observe them." *Edwards*, 554 U.S. at 177 (citation and quotation marks omitted). *Accord Crider v. State*, 984 N.E.2d 618, 624 (Ind. 2013) (acknowledging that, to permit defendants "to waive appeal of any and every sentence imposed in violation of law would invite disrespect for the integrity of the courts") (cleaned up).

To be sure, this Court has consistently acknowledged a defendant's right to self-represent, "even in a capital case." *Sherwood*, 717 N.E.2d at 135. *See also Hopper*, 957 N.E.2d at 618 (recognizing a defendant's right to proceed pro se in a trial for capital murder). And the public interest in these cases, we've noted, "need not vitiate the defendant's personal rights to represent himself and determine the objectives of his representation." *Smith*, 686 N.E.2d at 1275. But if "experience has taught us that a pro se defense is usually a bad defense," *Martinez*, 528 U.S. at 161 (quotation marks omitted), how do we protect the heightened standards of reliability when deciding whether someone is worthy of death or prison with no possibility of parole?

Of course, the bifurcation of proceedings ensures that the "penalty issue is not presented to the jury until after they have found the defendant guilty of the charged crime or crimes." *Judy*, 275 Ind. at 164, 416 N.E.2d at 105–06. But the Death Penalty Act imposes

no mandatory obligation on the defendant to produce mitigating evidence at trial; it merely gives him "the *opportunity* to offer such additional evidence." *Smith*, 686 N.E.2d at 1276. What's more, a pro se defendant's lackluster performance at the guilt phase of trial may very well undermine any mitigation strategy at the penalty phase. The judge or jury, after all, may consider at the sentencing hearing "all the evidence introduced at the trial stage of the proceedings." I.C. § 35-50-2-9(d). And this evidence alone may suffice in proving the existence of an aggravating circumstance in support of death or LWOP. *See Smith v. State*, 475 N.E.2d 1139, 1141–42 (Ind. 1985); *Judy*, 275 Ind. at 164, 416 N.E.2d at 106 (noting that the "prosecution may stand on the evidence presented at the trial phase" to prove an aggravating factor).

A pre-sentence investigation report (or PSI report), prepared for the trial court by the probation department, may reveal certain mitigating circumstances when a pro se defendant proves unwilling or unable to present them independently. *See Smith*, 686 N.E.2d at 1276. Among other data, a PSI report includes information on the defendant's "history of delinquency or criminality, social history, employment history, family situation, economic status, education, and personal habits." I.C. § 35-38-1-9(b)(2). But whatever mitigating benefit this information imparts, relying on these sources alone to ensure heightened reliability in sentencing presents several problems. To begin with, a PSI report lacks the adversarial acumen of defense counsel and may even include information harmful to the defendant. After all, the probation officer who compiles a PSI report enjoys "wide discretion to include any matters he or she deems relevant to a determination of a sentence."

Allen v. State, 720 N.E.2d 707, 714 (Ind. 1999). What's more, a PSI report, while available to the trial court judge, "may not be introduced into evidence and given to the jury." *Jarrett v. State*, 580 N.E.2d 245, 254 (Ind. Ct. App. 1991). *See* I.C. § 35-38-1-13 (governing confidentiality of PSI reports). This restriction "divorces mitigation from the trial context, rather than structuring the presentation in light of the nature of the crime and the conduct of the accused." Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 Temp. Pol. & Civ. Rts. L. Rev. 1, 34 (2011). Finally, we've held that a deficient PSI report—i.e., one that fails to "fully address the social history of the defendant, his employment history, his family situation, his economic status, and his personal habits"—violates no constitutional right to due process, absent the defendant's objections and absent his offer of supplemental evidence at trial. *Woodcox v. State*, 591 N.E.2d 1019, 1024 (Ind. 1992).

In short, without meaningful adversarial testing by professionally trained counsel, there are few, if any, safeguards to protect the state's heightened-reliability interest when a pro se defendant proves unwilling or unable to present the necessary mitigating evidence at trial. And for this reason, a trial court exercising jurisdiction over LWOP and death-penalty cases must tailor its self-representation inquiry to reflect "the state's interest in preserving the orderly processes of criminal justice." *Russell*, 270 Ind. at 59, 383 N.E.2d at 312. *Accord Latta v. State*, 743 N.E.2d 1121, 1130 (Ind. 2001) (concluding that trial courts, when deciding whether to reject a defendant's waiver of the Sixth Amendment right to conflict-free

counsel in the joint-representation context, may consider the "institutional interest in a fair proceeding" to justify overriding the defendant's right to counsel of her choice). What this inquiry looks like is a question we turn to next.

2. In capital cases and LWOP cases, a trial court should frame its waiver inquiry with the state's heightened reliability interests in mind.

A "defendant who is competent to stand trial and who knowingly, intelligently and voluntarily makes a timely and unequivocal waiver of counsel is entitled to exercise the right of self-representation, even in a capital case." *Sherwood*, 717 N.E.2d at 135. When deciding whether a defendant meets these standards, a trial court should inquire, on the record, whether the defendant clearly understands (1) the nature of the charges against her, including any possible defenses; (2) the dangers and disadvantages of proceeding pro se and the fact that she's held to the same standards as a professional attorney; and (3) that a trained attorney possesses the necessary skills for preparing for and presenting a defense. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003).

We emphasize that, among these general directives, no single guideline controls. In fact, when deciding whether a defendant properly waives the right to counsel, both this Court and the U.S. Supreme Court "have deliberately eschewed any attempt to formulate a rigid list of required warnings, talismanic language, or formulaic checklist." *Hopper*, 957 N.E.2d at 619 (citing *Tovar*, 541 U.S. at 88). Rather, "the extent and depth" of a trial court's warnings will often "depend upon an array of case-specific factors." *Id.*

The severity of a potential punishment, we believe, presents one such factor. So, when a defendant asks to proceed without counsel in a death-penalty or LWOP case, the court—while mindful of the state's heightened-reliability interest—should focus its inquiry on

- whether and to what extent the defendant has prior experience with the legal system;
- the scope of the defendant's knowledge of criminal law, legal procedures, rules of evidence, and sentencing; and
- whether and to what extent the defendant can articulate and present any possible defenses, including lesser-included offenses and mitigating evidence.

See Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); *Kubsch v. State,* 866 N.E.2d 726, 737–38 (Ind. 2007); *Jones,* 783 N.E.2d at 1138*; Sherwood*, 717 N.E.2d. at 134.

In considering these factors, a court should "indulge in every reasonable presumption **against** waiver" of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasis added). If, however, after carefully assessing the factors outlined above, a court permits a pro se defense, we strongly urge that court to appoint stand-by counsel to assist the defendant in reaching his "clearly indicated goals." *McKaskle*, 465 U.S. at 184. *See also Leonard v. State*, 579 N.E.2d 1294, 1295 (Ind. 1991); *German v. State*, 268 Ind. 67, 73, 373 N.E.2d 880, 883 (1978). And when a pro se defendant fails to present mitigating evidence, a trial court may appoint amicus counsel to

compile and argue that evidence.[14] *See McKaskle*, 465 U.S. at 177 n.7. So long as appointed counsel doesn't interfere with the defendant's personal defense, nothing in *Faretta* prohibits such a course of action. *See id*. at 187. *See also McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) (observing that the Sixth Amendment guarantees "the defendant's prerogative, not counsel's, to decide on the objective of his defense").

With this analytical framework in mind, we now turn to Wright's claim that the trial court erred by denying his request to self-represent.

C. Wright's waiver of the right to counsel—while knowing and voluntary—was made neither unequivocally nor intelligently.

Because Wright "answered affirmatively that he understood all of the questions asked by the court," he

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[14] In *Smith*, this Court interpreted *Faretta* as establishing a defendant's right to waive the presentation of mitigating evidence in a capital case and to enter a guilty plea agreeing to the death penalty. 686 N.E.2d at 1274–76. We question, though, the accuracy of that interpretation, as *Faretta* recognized a defendant's constitutional "right to make his defense," not to relinquish one. *See* 422 U.S. at 819. *See also McKaskle*, 465 U.S. at 177 (observing that *Faretta* "dealt with the defendant's **affirmative right to participate**" at trial) (emphasis added). In any case, nothing in *Faretta*, or *Smith* for that matter, precludes the presentation of mitigating evidence at trial by parties other than the defendant. *See id.* at 176, 177 n.7 ("noting that *Faretta* imposed 'no absolute bar on standby counsel's unsolicited participation' and observing that a "*pro se* defendant must generally accept any unsolicited help" from, among others, "amicus counsel appointed to assist the court"); *Smith*, 686 N.E.2d at 1276 (recognizing, without rejecting, argument by amicus curiae "that special counsel should have been appointed [at trial] to argue mitigating evidence in lieu of Smith").

insists that "he has shown that his desire to represent himself is unequivocal, knowing, intelligent, and voluntary." Appellant's Br. at 21.

