No. 21-634

IN THE
Supreme Court of the United States

ZACHARIAH BRIAN WRIGHT,
Petitioner,
v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Office of the
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER
Solicitor General*
CAROLINE TEMPLETON
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Counsel for Respondent

QUESTION PRESENTED

Whether the Constitution prohibits a state trial judge from appointing counsel for a 19-year-old criminal defendant in a capital case when he prefers representation by an attorney who cannot or will not represent him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL CASES [CONT'D]

STATE CASES

STATE CASES [CONT'D]

STATE CASES [CONT'D]

RULES

OTHER AUTHORITIES

INTRODUCTION

Petitioner Zachariah Wright was convicted at a bench trial of murder based on eyewitness testimony of the victim's wife. He now contends he should have been allowed to represent himself at trial, even though he would have preferred above all to be represented by counsel of his choosing, rather than by court-appointed, capital-qualified counsel. His petition should be rejected for two reasons: (1) Lower courts are not in conflict over whether a state court may require a defendant to proceed with counsel in this situation; and (2) Wright's request for self-representation was equivocal. That said, if the Court does grant this petition, it should consider overruling *Faretta v. California*, 422 U.S. 806 (1975), because the Constitution does not protect a right to represent oneself.

STATEMENT OF THE CASE

On June 17, 2017, Robert and Sonja Foster returned from a trip celebrating their fiftieth wedding anniversary. But before dawn the next day, Robert was dead and Sonja was gravely wounded—and sexually victimized—from a home invasion and physical assault by Zachariah Wright.

1. In the early morning hours of June 18, 2017, nineteen-year-old Zachariah Wright stole a bicycle from a driveway, rode the bicycle to another house where he broke into a detached garage and stole two leather vests, a pickaxe, and another bicycle. Tr. Vol. IV, 166–67, 182. Wright also tried to enter that dwelling. *Id.* at 171, 181. Wright then broke into the home

of Robert and Sonja Foster. *Id.* at 97. Wright entered the bedroom of the Fosters, where both were sleeping, and reached over Sonja to start stabbing Robert. *Id.* at 98. Robert attempted to escape Wright's attack, but Wright chased Robert and continued stabbing him. *Id.* at 100. The forensic pathologist identified 32 areas of sharp force injuries on Robert's head, back, chest and arms. Tr. Vol. III, 46. Seven stab wounds caused injury to his heart and lungs. *Id.* at 47–48. Robert died at the scene. Pet. App. 64a.

Sonja picked up a baseball bat from the closet and hit Wright in the back; Wright turned and stabbed Sonja just below her left eye all the way down to her lower teeth. Tr. Vol. IV, 101. Sonja fled to the front room of the house; Wright pursued. *Id.* at 101–02. Sonja asked if Robert was still alive, and Wright told her that he was. *Id.* at 102. Wright then caressed her cheek, told her it would be alright, touched her right breast, and exposed his erect penis. *Id.* Sonja escaped Wright and ran out of the front door, wearing her pajamas. *Id.* at 104. Wright caught her and tackled her. *Id.* He then held her down and tried to set her clothes on fire. *Id.* at 105. Sonja again managed to escape Wright and fled to a neighbor's house who heard Sonja screaming for help and called 911. *Id.* at 105–06, 121.

Forensic testing confirmed the presence of Wright's DNA on a bent knife blade recovered from the Foster home. Tr. Vol. III, 19. Police executed a search warrant on Wright's home, where they recovered a pair of jeans and boxer-style underwear that

both had Sonja and Robert's DNA on them. *Id.* at 25–26; Tr. Vol. IV, 27–28.

2. The State charged Wright with murder, a felony; attempted murder, a Level 1 felony; two counts of burglary, a Level 1 felony; attempted rape, a Level 1 felony; aggravated battery, a Level 3 felony; criminal confinement, a Level 3 felony; sexual battery, a Level 4 felony; arson, a Level 4 felony; nine counts of theft, a Level 6 felony; burglary, a Level 5 felony; attempted burglary, a Level 2 felony, obstruction of justice, a Level 6 felony; unauthorized entry of a motor vehicle, a Class B misdemeanor; and false informing, a Class B misdemeanor. App. Vol. II, 2.

At the initial hearing, the court appointed counsel for Wright, and the two developed a workable attorney-client relationship. *Id.* at 4. A few months later, however, the State filed a request for the death penalty, *Id.* at 6, which meant that Wright's appointed counsel could no longer represent him because he was not qualified to handle capital cases. *See* Ind. Crim. Rule 24 (requiring, in capital cases, appointment of two lawyers meeting specified training and experience qualifications). So, the court appointed Wright new, capital-qualified counsel. App. Vol. II, 6.

Shortly thereafter, Wright began writing letters to the trial court requesting a "fast and speedy" trial, which the trial court ignored because Wright was represented by counsel. *Id.* at 104–107, 109. Wright then started filing motions to remove his counsel. *Id.* at 111. He also requested the appointment of new counsel: "I now motion for new coun[s]el immediately. I

would also like there [sic] contact information immediately." *Id.* at 113. Wright reiterated his request noting that he had "put in several motions to fire [counsel], to withdraw motion for continuance, motion for fast and speedy, and a motion for a new attorney. Yet I hear nothing on the status of any of these motions. I request that since we are so short on time that you, the court, order [Wright's first attorney] as codefence [sic]." *Id.* at 120. Wright also prepared and submitted a new application for pauper counsel, having written at the top "I would like my new attorney to come see me immediately." *Id.* at 122.

Wright's capital-qualified counsel requested a hearing because Wright said he wanted to proceed pro se. *Id.* at 139. At the *Faretta* hearing, Wright told the trial court that he did not believe he "should have a State-appointed attorney anymore" but also said he "was satisfied" with his first attorney, Pet. Supp. App. 6a, and that his "first attorney wanted to give me what I want." *Id.* at 14a–15a.

The court denied Wright's request to proceed pro se, finding, in part, that his request was equivocal: "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." Pet. App. 78a.

3. Before trial, the State withdrew its request for the death penalty. App. Vol. II, 30. It sought instead a sentence of life without parole. *Id.* at 27; App. Vol. III, 109–10.

Wright waived his right to a jury trial, and the matter was tried to the bench. App. Vol. II, 34. Sonja, who was seventy years old at the trial, testified about the night she and Robert had returned from a trip celebrating their fiftieth wedding anniversary. Tr. Vol. IV, 96–97; Tr. Vol. III, 114. Sonja described Wright entering the bedroom, attacking her sleeping husband, and chasing her throughout the house and into the yard. Tr. Vol. IV, 97–101, 103–04. She also testified that she heard Wright speak on a news story and recognized his voice. *Id.* at 111. Wright's roommate testified that Wright came home on June 18, 2017, without a shirt or shoes and wearing bloody pants. *Id.* at 217. DNA testing also confirmed the presence of Wright's DNA on a knife with a bent blade. Tr. Vol. III, 19. And Robert and Sonja's DNA were found on Wright's jeans and boxer-style underwear. *Id.* at 26–28.

At the sentencing hearing, the trial court considered the State's charged aggravators including whether Wright murdered Robert while attempting to commit arson, while committing burglary, and while attempting to commit rape. App. Vol. III, 49–50. The trial court concluded that Wright intentionally murdered Robert: "When Mr. Foster attempted to flee, Zachariah Wright pursued him into other rooms of the Foster's home and continued to stab him." Pet. App. 64a. The court concluded that he did so after having broken into the Foster's home. *Id.* The court further concluded that Sonja suffered a serious bodily injury: "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." *Id.* at 65a. The trial court also found that Wright attempted to rape Sonja after stabbing her based on his conduct, including fondling her breasts, touching her face, and displaying his erect penis. *Id.*

In mitigation, the trial court considered Wright's age at the time of the murder. *Id.* at 68a. It also considered the circumstances of Wright's youth, finding that he "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." *Id.* at 69a. The court ultimately concluded that a sentence of LWOP was appropriate for Wright. *Id.* at 70a.