We agree with Wright that his decision was knowing. The trial court informed Wright that, unlike a pro se defendant, an attorney "is trained by education" and possesses the skills necessary to investigate a criminal case, to "pick a fair and impartial jury," to interrogate witnesses, to file motions, to "properly present substantive defenses," to object to evidence, to preserve the record for appeal, and to offer mitigating arguments at sentencing. Tr. Vol. 4, pp. 46–49. And, after pointing out that "death-penalty-qualified attorneys" have special training and experience, the court warned Wright that the prosecution had its own experienced lawyers and that, should Wright decide to proceed without counsel, he would not "receive any special treatment from the court" and would be held "to the same standard" as a practicing attorney. *Id.* at 46, 49–50. Wright consistently responded that he understood each of these points. We have no doubt that Wright knowingly waived his right to counsel.

We likewise agree with Wright that his decision was voluntary. The trial court concluded otherwise, reasoning that Wright's poverty forced him into accepting a court-appointed attorney. To be sure, Wright opined that "an attorney paid by the court" was "not going to listen to anything [he had] to say" and wasn't going to give him "what [he] want[ed]" since he did "not pay them." *Id.* at 45. But Wright also stated that his "first attorney," who was court-appointed, "wanted to give [him] what [he] want[ed]"

and he made no intimation that a private attorney would necessarily fare any better. *Id.* at 53.

At this point in our waiver analysis, we part ways with Wright's conclusion.

To begin with, we find that Wright equivocated in his decision at trial. His shift in preference for counsel between his initial hearing and the appointment of capital-qualified attorneys five months later reveals his early wavering on the issue. In a self-described "motion" to the trial court in early December 2017, Wright insisted that he had "declared several times" his status as a "pro se" defendant. App. Vol. 2, p. 126. But in an accompanying "lawsuit" against the court for "deny[ing him] the right to go pro se," Wright expressly "motion[ed] for new coun[s]el." *Id.* at 128. This clear request for representation directly conflicts with any autonomy interest Wright may have held before trial.[15]

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[15] A trial court need not focus its waiver inquiry only on the colloquy conducted at the *Faretta* hearing. This Court has emphasized more than once that, when deciding whether a defendant has properly waived the right to counsel, a court must consider "**other evidence in the record** that establishes whether the defendant understood the dangers and disadvantages of self-representation," "the **background and experience** of the defendant," as well as "the **context of the defendant's decision** to proceed pro se." *Hopper* v. *State*, 957 N.E.2d 613, 618 (Ind. 2011) (citing *United States* v. *Hoskins*, 243 F.3d 407 (7th Cir. 2001)) (emphasis added). *See also Kubsch* v. *State*, 866 N.E.2d 726, 736 (Ind. 2007) (same). To be sure, these analytical factors apply to the question of whether a defendant waived counsel "voluntarily and intelligently." *Hopper*, 957 N.E.2d at 618. But, in our view, it makes little sense to limit the trial court to testimony presented at the *Faretta* hearing when assessing one factor (equivocalness) while permitting the trial court to look beyond the *Faretta* hearing when assessing other

To be sure, at the time of his *Faretta* hearing, Wright seems to have abandoned his desire for court-appointed counsel. During the colloquy, he insisted more than once that he did "not wish to have a State-appointed attorney anymore at this time." Tr. Vol. 4, pp. 43, 44. Still, Wright seems to have wavered between dissatisfaction with his capital-qualified counsel and court-appointed counsel in general. While acknowledging that he "got along" with his first lawyer, he repeatedly expressed dissatisfaction with his current attorneys. Id. at 45. And an expression of discontent with court-appointed counsel is **not** an unequivocal assertion of the right to self-representation. *Dobbins v. State*, 721 N.E.2d 867, 872 (Ind. 1999) ("Defendant's declaration that he could not afford an attorney, when already represented by a court-appointed attorney, does not constitute a clear assertion of his right to self-representation."). What's more, Wright's acknowledged preference for either private counsel or his original attorney indicates no strong autonomy interest, leading us to conclude that there's little risk of violating his Sixth Amendment right to self-represent.

Even if we were to conclude that Wright unequivocally waived the right to counsel, his decision was not made intelligently. The "information a defendant must have to waive counsel intelligently will depend, in each case, upon the particular facts

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factors (voluntariness and intelligence). And, so far as our research has uncovered, the U.S. Supreme Court has never imposed such a limitation. What's more, this Court has broadly stated that "waiver must be viewed in light of all facts and circumstances," *Kubsch*, 866 N.E.2d at 737, suggesting that the inquiry as a whole may focus on evidence outside the *Faretta* hearing.

and circumstances surrounding that case." *Tovar*, 541 U.S. at 92 (quotation marks omitted). Case-specific factors we may consider include "the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88.

Here, the frustrations Wright held toward his current lawyers clearly seem to have rested on a mistaken understanding of their professional obligations. *See Lowrimore*, 728 N.E.2d at 865 (noting that "the tighter Criminal Rule 4 schedules must yield to the exigencies created by the injection of the death penalty"). And while Wright represented to the court that he possessed the requisite "knowledge or skill" and "all the qualifications" to represent himself, Tr. Vol. 4, pp. 43, 51, this clearly was not the case.

First, while Wright had some prior experience with the legal system, he conceded to never having tried a jury trial, never having picked a jury, never having cross-examined a witness, and never having made a closing argument. *Cf. Kubsch*, 866 N.E.2d at 738 (finding adequate waiver where defendant "obviously knew from his own experience of his right to call witnesses, present other evidence, and propose mitigating factors"). And while Wright had allegedly represented himself in a prior juvenile case, a delinquency proceeding simply doesn't implicate the same "formalities, procedural complexities, and inflexible aspects" as a criminal trial. *A.M. v. State*, 134 N.E.3d 361, 366 (Ind. 2019) (citations and quotations omitted).

Second, despite his independent studies while incarcerated, the scope of Wright's knowledge of the criminal law, legal procedures, rules of evidence, and

sentencing appears limited at best. While insisting that his "attorneys ha[d]n't even challenged the death penalty," he conceded, when prompted by the trial court, that it was "premature" to conclude "whether the death penalty could be challenged or not in this case." Tr. Vol. 4, pp. 46–47. What's more, at the conclusion of the colloquy, Wright informed the court of "five motions" he wanted to file, and then proceeded to ask the court how to go about filing them, demonstrating a lack of knowledge of the most basic procedural rules. *Id.* at 53. *See* Ind. Trial Rule 5(F) (enumerating several methods by which a party may file "pleadings, motions, and other papers with the court"). To be sure, a pro se "defendant need not possess technical legal knowledge" when exercising her right to self-represent. *Sherwood*, 717 N.E.2d at 134 (citing *Faretta*, 422 U.S. at 836). But even with incomplete knowledge of the law, a defendant should demonstrate at least some "familiarity with legal procedures and rules of evidence" as well as a basic "understanding of the sentencing process." *Jones*, 783 N.E.2d at 1138; *Kubsch*, 866 N.E.2d at 738. Wright, for his part, failed to show a rudimentary understanding of either. *Cf. United States v. Steele*, 2000 WL 796191, at *3, 221 F.3d 1340 (7th Cir. 2000) (unpublished) (finding a knowing and intelligent waiver where defendant had taken "three paralegal courses and received certificates in legal research and civil procedure," successfully "obtained a settlement from the State of Indiana" in a previous pro se suit, and explained that his choice to self-represent was "a matter of trial strategy").

Finally, Wright articulated no specific defenses to his crimes (let alone any lesser-included offenses) or potentially useful mitigating evidence. To the

contrary, he simply insisted that it was best that he was "just in control of [his] case," with no indication of proceeding pro se as a matter of trial strategy. While never inquiring about a specific defense, the trial judge offered Wright ample opportunity to inform the court of "anything else" he had in mind. Tr. Vol. 4, pp. 53, 54. And when Wright declined, the court made sure that he had "fully expressed [his] views on this subject." *Id.* at 54. With limited experience navigating the legal system, with deficient knowledge of criminal law and procedure, and with no apparent defenses or trial strategy, Wright's waiver of the right to counsel, we conclude, was not an intelligent one.[16] And while

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[16] According to the dissent (with which the concurrence-in-result ostensibly agrees), "whether a waiver of counsel is 'intelligent'" turns simply on the question of "whether 'the defendant knows what he is doing and his choice is made with eyes open.'" *Post*, at 3 (quoting *Iowa* v. *Tovar*, 541 U.S. 77, 88 (2004)). We acknowledge that the U.S. Supreme Court has been less than clear in distinguishing "intelligent" from "knowing." *See, e.g., United States* v. *Ruiz*, 536 U.S. 622, 629 (2002) (suggesting that the "law ordinarily considers a waiver **knowing, intelligent, and sufficiently aware** if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances") (emphasis added). But even if those two terms—intelligent and knowing—go hand in hand, it's clear to us that the courts have required something more than just asking whether a defendant "knew the dangers and disadvantages" of self-representation. *See, e.g., Tovar*, 541 U.S. at 88 (citing "the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding" as non-exclusive factors for deciding whether a defendant intelligently waived the right to counsel); *United States* v. *Sandles*, 23 F.3d 1121, 1128 (7th Cir. 1994) (whether a defendant waived his right to counsel depends in part on his "background and experience," which "includes educational achievements, prior experience with the legal system (including prior pro se representation), and performance at trial in the case at bar");

these factors may not have led us to the same conclusion in a case with less at stake, the state has a much stronger interest in ensuring a fair trial in this capital-turned-LWOP case.