4. On appeal, Wright pressed his claim for self-representation at trial. The Indiana Supreme Court considered the requirement that the assertion of *Faretta* rights be unequivocal. The court explained that "[a]bsent 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 17a–18a (internal citations omitted).

With that concern in mind, the court determined that Wright's request for self-representation was equivocal. In particular, the court observed that, "[i]n

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. 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 30a. The court also noted that while Wright "seem[ed] to have abandoned his desire for court-appointed counsel" at the *Faretta* hearing, he "wavered between dissatisfaction with his capital-qualified counsel and court-appointed counsel in general." *Id.* at 31a. The court finally concluded that "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." *Id.*

REASONS TO DENY THE PETITION

I. No Lower-Court Split Exists on the Issue Presented in This Case

The Court held in *Faretta v. California*, that a defendant in a criminal trial has the right to proceed without counsel only if he "clearly and unequivocally" asks to do so. 422 U.S. 806, 835 (1975). Indeed, "courts [are to] indulge in every reasonable presumption *against* [the waiver of counsel]." *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasis added). Here, Wright declared his status as a "pro se" defendant, but later expressly moved for new counsel or restoration of his first appointed counsel. Pet. App. 30a. Then, at the *Faretta* hearing, Wright stated that he no longer wanted appointed counsel, but allowed that

he was satisfied with his first appointed counsel. *Id.* at 31a. Wright criticized the public-defender system but indicated that *private* counsel would give him what he wanted. *See Id.* at 78a–79a; Pet. Supp. App. 5a–6a. Under these circumstances, the Indiana Supreme Court properly concluded that Wright failed to express a "strong autonomy" interest necessary to overcome the presumption against self-representation. Pet. App. 31a.

To justify review of this fact-intensive adjudication, Wright invokes two purported splits in authority, but neither pans out. 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." Pet. 12. But far from "entrench[ing] a split," *id.*, the decision below is consistent with the holdings of the cited cases, which turn on a variety of facts and circumstances that influenced various judicial assessments of equivocation. The second supposed split is "whether, how, and when a court should override a defendant's right to self-representation when he faces the possibility of severe penalties." *Id.* But the only identified split—whether standby counsel may present mitigation evidence over the pro se defendant's objection, *see State v. Reddish*, 859 A.2d 1173 (N.J. 2004)—in no way implicates the facts of *this* case. The Court should therefore deny the petition.

A. No split exists on the equivocation issue

The petition first contends that the Indiana Supreme Court's decision "expands a split . . . 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." Pet. 13. The petition purports to identify "three distinct approaches," *id.*, but manages only to show that every demand for self-representation requires case-specific factual inquiries and judgment as to whether it is informed, voluntary, and unequivocal.

The petition broadly asserts that several courts "hold that a request for self-representation is not equivocal merely because a defendant has an acknowledged preference for unavailable counsel," and that some courts further "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." *Id.* at 16–17.

Some cases cited by Wright, however, do not provide any holding that squarely supports his conflict theory. For example, the court in *Tamplin v. Muniz* merely held that trial counsel was ineffective for failing to raise a *Faretta* claim at all. 894 F.3d 1076, 1091 (9th Cir. 2018). And, far from illustrating when a court may *reject* self-representation, the court in *State v. Stallings* upheld a trial court's decision to *permit* self-representation. 476 P.3d 905, 916–19 (N.M. 2020).

In other cases cited by Wright, the court considered facts and circumstances not present here that tended to clarify the demand. For example, *Freeman v. Pierce*, 878 F.3d 580, 586–90 (7th Cir. 2017), had to

do with the significance of a prospective pro se defendant's request for *standby* counsel, which says nothing about the significance of a defendant's competing request for full-blown representation. Unlike a request for a different lawyer, appointment of standby counsel is a common feature in pro se cases and fully consonant with exercise of the *Faretta* right. And while the *Freeman* court also said that the defendant's dissatisfaction with counsel did not *preclude* an unequivocal request to proceed pro se, *id.* at 588, that holding does not imply the converse, *i.e.*, that dissatisfaction with counsel is *irrelevant* to the equivocation inquiry.