At the end of the day, the trial court here, after making "the proper inquiries" of Wright and conveying to him "the proper information," made "a reasoned conclusion" about Wright's understanding of his rights, ultimately denying his request for self-representation. *See Poynter*, 749 N.E.2d at 1128. After a careful review of the record on direct appeal, we affirm that ruling by holding that Wright equivocated in his decision to proceed pro se and that he lacked the requisite intelligence to properly waive the right to counsel.

II. Wright's LWOP sentence was not inappropriate.

Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute, if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing review turns on "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In the end, "the length of the aggregate sentence and how it is to be served are the issues that matter." *Id.*

Kubsch, 866 N.E.2d at 737 (citing *Sandles* for the same proposition).

A. The nature of Wright's offenses justifies his sentence.

Wright argues that he's "not the worst of the worst for whom the maximum sentence of life without the possibility of parole is appropriate." Appellant's Br. at 21. But, while insisting that the goal of Rule 7(B) is "'to impose similar sentences on perpetrators committing the same acts who have similar background,'" *id.* at 22 (quoting *Serino v. State*, 752 N.E.2d 852, 856 (Ind. 2003)), Wright offers no precedent for this Court to make such a determination. And, even if he had, Wright did not receive the maximum sentence for murder with aggravating circumstances, which—as the State originally proposed—would have been the death penalty. See I.C. § 35-50-2-9.

Wright also contends that the murder he committed "was not premeditated," and that there's "no evidence" he intended "to commit any offense other than burglary or theft." Appellant's Br. at 28. But even if Wright had no plans to kill Max until after he arrived at the Fosters' home, his conduct, once inside, supports an inference of premeditation. Indeed, Wright stood in the doorway of the Fosters' bedroom eyeing his victims with knife in hand. At that point, he could have turned around and walked away. He chose not to. Instead, he entered the room, walked toward the bed, leaned over Sonja, and stabbed Max repeatedly to death. Whether at the moment he entered the Fosters' home, or when he paused at the bedroom door, however briefly, the "time span between formation of an intent to kill and the killing itself need not be appreciable to constitute

premeditation."[17] *Currin v. State*, 497 N.E.2d 1045, 1047 (Ind. 1986). *See also Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014) (finding LWOP appropriate where the "nature of the offense was calculated, premeditated, and brutal").

Finally, Wright didn't just commit a single crime against a single victim at a single location. Rather, he committed multiple offenses—murder, criminal confinement, theft, burglary—as part of a larger crime spree that involved multiple victims and multiple locations. And by disposing of his boots after fleeing the crime scene, Wright attempted to conceal evidence of his crime. *See Rogers v. State*, 878 N.E.2d 269, 275 (Ind. Ct. App. 2007) (citing defendant's "attempt to conceal evidence" as one factor for concluding that the sentence was not inappropriate).

For these reasons, the nature of Wright's offenses justifies his sentence.

B. Wright's character likewise offers no relief.

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[17] Some of our earliest precedent follows this understanding of premeditation. *See, e.g., Koerner v. State*, 98 Ind. 7, 10 (1884) ("It is as much premeditation, if it be entered into the mind of the guilty agent a moment before the act, as if it entered ten years before.") There are, to be sure, some cases that come to the contrary conclusion. *See, e.g., Barker v. State*, 238 Ind. 271, 279, 150 N.E.2d 680, 684 (1958) (finding it "difficult to conceive that" premeditation may be practically simultaneous with the act of killing") (citing cases). In any event, our murder statute no longer requires premeditation. *Compare* I.C. § 35-13-4-1 (Burns 1975) (repealed 1976) (defining murder as a killing done "purposely and with premeditate malice"), *with* I.C. 35-42-1-1 (defining murder as the knowing or intentional killing of another human being).

Having been exposed to alcohol, drugs, and domestic violence, "repeatedly neglected, abandoned and mentally and physically abused," "sexually molested by relatives," and constantly subjected to poverty and instability, Wright argues that his "childhood was horrific beyond belief." Appellant's Br. at 28. And while acknowledging that the "crimes for which [he] was convicted were heinous," he faults the trial court for giving "little or no weight to the horrendous environment in which [he] had to survive since early childhood." *Id.* at 22.

On occasion, this Court has considered a defendant's traumatic youth in reducing a sentence. *See, e.g., Mullins v. State*, 148 N.E.3d 986, 987–88 (Ind. 2020) (per curiam) (citing defendant's "relatively young" age of 21 years, along with a "difficult" childhood of drug exposure and physical and sexual abuse, in support of reducing her 24.5-year aggregate term for two felony meth dealing convictions to an aggregate sentence of 18 years). But more often than not, we have "held that evidence of a difficult childhood is entitled to little, if any, mitigating weight." *Bethea v. State*, 983 N.E.2d 1134, 1141 (Ind. 2013) (citing cases). And we see no reason to do otherwise here.

While Wright's troubled childhood certainly elicits some sympathy, his own delinquent behavior disrupted any potentially positive change in his youth. See Appellant's Br. at 28 (acknowledging that his theft from his foster parents landed him back in youth-detention center). What's more, the "horrendous environment" of his childhood didn't stop him from attempting to better himself as a young adult (nor did it compel his siblings, who presumably

experienced a similar childhood, to commit heinous crimes). After graduating high school, Wright enrolled in an on-line university and, at the time of his arrest, he worked full time at a restaurant. The mitigation specialist's report also noted that Wright dreamed of majoring in business and becoming an entrepreneur. And during his placement at the IU Methodist Children's Home between 2013 and 2015, Wright apparently made several good friends and was "very respectful" to the adults there. App. Vol. 3, p. 219. In short, to the extent Wright's childhood warranted consideration at sentencing, his own self-improvement as a young adult undermines his argument here.

Still, while admitting to his criminal record, Wright emphasizes that it consists only of four misdemeanors (two thefts, institutional criminal mischief, and public intoxication) and a single felony (burglary)—all of which occurred within a two-year period. But even if these crimes amounted to low-level offenses, several of them (theft and burglary, if not criminal mischief) involved the same conduct that escalated to murder here. *See Rice v. State*, 6 N.E.3d 940, 947 (Ind. 2014) (noting that defendant's two previous misdemeanor convictions involved "the same criminal conduct that in this case escalated to felony murder"). What's more, Wright was on probation for his earlier crimes at the time he embarked on his crime spree in June 2017, giving us even less of a reason to find his sentence inappropriate. *See Knapp*, 9 N.E.3d at 1292 (citing defendant's probation status at the time he committed the crimes as one factor in declining to find LWOP inappropriate).

In short, Wright's character, as with the nature of his offenses, warrants no revision of his sentence. *See Houser v. State*, 823 N.E.2d 693, 700 (Ind. 2005) (holding LWOP sentence was not inappropriate where the aggravating circumstance of committing burglary during the commission of murder outweighed the mitigating circumstance of defendant's emotionally abusive childhood).

Conclusion

Because Wright's request to self-represent was neither unequivocal nor intelligent, we hold that the trial court properly denied his request to self-represent. And because neither the nature of Wright's offenses nor his character dictate otherwise, we hold that Wright's sentence was not inappropriate. We thus affirm the decision of the trial court on both grounds, remanding only for the court to correct a minor oversight in its sentencing order. *See supra*, n.2.

Rush, C.J., and David, J., concur.
Massa, J., concurs in result with separate opinion.
Slaughter, J., dissents with separate opinion.

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Massa, J., concurring in result.

It is hard to quarrel with much of the dissenting opinion. The Court today tills new constitutional soil in suggesting the standard for waiving the right to counsel varies depending on the seriousness of the case. And it weighs Zachariah Wright's legal skills in assessing the knowing and intelligent nature of his waiver in a way explicitly rejected by the Supreme Court of the United States in its seminal decision, *Faretta v. California*, 422 U.S. 806, 835–36 (1975). I thus cannot join much of the Court's opinion for reasons sufficiently explained by the dissent.

However, I am convinced that the trial court sifted through all of Wright's various assertions—both written and oral—on more than one occasion, and concluded that what he ultimately wanted was to hire his own private counsel, or at least have his old counsel back. His waiver, therefore, was not unequivocal, and the trial court should be affirmed.

Slaughter, J., dissenting.

The Sixth Amendment's right to counsel includes the right to proceed without counsel. Here, Zachariah Wright faced the death penalty after being charged with multiple felonies, including murder. He initially sought, and was given, court-appointed counsel. But almost two years before trial, he told the court he wanted to represent himself. The court held a hearing on Wright's request and explained the advantages of having a lawyer and the disadvantages of representing himself. Wright, though, persisted in wanting to lead his own defense. The court denied his request and, after a bench trial, found him guilty. Wright now claims the trial court violated his

constitutional right to represent himself. Despite the horrific nature of Wright's crimes, I am constrained by the record below and Supreme Court precedent to conclude that Wright was denied his right of self-representation and thus is entitled to a new trial.

* * *

The Sixth Amendment protects a defendant's right to the assistance of counsel in "all criminal prosecutions". U.S. Const. amend VI. This right, along with other Sixth Amendment rights, is essential to a fair trial and includes the right to proceed without counsel. "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." *Faretta v. California*, 422 U.S. 806, 819 (1975).

The right to proceed without counsel derives from several values, including (1) "respect for the individual" and (2) the "nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so". *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (cleaned up). When properly invoked, the right of self-representation means the State cannot, consistent with the Constitution, "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Faretta*, 422 U.S. at 807. This right would mean little if a defendant had to "accept a lawyer he does not want." *Id.* at 833. The right thus serves as "an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820.

Invoking the right of self-representation requires waiving the assistance of counsel. For the waiver to be valid, the defendant must "be made aware of the dangers and disadvantages of self-representation", and the record must "establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id*. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Once the defendant understands the consequences of waiving counsel and representing himself, the court must allow him to proceed pro se. Here, after initially seeking the appointment of counsel, which the trial court granted, Wright had a change of heart and sought to represent himself. In a detailed colloquy almost two years before trial, the judge asked extensive questions probing whether Wright understood the "dangers and disadvantages" of representing himself. The court ultimately found he did not and denied his request.

On appeal, Wright argues that the trial court erred in denying his request to proceed pro se. The Court agrees that Wright's waiver was both knowing and voluntary. But it holds his waiver was neither intelligent nor unequivocal and thus not sufficient to invoke his right of self-representation. I part ways with the Court on two grounds. First, the controlling *Faretta* test and its state-law supplement compel the opposite result of today's holding—they show that Wright's waiver of counsel was intelligent and that he invoked his right to self-representation unequivocally. Second, the Constitution does not allow states to use a "tailoring" approach to erect a higher bar for defendants who want to represent themselves.

I

For two reasons, I cannot join the Court's conclusion that Wright's waiver of counsel was insufficient. First, under governing law, a waiver is intelligent if the defendant is aware of the risks of proceeding pro se, *Faretta*, 422 U.S. at 835—i.e., "the defendant 'knows what he is doing and his choice is made with eyes open.'" *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (quoting *Adams*, 317 U.S. at 279). I would find that the trial court's lengthy colloquy detailing the risks of proceeding pro se "opened" Wright's eyes and made his waiver intelligent. Second, I would find that Wright's repeated requests to proceed without counsel underscore that his invocation of the right of self-representation was unequivocal. Given these conclusions, there is but one suitable remedy: Wright is entitled to a new trial. "The right [of self-representation] is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

A

Under Supreme Court precedent, whether a waiver of counsel is "intelligent" does not turn on the defendant's IQ but on whether "the defendant 'knows what he is doing and his choice is made with eyes open.'" *Tovar*, 541 U.S. at 88 (quoting *Adams*, 317 U.S. at 279). Essentially, the defendant "should be made aware of the dangers and disadvantages of self-representation". *Faretta*, 422 U.S. at 835. We consider a waiver intelligent when the defendant "fully understands the nature of the right and how it would likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis omitted).

Based on these considerations, the record establishes that Wright's waiver was intelligent. And, consistent with *Faretta*, the relevant time for determining waiver is during the waiver hearing. *See, e.g., Faretta*, 422 U.S. at 835 (focusing on defendant's words and deeds during waiver hearing).

The record shows that the trial court made Wright aware of the dangers and disadvantages of self-representation during the waiver hearing. The court's thorough colloquy raised both the benefits of having a lawyer and the detriments of going it alone. One set of advisements explained that Wright was then (during the *Faretta* hearing) facing the death penalty if convicted. [Tr. Vol. 4, p. 46.] The court explained the myriad ways a lawyer can assist a criminal defendant before trial. Lawyers, it explained, are trained in:

- investigating criminal cases, finding favorable witnesses, and securing their testimony [*id.* at 47];
- gathering evidence, including documents, and using them to the defendant's advantage [*ibid.*];
- preparing and filing motions, framing issues, and responding to motions filed by the State [*id.* at 47–48];
- evaluating the strengths and weaknesses of the State's case, advising whether seeking a plea might be advantageous, and assisting in negotiating a plea [*id.* at 48].

In addition, the court explained that if the case goes to trial, lawyers know how to:

- pick a fair and impartial jury [*id.* at 49];

- make a favorable opening statement and closing argument [*ibid.*];
- object to inadmissible evidence [*id.* at 48];
- examine witnesses—eliciting favorable testimony from defense witnesses and cross-examining the State's witnesses [*id.* at 47].

Also, after the guilt phase, lawyers can:

- represent a capital defendant at the sentencing phase, make arguments in mitigation, which might help to spare the defendant's life [*id.* at 49];
- preserve a record for appeal and prosecute an appeal [*id.* at 48–49].

The court further emphasized that if Wright were to proceed without counsel:

- he would be held to the same standards and would have to follow the same rules as a licensed lawyer [*id.* at 49–50];
- the court could not advise or assist him [*id.* at 50];
- he would forfeit an ineffective-counsel claim [*ibid.*];
- he would be on an uneven field, as the State would be represented by an attorney and have all the advantages of a trained attorney [*ibid.*].

The court also opined that going pro se is a "very bad decision in many cases", and that it is almost always a good idea to be represented by counsel in a criminal case. [*Ibid.*] And the court noted that even lawyers

charged with crimes often get other lawyers to represent them. [*Id.* at 51.]

After each advisement, the court asked if Wright understood what a lawyer could do for him and his defense. Wright responded that he did. [*Id.* at 46–51.] Taken together, these advisements informed Wright of the risks of going pro se and underscored he was making his decision with eyes open.

Despite Wright's multiple, repeated statements that he wished to proceed on his own behalf, the trial court pressed on—undeterred by Wright's insistence that he wanted to represent himself—and changed its line of questioning. It went from asking Wright if he understood the risks of representing himself to whether he had the legal ability to do so. It asked Wright:

- what knowledge or skill he thought he had that he could use to represent himself;
- whether he had any experience in the study of law, in particular criminal law;
- whether he had ever tried a jury trial, picked a jury, cross-examined a witness, or made a closing argument.

[*Id.* at 51.] Wright acknowledged no formal training in the law but explained that he had "been charged with a number of crimes" and been "through this [legal] process many times". [*Ibid.*] And he answered "no" to the set of questions about his experience trying a case. [*Ibid.*]

The Court focuses on three aspects of Wright's responses in concluding that his waiver was not intelligent: his "limited experience navigating the

legal system", his "deficient knowledge of criminal law and procedure", and his lack of "apparent defenses or trial strategy". *Ante*, at 25–26. But *Faretta* rejects such an approach and holds that an "intelligent" waiver focuses only on whether the defendant knows the dangers and disadvantages of representing himself: "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation". 422 U.S. at 835. Any inquiry into a defendant's legal know-how, *Faretta* holds, is unwarranted.

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of prospective jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Id. at 836 (footnote omitted).

For these reasons, I would find that Wright's waiver of counsel was intelligent.

B

The Court also holds that Wright did not unequivocally invoke his right of self-representation. I cannot join this holding because our case law and the record below show that Wright's invocation was unequivocal. As discussed above, *Faretta* is the foundational case on the right of self-representation. The Supreme Court has not said what a defendant must do to trigger this right, but we have. In *Anderson v. State*, we announced "what is necessary to constitute an assertion", 267 Ind. 289, 294, 370 N.E.2d 318, 320 (1977), of the right of self-representation: a

defendant must make a "clear and unequivocal request"—one "sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel." *Id.* (cleaned up); *Hopper v. State*, 957 N.E.2d 613, 621 (Ind. 2011) (cleaned up).

In determining what constitutes an unequivocal request, we have two guideposts: *Anderson* stakes out what does not constitute a clear and unequivocal request, 370 N.E.2d at 321; and *Russell v. State* stakes out what does. 270 Ind. 55, 61, 383 N.E.2d 309, 314 (1978). Comparing the colloquies in *Anderson* and *Russell* to Wright's, we see that Wright's repeated assertions that he wanted to proceed pro se go well beyond what we have found unequivocal.