Moreover, far from falling into distinct categories, Wright's remaining cited cases demonstrate nothing but a fact-dependent "totality-of-the-circumstances approach to determining whether a defendant's request for self-representation is unequivocal." Pet. 15. *See, e.g.*, *State v. Jordan*, 44 A.3d 794, 807 (Conn. 2012) (observing that "[t]he inquiry is 'fact intensive and should be based on the totality of the circumstances surrounding the request'" and reversing because "in context" of the "previous seven month period of self-representation and his recent filing, pro se" defendant's request "in writing and orally" was unequivocal (quoting *Commonwealth v. Davido*, 868 A.2d 431, 439 (Pa. 2005))); *Buhl v. Cooksey*, 233 F.3d 783, 792–93 (3d Cir. 2000) (concluding on habeas review that state court erred in failing to make a *Faretta* inquiry after defendant "filed a *written* motion to proceed pro se," "told the court that he had represented himself on three prior occasions," and merely agreed with the court that he was dissatisfied with counsel); *United States v. Gonzales-Arias*, 946 F.3d 17, 37–39 (1st Cir.

2019) (affirming trial court's decision allowing defendant to proceed pro se where defendant "stressed from the get-go" and later "confirmed" that he did not want his prior counsel and then "in fact represented himself" at sentencing).

Indeed, the defining feature of most appellate cases in this universe is affirmation of the trial court's circumstantial analysis, just like here. *See, e.g.*, *State v. Swan*, 10 P.3d 102, 107 (Mont. 2000) (affirming trial court); *Davido*, 868 A.2d at 445 (affirming trial court); *State v. Stenson*, 940 P.2d 1239, 1285 (Wash. 1997) (en banc) (affirming trial court); *State v. Curry*, 423 P.3d 179, 181 (Wash. 2018) (affirming trial court); *Stallings*, 476 P.3d at 910 (affirming trial court); *Gonzales-Arias*, 946 F.3d at 22 (affirming trial court); *Wilson v. Walker*, 204 F.3d 33, 35 (2d Cir. 2000) (per curiam) (affirming trial court); *People v. Michaels*, 49 P.3d 1032, 1040 (Cal. 2002) (affirming trial court); *State v. Pires*, 77 A.3d 87, 90–91 (Conn. 2013) (affirming trial court); *Mosley v. State*, 209 So. 3d 1248, 1271–72 (Fla. 2016) (finding no error in trial court's denial of self-representation); *Gallego v. State*, 23 P.3d 227, 242 (Nev. 2001) (affirming trial court), *abrogated on other grounds*, *Nunnery v. State*, 263 P.3d 235 (Nev. 2011); *Nunnery*, 263 P.3d at 241 (affirming trial court); *State v. Cunningham*, 474 S.E.2d 772, 775–76 (N.C. 1996) (finding no error in trial court's self-representation determination); *State v. Bakalov*, 979 P.2d 799, 808–811 (Utah 1999) (affirming trial court's self-representation determination). Given the fact-laden nature of determining whether a defendant's waiver of right to counsel is knowing, intelligent,

voluntary, and unequivocal, this record of deference to trial courts is unsurprising.

The petition demands a bright-line rule governing a trial court's decision where a defendant expresses a preference for unavailable counsel, stating that the Indiana Supreme Court "impose[d] 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." Pet. 36. But the Indiana Supreme Court never instituted such a rule; it simply found equivocation on the facts of this case. The petition thus fails to present a split in authority relevant to whether Wright's invocation of the right to represent himself was equivocal.

B. The decision below does not implicate any conflict over denial of pro se representation in high-penalty cases

The decision below implicates no conflict over how courts should respond to pro se representation requests in high-penalty cases.