In *Anderson*, we held that the defendant had not clearly and unequivocally asserted the right to proceed pro se, and we did so by focusing on the back-and-forth between the court and the defendant. 370 N.E.2d at 319–21. There, the defendant said in passing that he wanted a private lawyer but would rather go pro se if he "can't get no lawyer." *Id.* at 320. Observing that this was the "only mention of self-representation" and that the matter "was never raised again", *id.*, we rejected the defendant's *Faretta* argument and held that this bare statement did not amount to a clear and unequivocal assertion of the right to proceed pro se. *Id.* at 321.

In *Russell*, we again focused on the colloquy between the court and the defendant and found that the defendant's statements "met the *Anderson* standard of a clear and unequivocal assertion of the self-representation right." 383 N.E.2d at 314. There, the defendant's lawyer, on the day of trial, informed

the court that the defendant wanted to conduct his own defense. *Id.* at 311. The defendant pushed for pro se representation, stating:

> • "Your Honor, I feel that, under the circumstances of the case, I have more knowledge of the case, that I would be more competent in my behalf to conduct the trial myself."
>
> • "If a person is competent, I believe I am competent to take and defend myself."

Id. On appeal, we rejected the defendant's day-of-trial attempt to invoke his right of self-representation because it was untimely—not because it was unclear or equivocal. *Id.* at 314–15.

Here, Wright's statements to the trial judge are even more emphatic than those in *Russell*, which we held were unequivocal, and more decisive than the defendant's lone, wishy-washy statement in *Anderson*. Wright, during his colloquy, repeatedly emphasized his desire to proceed pro se:

> A. I asked both my attorneys to filed [*sic*] for a fast and speedy trial and both attorneys refused, which is a violation of my constitutional rights. And I've asked many times and both attorneys have both told me no and they refused. And I qualify for all the qualifications for going pro se.
>
> Q. Say it again, sir?
>
> A. I qualify for all the qualifications for going pro se.

* * *

Q. Okay. So I guess I'm trying to understand what our position is here. Are you asking to act as your own attorney or—

A. —yes—

Q. —or is it something in the nature that you just would like—

A. —I do not wish to have a State-appointed attorney anymore at this time.

Q. Is it these attorneys in particular or that you just would like any other attorneys?

A. I would like no attorney.

Q. Okay. And so at the beginning of this case, you got a full advisement of your rights and I explained to you the right to an attorney.

A. Uh-huh, that's correct.

Q. That if you couldn't afford one, one would be provided for you. I concluded you couldn't afford an attorney. I presume you can't afford an attorney, you don't have the means; is that correct, to hire an attorney?

A. That's correct.

Q. So at that time you asked me to appoint an attorney for you, and I did. I appointed Mr. Reid. Do you remember Mr. Reid?

A. Yes.

Q. You got along okay with Mr. Reid didn't you?

A. Yes.

Q. Okay. So what's changed, then, since then? At one point it seemed like you wanted to have an

attorney and then now it seems something seems to be different.

A. What's changed is I believe the attorneys' [*sic*] believed they were acting in my best interest, which wasn't my best interest because my only interest was for a fast and speedy. And if I have an attorney that refuses to give me what I want and is violating my constitutional rights, I do not believe, you know, I should have a State-appointed attorney anymore. I was satisfied with Allan Reid's work, but you charged me with the death penalty, so he could not be on my case anymore.

Q. So it's not that you don't want some other attorney, because you understand—

A. —Well, I believe any attorney paid by the court is not going to listen to anything I have to say and is not going to give me what I want, because I do not pay them.

Q. And what sort of information have you developed since I had an attorney appointed for you and have had attorneys appointed for you that's caused you to have this difference of conclusion? What's, what's changed?

A. They refuse to give me access to my rights.

Q. Okay. And so do you want me to get you somebody else or you -

A. - I wish to go pro se -

Q. - to handle it yourself?

A. Uh-huh.

[Tr. Vol. 4, p. 43–45.]

These assertions amply satisfy *Anderson's* standard of an unequivocal request. And if these clear statements were somehow not enough, here is another exchange showing that Wright wanted to "control" his case:

> Q. It's just puzzling to me where this comes from, because at the beginning of the case you wanted an attorney, had an attorney, were happy with your attorney, and then the circumstances change. Now, all of a sudden, you don't think you want an attorney. Help me understand.
>
> A. Uh-huh. Well, as I said, I experienced, you know, having an attorney and I realize that I am better off without an attorney, because, like I said, an attorney is not going to give me what I want. My first attorney wanted to give me what I want, but these new attorneys do no [*sic*]. I think it's better if I'm just in control of the—of my case.

[*Id.* at 53.] These statements underscore that Wright invoked his right of self-representation clearly and unequivocally. Thus, I cannot join today's opinion holding otherwise.

II

The other reason for my dissent is that today's opinion creates a new test for analyzing a defendant's assertion of the right to proceed pro se—a *Faretta*-plus test. The Court adds the need to "tailor" an application of *Faretta*'s factors based on the State's interest in ensuring a fair and reliable criminal process in a capital case. *Ante*, at 19–20. Based on its enhanced test, the Court holds that the defendant's right of self-representation yields to the State's competing interest in ensuring a criminal trial's

integrity and efficiency. But Supreme Court precedent does not support such "tailoring" of competing interest when the defendant timely asserts the right to proceed pro se. The only issues here should be whether Wright invoked his right to self-representation unequivocally and waived his right to counsel knowingly, intelligently, and voluntarily. See *Anderson*, 370 N.E.2d at 320; *Tovar*, 541 U.S. at 88. Either he did, or he did not. These are binary questions not subject to tailoring.

No Supreme Court precedent holds that the *Faretta* analysis changes when a defendant's decision could be a matter of life or death. Indeed, the Supreme Court has not once espoused today's approach—despite addressing *Faretta* in the context of capital cases a number of times. See, e.g., *Godinez v. Moran*, 509 U.S. 389, 400–01 (1993) (not mentioning the state's interests and reasoning that the only "heightened standard" necessary in a death-penalty case was to find that the waiver of counsel was "knowing and voluntary"); *Patterson v. Illinois*, 487 U.S. 285, 297–98 (1988) (not mentioning the state's interests and explaining that waiving right to counsel under Sixth Amendment in a death-penalty case is not categorically "more difficult" than waiving the right under the Fifth Amendment). Today's test instead is based on an overly broad reading of a few discrete cases and narrow holdings where the Supreme Court merely recognized that a defendant's right of self-representation is not absolute. For instance, a trial court can curtail the right if a pro se defendant obstructs proceedings. See *Illinois v. Allen*, 397 U.S. 337, 346–47 (1970). Courts also may insist on a timely assertion of the right to proceed pro se, *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162

(2000), and a defendant must be competent to execute a valid waiver. *Godinez*, 509 U.S. at 396. These examples show that this right, even if validly invoked, can later be curtailed.

To be sure, a defendant's waiver may be ill-advised. But, as the Supreme Court observes, "[p]ersonal liberties are not rooted in the law of averages", but in the law's "respect for the individual". *Faretta*, 422 U.S. at 834 (cleaned up). A right premised on respect for individual freedom must include the freedom to make mistakes—even those with dire consequences. It is when the stakes for the criminal defendant are most grave that the law's "respect for the individual" should be at its highest. Yet today's opinion finds that the facts here "may not have led us to the same conclusion in a case with less at stake". *Ante*, at 26. That is because, the Court holds, "the state has a much stronger interest in ensuring fair trial in this capital-turned-LWOP case." *Ibid.* But the Supreme Court does not require that a valid waiver of counsel turns on the severity of the State's sanction. An intelligent waiver is no less intelligent when the stakes are grave. Indeed, our own precedent permits a capital defendant to plead guilty under a plea agreement calling for the death penalty. *Smith v. State*, 686 N.E.2d 1264, 1265 (Ind. 1997).

Because Supreme Court precedent does not permit today's "tailoring" test, "the severity of a potential punishment" cannot authorize the State's interests to eclipse the defendant's. *Ante*, at 14. Thus, *Faretta* does not allow us to ignore Wright's waiver.

* * *

For these reasons, I respectfully dissent.

IN THE BOONE SUPERIOR COURT I

CAUSE NO. 06D01-1706-MR-001078

STATE OF INDIANA)
) SS:
COUNTY OF BOONE)

STATE OF INDIANA)
)
vs)
)
ZACHARIAH BRIAN WRIGHT)

FINDING OF GUILT AFTER BENCH TRIAL

On November 6-7, 2019, this matter came before the Court for a bench trial. The State appeared by T.K. Morris and Hira Malik and by its designated witness Tony Bayles. The Defendant appeared in person and by attorneys Mark Inman and Andrew Borland. The Court heard opening statements. In its case in chief, the State called witnesses, introduced exhibits, and rested. The Defense rested its case in chief without presenting evidence. The Court heard final arguments and recessed to deliberate. The Court pursuant to IRE 201(b)(5) took judicial notice of the Judgement of Conviction in 06D02-1507-F6-394 entered against Defendant for Theft.