First, the petition worries that some state courts "override the right of self-representation in high-penalty cases by sometimes requiring the trial court to appoint standby counsel." Pet. 22 (citing *Barnes v. State*, 29 So.3d 1010 (Fla. 2010), and *Reddish*, 859 A.2d 1173). But *this* case is not about standby counsel, and in any event the Court has expressly allowed that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help." *Faretta*, 422 U.S. at 834 n.46; *see also McKaskle v. Wiggins*, 465 U.S. 168,

170, 184 (1984) (holding that standby counsel may, over the defendant's wishes, undertake "basic mechanics" of a trial "consistent with the protection of the defendant's *Faretta* rights").

Second, and even less relevant to this case, the petition stakes out a conflict among courts over whether standby counsel may offer mitigating evidence in the capital phase over defendant's objection. *Compare Reddish*, 859 A.2d at 1204, *with United States v. Davis*, 285 F.3d 378, 385 (5th Cir. 2002). But again, the Indiana Supreme Court did not address the role of standby counsel—rather, it affirmed rejection of self-representation entirely because "Wright equivocated in his decision at trial," App. 30a.

The other "high-penalty" cases cited by Wright do not, as the petition admits (Pet. 24), "specifically address" whether the stakes may justify overriding a demand for self-representation. Indeed, in some cases, courts refused pleas for reversal by defendants who were convicted after representing themselves. *See, e.g.*, *Torres v. United States*, 140 F.3d 392, 395 (2d Cir. 1998) (holding that defendant's *Faretta* motion was properly granted even though it was politically motivated); *State v. Taylor*, 781 N.E.2d 72, 79–81 (Ohio 2002) (holding that the trial court did not err by allowing the defendant to proceed pro se even though "his decision to represent himself was not 'a good idea'"). Meanwhile, in *Finch v. State*, 542 S.W.3d 143, 146 (Ark. 2018), the court affirmed denial of self-representation because the defendant refused to cooperate with mental evaluations and disrupted court proceedings. And while the court reversed denial of self-

representation in *State v. Richards*, 456 N.W.2d 260 (Minn. 1990), it did not suggest the trial court improperly relied on the potential sentence.

In any event, although the Indiana Supreme Court ruminated that, "[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. 26a, it ultimately considered the same four elements of counsel waiver—knowing, intelligent, voluntary, and unequivocal—that other courts consider. App. 28a. Accordingly, no lower-court conflict is implicated.

II. If the Court Grants the Petition, It Should Use this Case to Overrule *Faretta*

The Court should not bother with this case, but if it does, it should consider, once again, overruling *Faretta*, which rests on unsound historical footing, suffers from an eroded rationale, and affords no rights that citizens use to structure their lives based on settled expectations about the law. *Cf. Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

In *Faretta*, the Court voted 6-3 to infer a right of self-representation from a supposed historical aversion to compulsory counsel, from the right to self-representation provided by the Judiciary Act of 1789 and state codes of the period, from the personal nature of Sixth Amendment rights generally, and from its understanding of what it more broadly means to "enjoy the right . . . to have Assistance of Counsel." *See Faretta v. California*, 422 U.S. 806, 812–32 (1975).

But in dissent, Chief Justice Burger, joined by Justices Blackmun and Rehnquist, shredded the majority's supposed historical support, demonstrated that the decision contradicted the text of the Sixth Amendment and settled precedent, and characterized the holding as "another example of the judicial tendency to constitutionalize what is thought 'good.'" *Id.* at 836 (Burger, C.J., dissenting). Justice Blackmun added his own dissent for good measure, amplifying further the flaws in the majority's historical analysis. *Id.* at 846 (Blackmun, J., dissenting).

Over the years, the non-textual right of self-representation has stood on increasingly shaky ground, as the Court has incrementally trimmed *Faretta*'s application and cast doubt upon its underlying rationale. For example, while *Faretta* found a "constitutional right to proceed without counsel," *id.* at 807, in *McKaskle v. Wiggins*, the Court recast that right as merely the defendant's "constitutional right to appear on stage at his trial." 465 U.S. 168, 187 (1984) (permitting imposition of standby counsel). It also stressed that "the defendant's right to proceed *pro se* exists in the larger context of the criminal trial," which is designed to determine guilt or innocence, not to provide a platform for self-actuation. *Id.* at 177 n.8.