Duly advised in the premises, the Court FINDS that the State of Indiana has proven beyond a reasonable doubt that the Defendant Zachariah Wright is guilty of Count I: Murder, a Felony; Count

II: Attempted Murder, a Level 1 Felony; Count III: Burglary, a Level 1 Felony; Count IV: Burglary, a Level 1 Felony; Count V: Attempt Rape, a Level 1 Felony; Count VI: Aggravated Battery, a Level 3 Felony; Count VII: Criminal Confinement, a Level 3 Felony; Count VIII: Sexual Battery, a Level 4 Felony; Count XV: Theft, a Level 6 Felony; Count XVIII: Burglary, a Level 5 Felony; Count XIX: Theft, a Level 6 Felony; Count XX: Attempt Burglary, a Level 4 Felony; and Count XXI: Theft, a Level 6 Felony.

The Court further FINDS Defendant is not guilty of Count XIV: Theft, as a Level 6 Felony. The State previously moved to dismiss Counts IX, X, XI, XII, XIII, XVI, XXII, and XXIII. The same was granted.

A hearing on sentencing is set for January 16, 2020, at 8:30 a.m. The Boone County Adult Probation Department SHALL complete and distribute its pre-sentence investigation report on or before January 13, 2020.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED on this 7th day of November, 2019.

/s/ Matthew C. Kincaid
MATTHEW C. KINCAID
JUDGE, BOONE SUPERIOR COURT I

Distribution: Morris/Malik
Inman/Borland
Court File

IN THE BOONE
SUPERIOR COURT I

CAUSE NO. 06D01-1706-
MR-1078

STATE OF INDIANA)
) SS:
COUNTY OF BOONE)

STATE OF INDIANA)
)
V.)
)
ZACHARIAH B. WRIGHT,)
Defendant)

SENTENCE

PROCEDURAL HISTORY

On June 26, 2017, the State of Indiana filed charges of Murder, Attempted Murder, Burglary, Attempted Rape, Aggravated Battery, *inter alia* against the Defendant. On September 17, 2017, the State of Indiana filed a page separate from the charging information to seek the imposition of the death penalty on the murder charge. On April 22, 2019, the Defendant waived trial by jury for all phases. On July 23, 2019, the State of Indiana withdrew its request for the imposition of the death penalty and filed a separate page to seek the imposition of life imprisonment without the possibility of parole on the murder charge. After the State of Indiana filed an amended charging information and then a subsequent

motion to dismiss certain counts, [1] fifteen counts were tried to the Court on November 6-7, 2019.

FINDING OF GUILT[2]

The Court FINDS that the State of Indiana proved the guilt of the Defendant beyond a reasonable doubt as charged in Count I – Murder, a felony; Count II – Attempt Murder, a level 1 felony; Count III – Burglary, a level 1 felony; Count IV – Burglary, a level 1 felony; Count V – Attempt Rape, a level 1 felony; Count VI – Aggravated Battery, a level 3 felony; Count VII – Criminal Confinement, a level 3 felony; Count VIII – Sexual Battery, a level 4 felony; Count XV – Theft, a level 6 felony; Count XVII – Theft, a level 6 felony; Count XVIII – Burglary, a level 5 felony; Count XIX – Theft, a level 6 felony; Count XX – Attempt Burglary, a level 4 felony; Count XXI – Theft, a level 6 felony.

SENTENCING HEARING

This matter is now, on January 3, 2020, before the Court on sentencing. The State of Indiana appeared in person and by its deputy prosecutors T.K. Morris and Hira Malik. The Defendant appeared in person and by his lawyers Mark Inman and Andrew Borland. The Court has before it a pre-sentence investigation report prepared by the Boone County Adult Probation Department. Counsel have had the opportunity to review the same and note any corrections to the report. No corrections were made.

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[1] Counts IX, X, XI, XII, XIII, XVI, XXII, and XXIII, at the State's request, were dismissed prior to trial.

[2] The Defendant is FOUND not guilty of Count XIV – theft.

LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR COUNT I MURDER

The Court incorporated by reference of the portions of the trial of November 6 and 7 relevant to the question of life without the possibility of parole on Count I. The Court took judicial notice of the charging information, the affidavit for probable cause and the sentencing order of State of Indiana v. Zachariah Brian Wright, 06D02-1604-F5-334. The parties stipulated that Zachariah Wright was on probation on June 18, 2017 in this cause. The Court FOUND in open Court that the State of Indiana proved beyond a reasonable doubt that when Zachariah Wright murdered Robert Max Foster he was on probation after having received a sentence for the commission of a felony. The evidence shows beyond a reasonable doubt that in cause number 06D02-1604-F5-334; Zachariah Wright was convicted of burglary as a level 5 felony on September 29, 2016 and was placed on probation for three years. The evidence shows beyond a reasonable doubt that when Zachariah Wright murdered Robert Max Foster he was on probation.

The Court having found that at least one aggravating factor under I.C. 35-50-2-9 had been proven beyond a reasonable doubt and the Court having taken under advisement for deliberation the question of the proof of the remaining charged aggravating factors in the State's separate page seeking the imposition of life imprisonment without the possibility of parole on the murder charge, the State presented no further testimony. The Defense offered Defendant's Memorandum of Sentencing filed December 20, 2019 and attached submissions including Relevant Mitigating Circumstances, Death

Penalty Request Not Filed; Timeline of Significant Life Events (including a family tree diagram); Social History Report Concerning Zachariah B. Wright. The Court received these without objection from the State. The Court heard argument of the State. The Court heard argument of the Defense. The Court heard the State's brief rebuttal. Defendant made no request for allocution. Victims deferred their request to be heard on sentencing until a later point in the hearing. The Court recessed to deliberate on the request for life without parole on Count I.

SENTENCE RATIONALE FOR COUNT I

The Court having found the Defendant guilty of murder as charged in Count I now FINDS that the Defendant should be sentenced to a term of life imprisonment without the possibility of parole.

The potential imposition of a sentence of life imprisonment without the possibility of parole is governed by statute,[3] Indiana Code 35-50-2-9. As pertaining to this case and the aggravators alleged, the pertinent part of the statute reads as follows:

---

[3] The Indiana Supreme Court recently discussed its requirements for a trial court to be considered to have made adequate findings for a capital sentence. The Court has written: "[A] trial court's sentencing order imposing a capital sentence must, at a minimum, address the following four issues: (1) identify each mitigating and aggravating circumstance found; (2) include the specific facts and reasons which lead the court to find the existence of each such circumstance; (3) articulate that the mitigating and aggravating circumstances have heen [*sic*] evaluated and balanced in determination of the sentence; and (4) the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime. *Clippinger v. State*, 54 N.E.3d 986, 991 (Ind. 2016) (citing *Lewis v. State*, 34 N.E.3d 240, 249 (Ind. 2015)).

(a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged . . . .

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

. . .

(B) Burglary (IC 35-43-2-1).

. . .

(F) Rape (IC 35-42-4-1).

. . .

(9) the defendant was:

. . .

(c) on probation after receiving a sentence for the commission of a felony;

. . .

at the time the murder was committed.

The burden upon the State to prove beyond a reasonable doubt is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise from the evidence or from a lack of evidence. Reasonable doubt would exist if the finder of fact, here the Court, was not firmly convinced of the Defendant's guilt and of the satisfaction of a statutory aggravator after having weighed and considered all of the evidence. A defendant must not be convicted or handed a capital sentence on suspicion or speculation. It is not enough for the State to show that the Defendant probably committed the acts which serve as statutory aggravating circumstances for the consideration of a capital sentence. The State must convince the Court of the Defendant's guilt and of the aggravating circumstances by evidence which leaves the Court with no reasonable doubt. The proof must be convincing enough that it may be relied upon and acted upon in this matter of the highest importance.

IDENTIFICATION OF AGGRAVATING CIRCUMSTANCES FOUND AND SPECIFIC FACTS AND REASONS WHICH LEAD THE COURT TO FIND THE EXISTENCE OF SUCH CIRCUMSTANCES

As noted above, the Court FOUND that the State of Indiana proved beyond a reasonable doubt that when Zachariah Wright murdered Robert Max Foster he was on probation after having received a sentence for the commission of a felony.

The Court further FINDS that the State of Indiana proved beyond a reasonable doubt that Zachariah Wright *intentionally* murdered Robert Max Foster. He

stabbed him repeatedly in his bed. When Mr. Foster attempted to flee, Zachariah Wright pursued him into other rooms of the Foster's home and continued to stab him. Zachariah Wright inflicted over thirty stab wounds to Mr. Foster. The Court has no actual or logical doubt based upon reason or common sense but that Zachariah Wright *intentionally* murdered Mr. Foster.

The Court further FINDS that the State has proven beyond a reasonable doubt that when Zachariah Wright murdered Robert Max Foster he was committing or attempting to commit burglary. Zachariah Wright murdered Mr. Foster in his home. The Court is firmly convinced that Zachariah Wright *broke* and entered the home and the circumstances of the timing of the entry and the necessity of having entered through a door that was not open, *see State v. Smith*, 535 N.E.2d 117 (Ind. 1989) (some physical movement of a structural impediment is necessary to support a finding of breaking and even the slightest force such as the opening of an unlocked door can constitute a breaking). The Court is firmly convinced that Zachariah Wright broke and entered the Foster's dwelling and that he intended to commit a felony or theft therein; specifically, the night of the murder in the home of the Fosters he had taken vests and two bicycles from other people. His breaking, entering and presence in the home of the Fosters was a burglary.

The Court further FINDS beyond a reasonable doubt that the burglary resulted in Robert Max Foster's death and, prior to his death, the serious bodily injury he suffered from multiple stab wounds that caused his death.

The Court further FINDS beyond a reasonable doubt that the burglary resulted in serious bodily injury to Sonja Foster. The photographs admitted of Sonja, her present condition with a lingering scar, the knocking her teeth out by the stabbing and the serious gash to her lip and face leave the Court firmly convinced that the burglary resulted in serious bodily injury to Sonja Foster.

The Court further FINDS the State has proven beyond a reasonable doubt that when Zachariah Wright murdered Robert Max Foster he was committing or attempting to commit rape which is to knowingly and intentionally have sexual intercourse or other sexual conduct with another person – Sonja Foster. The evidence shows that Zachariah Wright, immediately after having stabbed Robert Max Foster to death and having stabbed Sonja Foster in the face, sat Sonja Foster in a chair, and holding her at the point of a deadly weapon (a knife) he stood in front of her. He spoke to her in a manner intended to break her will to fight back his intended attempt at sexual intercourse or other sexual conduct (as the term is defined in I.C. 35-31.5-2-221.5) telling her that her that her [*sic*] husband was not dead and that he was just knocked out. Further he told Sonja that her husband had killed people. During this time, he fondled her breasts and touched her face, both gestures and attempts to subdue a shocked victim and to prepare to rape her. Zachariah Wright removed his pants to display an erect penis. Zachariah Wright, the Court FINDS beyond a reasonable doubt, took substantial steps towards committing the crime of rape upon Sonja Foster contemporaneous to or while having intentionally murdered her husband.

In summary, the Court now FINDS and IDENTIFIES four aggravating circumstances relevant to the sentencing decision whether to impose a sentence of life without the possibility of parole. These are (1) that Zachariah Wright intentionally killed Robert Max Foster while he was committing burglary resulting in the death of Robert Max Foster; (2) that Zachariah Wright intentionally killed Robert Max Foster while he was committing burglary resulting in the serious bodily injury of Sonja Foster; (3) that Zachariah Wright intentionally killed Robert Max Foster while he was committing attempted rape upon Sonja Foster; and (4) that Zachariah Wright intentionally killed Robert Max Foster while he, Zachariah Wright, was on probation for a felony.

IDENTIFICATION OF MITIGATING CIRCUMSTANCES CONSIDERED AND FOUND AND SPECIFIC FACTS AND REASONS WHICH LEAD THE COURT TO FIND THE EXISTENCE OF SUCH CIRCUMSTANCES

As for mitigators under I.C. 35-50-2-9(c):

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

There are no statutory mitigating factors under paragraphs 1-7 of 9(c). For 1, the Defendant has a history of prior criminal conduct – he has been convicted of burglary. For 2, there is no evidence that the Defendant was under the influence of extreme mental or emotional disturbance when he murdered Robert Max Foster. For 3-7, there is zero evidence of victim consent, that the Defendant was a mere accomplice, that the Defendant was acting under substantial domination of some other person, that Defendant was mentally disease or intoxicated such as to be unable to appreciate criminality of his actions or to conform to the law, or that he was less than eighteen (18) years of age at the time the murder was committed.

But I.C. 35-50-2-9(c)(8) also requires the Court to also consider "[a]ny other circumstances appropriate for consideration" as mitigators.

The Defense cites the young age of the Defendant at the time of the murder. He was 19. This is a mitigating factor.

The Defense also cites other circumstances that the Court should consider under 9(c)(8) as follows: (1) Defendant was exposed to drugs and alcohol before he was born; (2) that Defendant's parents and other care givers were alcoholics and addicts; (3) Defendant observed instances of domestic violence; (4) Defendant was a victim of physical and sexual abuse as a child; (5) Defendant's parents often abandoned him when he was a child; (6) Defendant was neglected by his parents; (7) Defendant's childhood was fraught with instability, repeated moves and multiple, often incompetent, caregivers, (8) that the Defendant grew up in poverty, (9) that Defendant aged out of foster care without resources and that his abuse trauma was not treated; (10) that Defendant was raised by a mentally ill and personality disordered mother; (11) that Defendant's parents were often incarcerated; (12) that institutions that might have served Defendant failed to serve him; (13) and that Defendant scores high on an Adverse Child Experience Questionnaire developed to identify the impact of childhood experiences of abuse and neglect; and (14) that Zachariah Wright did not have a fully developed brain at the time of the offense. The picture painted by the Defense, particularly thoroughly, by mitigation specialists Jacqueline Guy and Janet Dowling, is that indeed, Zachariah Wright suffered a very disadvantaged childhood. The Court FINDS that Zachariah Wright's hard upbringing is a mitigating factor, though it is somewhat subsumed by the factor of Zachariah's age at the time of the offense.

The Defense cites other cases for the proposition that others convicted of serious crimes in Indiana have done worse and not received capital sentences; that Zachariah Wright is not the "worst of the worst." Whether it is true or not that others have committed more serious crimes and been punished more leniently, such is extraneous to the sentencing decision in this case. Other case results are not a mitigating factor in this case and the Court declines to find them so.

In summary, the Court now FINDS and IDENTIFIES mitigating circumstances relevant to the sentencing decision whether to impose a sentence of life without the possibility of parole that evidence offered on his behalf shows that the Defendant has led a sad young life and that he was in fact subjected as a child to bad or non-existent parenting by mentally ill, personality disordered and addicted parents and caregivers, bad influences, toxic family circumstances, failed supervision, abuse, and poverty.

EVALUATION (BALANCING) OF THE MITIGATING AND AGGRAVATING CIRCUMSTANCES IN DETERMINING WHETHER TO IMPOSE A SENTENCE OF LIFE WITHOUT PAROLE; TRIAL COURT'S CONCLUSION AS TO THE APPROPRIATE PUNISHMENT ON COUNT I – MURDER

Though he was young at the time he murdered Robert Max Foster and though he had a difficult an upbringing as a youth, the aggravating circumstances alleged by the State of Indiana in its separate page seeking life without parole and prove beyond a reasonable doubt outweigh, significantly so, the weight which should be accorded to the mitigating circumstances of Zachariah Wright's youth at the time

of the sentence and of the hard life Zachariah Wright experienced prior to his murdering Robert Max Foster.

It is the Court's conclusion that the appropriate punishment for Zachariah Wright for murdering Robert Max Foster is to be imprisoned for life without the possibility of parole.

SENTENCING DISCUSSION FOR REMAINING COUNTS

Merger

The State and Defense stipulate and agree that certain counts, pursuant the United States and Indiana Constitutions' prohibitions against double jeopardy merge; Counts II, III, IV, V, VI and VIII all contain elements of the State's request for life without parole and as such the convictions for these offenses merge into Count I. The State and Defense also stipulate and agree that Counts XIX and XXI merge into Count XVIII.

As for Count VII the State contends that the conviction for criminal confinement should not merge into Count I. The Defense argues that it should. The Court FINDS and CONCLUDES that there was a separate act of criminal confinement where the Defendant chased Sonja Foster out of her home after she escaped from Zachariah Wright's attempted rape that he held her on the ground before he fled. Count VII the Court FINDS and CONCLUDES does not merge into any of the prior counts, including Count I.

Thus, the Court must make sentencing decisions on counts VII, XV, XVII, XVIII and XX. Sentencing for non-capital offenses involves a weighing of aggravating and mitigating circumstances. There are aggravating circumstances. First, Zachariah Wright

violated terms of his probation in 06D02-1604-F5-334. I.C. 35-38-1-7.1(a)(6). Second, and related to the first, Zachariah Wright has a history of criminal or delinquent behavior – a conviction for burglary. I.C. 35-38-1-7.1(a)(2). These apply to all the remaining counts. It also appears that as to Count VII criminal confinement of Sonja Foster that she suffered harm, injury or loss that was significant and was greater than the elements necessary to prove the commission of the offense. I.C. 35-38-1-7.1(a)(1). Zachariah Wright chased Sonja from her home after had murdered her husband therein and he tackled her and attempted to light her nightgown on fire.