In *Martinez v. Court of Appeal*, the Court rejected self-representation on appeal and criticized *Faretta*'s embrace of "nontextual" rights and its historical analysis by observing that "the original reasons for protecting that right do not have the same force" now when every defendant can have competent counsel appointed. 528 U.S. 152, 158, 160 (2000). *Martinez*

also cast doubt upon *Faretta*'s "autonomy" rationale, reasoning that autonomy is sufficiently respected with appointed counsel that is loyal and competent. *See id.* at 160–61. Finally, citing *McKaskle*, the Court in *Martinez* said that "the defendant's interest in acting as his own lawyer" is at times outweighed by "the government's interest in ensuring the integrity and efficiency of the trial." *Id.* at 162. The Court thus suggested that future cases could further limit or even abrogate the right to self-representation where its invocation squarely conflicts with fundamental fairness. *See id.*

Then, in *Indiana v. Edwards*, the Court further narrowed *Faretta*, holding that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. 164, 178 (2008). It declined to overrule *Faretta*, but only because it asked whether "*Faretta*, contrary to its intent, has led to trials that are unfair." *Id.* The Court recognized that *Faretta* sometimes leads to unfair results but cited "recent empirical research suggests that such instances are not common." *Id.* (citing Hashimoto, *Defending the Right of Self–Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 427, 447, 428 (2007)). That analysis ignored fundamental legal infirmities with *Faretta*—and overstated the results of the Hashimoto study. One scholar criticized the *Edwards* opinion's "serious and ironic misreading of Professor Hashimoto's study to suggest that it demonstrates that all is basically well

in *pro se* land." Eugene Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 Geo. J. Int'l L. 919, 921 n.5 (2009).

More recently, the Court observed "tension" between the Sixth Amendment's right to counsel and *Faretta*'s right to self-representation. *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). In many ways, this case illustrates the irreconcilable tensions *Faretta* introduces into state criminal justice systems. Consistent with *Gideon v. Wainwright*, 372 U.S. 335 (1963), the trial judge appointed government-paid counsel, which Wright found acceptable. But when the State decided to pursue capital punishment, Indiana law required that Wright be represented by counsel having proper training and sufficient experience in capital cases (presumably a laudable goal under the Sixth Amendment). So, the trial court appointed *more* highly qualified counsel, which Wright found *un*acceptable. Equivocation aside, *Faretta* requires deference to Wright's choice, with the State's constitutional duty to afford minimally adequate representation (which Wright accepted) undermined by its insistence on highly qualified representation (which Wright rejected). (The State ultimately dropped the death penalty too late for the first-appointed lawyer to resume the representation.)

Paradoxically, with the threat of a *Faretta* motion always looming, the Indiana criminal-justice system might be better off dispensing with capital-qualified counsel for all capital defendants—better to ensure capital defendants at least have *a* lawyer than to hold out for ensuring a specially qualified one. In other

words, the categorical rule suggested by Wright—that all demands for self-representation must be honored, regardless of the circumstances or contradictions in that request—puts courts to an impossible choice: *Gideon* or *Faretta*? The lack of any safe harbor can only confirm that *Faretta* is jurisprudentially unsound.

***

Zachariah Wright was nineteen and potentially facing the death penalty when the trial court appointed him properly qualified legal counsel. That appointment served the interests of both Wright and society more generally. Wright escaped capital punishment, but now seeks a do-over of the entire proceeding, which would open anew the same questions, choices, and issues the Indiana criminal justice system already addressed. Wright protests that the State's "paternalism" will "undermine the public's belief in the legitimacy of the courts." Pet. 37. But as the Court acknowledged in *Edwards*, "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Edwards*, 554 U.S. at 177 (quoting *Wheat v. United States,* 486 U.S. 153, 160 (1988)).

The Court should deny the petition, but in the alternative it should, if necessary to ensure that defendants such as Wright proceed to trial represented by competent counsel, sweep *Faretta* aside.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Office of the
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER
Solicitor General*
CAROLINE TEMPLETON
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

**Counsel of Record*

Dated: January 20, 2022