As for statutory mitigators listed under 35-38-1-7.1(b), none of these are present for Sonja Foster. As for the crimes against the non-Foster victims, there is one additional statutory mitigating factor for these crimes that the Court would be remiss to ignore. In the crimes in which Defendant has been convicted, other than the crimes against the Fosters, the victims have largely recovered their losses. I.C. 35-38-1-7.1(b)(1). There are non-statutory mitigators cited by the Defense and those have been previously found by the Court on the capital count above.

For the remaining counts VII, XV, XVII, XVIII and XX the mitigating factors balance equally with the aggravating factors and thus call for an advisory sentence of 9 years on Count VII, 1 ½ years on Count XV; 1 ½ years on Count XVII; 2 ½ years on Count XVIII; and 6 years on Count XX.

Consecutive Sentences or Concurrent Sentences

Trial Courts may not order consecutive sentences in Indiana without statutory authority and concurrent

sentences are presumed. A consecutive sentence can be imposed if warranted by aggravating circumstances. A trial court imposing a consecutive sentence must articulate, explain and evaluate the aggravating circumstance to support the sentence. A trial court may impose a term of years consecutive to a life sentence. *Clippinger v. State of Indiana*, 54 N.E.2d 986 (Ind. 2016) (affirming consecutive life sentences with a consecutive sentence of 20 years for a serious violent felon in possession of a firearm).

Zachariah Wright chasing Sonja from her home after killing her husband and then attempting to light her nightgown on fire with a lighter is a separate criminal act of confinement apart from what happened inside the home. It warrants a consecutive sentence. For Counts XV (theft of Demaree's bike), XVII (theft of Bonty's car keys), XVIII (breaking and entering of Barnard/Boice's garage to steal vests and bicycle) and XX (attempted burglary of Barnard/Boice's home) there are three separate victims. The Court CONCLUDES that the sentences for each separate set of victims should be consecutive with each other and that the sentence for Counts XVIII and XX should be concurrent.

JUDGMENT AND SENTENCE

It is THEREFORE ORDERED that Zachariah Wright is ADJUDGED guilty of Count I – Murder into which Counts II, III, IV, V, VI, and VIII are merged.

It is THEREFORE FURTHER ORDERED that Zachariah Wright is ADJUDGED guilty of Count VII – Criminal Confinement a level 3 felony.

It is THEREFORE FURTHER ORDERED that Zachariah Wright is ADJUDGED guilty of Count XV – Theft a Level 6 felony.

It is THEREFORE FURTHER ORDERED that Zachariah Wright is ADJUDGED guilty of Count XVII – Theft a Level 6 felony.

It is THEREFORE FURTHER ORDERED that Zachariah Wright is ADJUDGED guilty of Count XVIII – Burglary a Level 5 felony into which Counts XIX and XXI are merged.

It is THEREFORE FURTHER ORDERED that Zachariah Wright is ADJUDGED guilty of Count XX – Attempted Burglary a Level 4 felony.

The Court SENTENCES the Defendant, Zachariah Wright as follows:

Count I – Life Imprisonment without the possibility of parole;

Count VII – Consecutive with Count I, 9 years executed at the Indiana Department of Corrections, credit for 930 days confined prior to sentencing;

Count XV – Consecutive with Count I and Count VII, 1 ½ years executed at the Indiana Department of Corrections;

Count XVII – Consecutive with Count I, Count VII, and Count XV, 1 ½ years executed at the Indiana Department of Corrections;

Count XVIII – Consecutive with Count I, Count VII, Count XV and Count XVII, 2 1/2 years at the Indiana Department of Corrections; and

Counts [*sic*] XX – Consecutive with Count I, Count VII, Count XV and Count XVII and concurrent with Count XVIII, 6 years executed at the Indiana Department of Corrections.

The total sentence is life imprisonment without the possibility of parole with a consecutive term of 20 ½ years.

SO ORDERED this January 3, 2020.

/s/ Matthew C. Kincaid
Matthew C. Kincaid
Judge, Boone Superior Court I

CRIMINAL NOTICE

BOONE SUPERIOR COURT I
307 Courthouse Square
Lebanon Indiana 46052

06D01-1706-MR-001078

State of Indiana v. Zachariah Brian Wright

To: File Copy

ATTORNEYS	PARTIES
	PLAINTIFF
Kent Thomas Eastwood; Kent Thomas Eastwood; Thomas Kenneth Morris; Hira Malik	State of Indiana
	DEFENDANT
Andrew J. Borland; Mark Inman	Zachariah Brian Wright

EVENTS:

Entry Date	File Stamp/ Order Signed/ Hearing Date	Events and Comments
01/03/2020		Administrative Event (Credit time of 930 actual days in sentencing order is counting the date of sentencing on January 3, 2020. Defendant shall have 929 actual credit days from June 18, 2017 through January 2, 2020.)

IN THE BOONE
SUPERIOR COURT I

CAUSE NO. 06D01-1706-
MR-1078

STATE OF INDIANA)
) SS:
COUNTY OF BOONE)

STATE OF INDIANA)
)
V.)
)
ZACHARIAH B. WRIGHT,)
Defendant)

ORDER DENYING RELIEF UPON NOTICE TO THE COURT

Comes now the Court, and having heard Defendant's Notice to the Court ex parte on February 22, 2018 now FINDS and ORDERS as follows:

1. Defendant was appointed a public defender when he was charged with murder. The appointment was at Defendant's request. After the State amended its charge to seek the death penalty, the Court appointed capital qualified counsel Mark Inman and Andrew Borland.

2. Defendant has wanted the court to set a "fast and speedy" trial. Defendant's attorneys have not filed a request to advance the trial. There may be a disagreement between Defendant and his attorneys [*sic*] this subject. Counsel may be of the professional

opinion that adequate preparation for a capital trial cannot occur within the shortened period wished for by their client.[1] The scheduling order, arising from input of qualified counsel for the Defendant and the Prosecutor, is not atypical for capital cases.

3. Since his original request for a public defender, Defendant has developed the opinion that he should not have a publicly appointed attorney. Mr. Wright's expressed desire to act as his own counsel now is not unequivocal from his request that the Court appoint him counsel at the beginning of the case. It is not unequivocal from various letters about the subject of his representation that Mr. Wright has sent the Court. It is not unequivocal, even now, considering Mr. Wright's speculation that a private lawyer would be desirable.

4. If a request to proceed without counsel was unequivocal, one who "knowingly, intelligently, and voluntarily" waived his right to counsel would be entitled to conduct his own defense. See Faretta v. California, 422 U.S. 806, 833 (1975); see also Sherwood v. State, 717 N.E.2d 131, 134-135 (Ind. 1999).

5. Mr. Wright appears to the Court to be *aware* that he is presently expressing a wish to proceed unrepresented. His request is knowingly made.

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[1] Mindful of the fact that capital cases require extensive discovery and preparation, the Court would, if at some point trial preparation is proceeding in a manner such that trial could possibly be advanced from its current date, entertain a motion by defense counsel to set an advanced aspirational date. The Court would keep the existing date in place, in the event that aspirations do not materialize and more time is needed to fully prepare.

However, all three aspects of the waiver must be satisfied.

6. Mr. Wright's now expressed desire to act as his own attorney is not intelligent. Instead, Mr. Wright's expression of a desire to act as his own attorney arises from a misunderstanding of his right to a fast and speedy trial in a capital case. See State v. Lowrimore, 728 N.E.2d 860 (Ind. 2000). His present expressed desire is based upon a misapprehended understanding of the law, not an intelligent one.

7. Mr. Wright's now expressed desire is also not voluntary. He disagrees with his attorneys' strategic decision not to ask for an earlier trial date and theorizes that because they are public defenders that they will not obey his instruction. What Mr. Wright really wants is a private lawyer to represent him. But Mr. Wright has no means to retain a private attorney. Thus his expressions to the Court are compelled by his poverty and not voluntarily chosen. His demand to act as his own attorney is, notwithstanding his contrary assertions, involuntary.

8. Mr. Wright's now expressed wishes are not intelligently formed for at least one additional reason. Mr. Wright misunderstands the professional responsibilities of his Counsel. Mr. Inman and Mr. Borland's professional responsibilities are no different than they would be had they been privately retained. A private attorney would have no greater professional obligation, in this capital case, to move for an earlier trial than do Mr. Wright's publicly appointed attorneys. Whether a private attorney would have a difference of opinion on the prudence of asking for an earlier trial date is speculation.

WHEREFORE relief upon Defendant's expressions to the court made February 22, 2018 is DENIED. It is further ORDERED that Defendant's Counsel SHALL continue in their representation.

SO ORDERED this March 12, 2018.

/s/ Matthew C. Kincaid
Matthew C. Kincaid
Judge, Boone Superior Court I