
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2026

SCOT GAITHER, *Petitioner*

v.

**TIM LANE, WARDEN,
GREEN RIVER CORRECTIONAL COMPLEX, *Respondent***

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

This case presents the following questions for review:

1. To accept a waiver of counsel on direct appeal of a criminal case, must a state court at least obtain some evidence of a knowing waiver, as the state courts of Arizona, Georgia, Mississippi, Pennsylvania, and Texas have held or is a mere request to proceed *pro se* on appeal sufficient, as the Fifth, Sixth and Seventh Circuits have held?
2. Consistent with 28 U.S.C. §2254(b)(1)(B)(i) which excuses exhaustion requirements when “there is an absence of available State corrective process,” and consistent with *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000), and *Shinn v. Ramirez*, 596 U.S. 366 (2022), may a federal habeas petitioner develop the factual basis of a claim through an evidentiary hearing when the state court lacks a corrective procedure, or does §2254(e)(2)(A)’s “fails to develop” language prohibit it?

LIST OF PARTIES

1. Petitioner Scot Gaither is represented by Hon. Timothy G. Arnold, Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.
2. Respondent Tim Lane, Warden, Green River Correctional Complex is represented by Hon. Russell Coleman, Attorney General, and Hon. Matthew Krygiel, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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Scot Gaither, Petitioner, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit, affirming a finding denying habeas corpus relief on his claim that his waiver of appellate counsel was not knowing, voluntary and intelligent.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit in *Gaither v. Lane*, 169 F.4th 716 (6th Cir. 2026) is attached at Appendix (“Apx”) A. The unpublished ruling of the United States District Court for the Western District of Kentucky in *Gaither v. Mazza*, 4:18-CV-00151-JHM, 2024 WL 6843553 (W.D. Ky. Sept. 16, 2024), is attached at Apx B. The unpublished decision of the

Kentucky Supreme Court in *Gaither v. Commonwealth*, 2004-SC-0474-MR, 2006 WL 436071 (Ky. Feb. 23, 2006) is attached at Apx C.

JURISDICTION

It is undisputed that Petitioner timely and properly filed a habeas corpus action in the United States District Court for the Western District of Kentucky, and then timely and properly appealed the denial of relief in that action to the United States Court of Appeals for the Sixth Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final decision of a United States Circuit Court of Appeals.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(e)(2) states:

- (2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
 - (A)** the claim relies on--
 - (i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
 - (B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

After a jury trial, Mr. Gaither was convicted of manslaughter, kidnapping, and other offenses and sentenced to life without parole. His trial attorney failed to file a notice of appeal on his behalf. By the time Mr. Gaither realized this, he was in the Kentucky State Penitentiary, and had met Eric Hermansen, a life sentenced inmate who was also a legal aide.¹ Hermansen convinced Gaither that “attorneys were no good” and “unless an attorney can actually relate to doing time, no attorney would ever be able to appreciate the imperative need to effectively advocate appellate issues under the AEDPA, as there are literally thousands of inmates nationwide who will never be heard because some appellate or trial attorney was unable to appreciate just what was at stake . . .”²

Hermansen drafted a motion for belated appeal for Gaither, which recites that “[u]nless Mr. Gaither indicates other wise [sic] he does not want any appointment of counsel, as he unequivocally invokes his inalienable § 11 Kentucky Constitutional right to be heard by himself, . . . [citing authority].”³ Upon receipt of the Motion for Belated Appeal the Kentucky Supreme Court apparently reached out to the Appeals Branch of the Department of Public Advocacy (“DPA”), offering to appoint DPA to the case, and its manager at the time, Margaret Case, responded with a letter to the Clerk of the Court declining the appointment out of concern for Gaither’s right to

¹ Hermansen Affidavit (“Hermansen”), R. 1-1, PageID## 103-104, at 103.

² *Id.*, at 104.

³ Motion for Belated Appeal, R. 1-1, PageID## 105-108, at 106.

proceed pro se.⁴ However, Ms. Case wrote Gaither a letter asking if he wished to be represented by counsel, and recommended that he accept representation.⁵ Hermannsen claims that he discussed the letter with Gaither and wrote a letter to DPA refusing representation.⁶ However, DPA staff in Frankfort never received a response of any kind, and closed the file without investigating further, interpreting the absence of a response to mean that Gaither did not want counsel on his motion.⁷

The case was remanded to the trial court for a hearing on whether Gaither's failure to file a notice of appeal could be attributed to him, personally.⁸ At the outset of the hearing, the trial court found Gaither to be indigent and appointed counsel to represent him, which Gaither agreed to.⁹ After the hearing on Gaither's belated appeal motion, the court found counsel had failed to perform his duties at the post-trial stage.¹⁰ The Kentucky Supreme Court granted Gaither's belated appeal.¹¹

Pursuant to that order, Gaither filed a *pro se* notice of belated appeal, and a Motion to Proceed In Forma Pauperis in which he requested waiver of costs, but stated, "It should be noted, Mr. Gaither does not want any appointment of counsel."¹²

⁴ July 27, 2004 Letter, R. 1-1, PageID# 109.

⁵ July 28, 2004 Letter to Gaither ("Case Letter"), R. 1-1, PageID## 110-111.

⁶ Hermannsen, *supra*, at 103.

⁷ Emails between Rebecca Diloreto and Margaret Case, R. 1-1, PageID## 112-116.

⁸ 8/23/04 Kentucky Supreme Court Order Remanding Belated Appeal, R 1-1, PageID# 127.

⁹ 10/21/2004 Order, R 1-1, PageID# 128.

¹⁰ *Id.*

¹¹ Order Granting Belated Appeal, R 1-1, PageID# 121.

¹² 11/22/04 IFP Motion, R. 1-1, PageID## 143-144.

At the same time, he submitted an “Order and Affidavit of Indigency” on a typed form which included language, “Unless I have explicitly indicated otherwise, I do not want appointment of counsel”¹³ The trial court signed the order at the bottom of the form, and took no further action to ascertain whether Gaither’s desire to waive counsel was knowing, voluntary, and intelligent.¹⁴

Gaither was never represented by counsel on his direct appeal, which was decided based on a *pro se* brief completed by Hermansen. Hermansen’s brief failed to raise numerous critical claims, including the fact that Gaither was ineligible for a life without parole sentence, and a jury unanimity issue that was automatically reversible.¹⁵ The Kentucky Supreme Court affirmed his conviction in a memorandum opinion. *Gaither v. Commonwealth*, 2006 WL 436071 (Ky. 2006) (*Gaither I*). As the court pointed out, many of the issues were “unpreserved and without merit.” *Id.*, at *2.

After his direct appeal was denied, Gaither went through a series of post-trial proceedings in state court. Gaither’s initial state post-conviction action motion was completed while Gaither was still “represented” by Hermansen, and was unable to be

¹³ Order and Affidavit of Indigency, R 1-1, PageID # 145.

¹⁴ *Id.*

¹⁵ Specifically, the instructions allowed the jury to convict Gaither of kidnapping if he believed that the purpose of the restraint was to “terrorize another.” Under the law at the time of the appeal, where an instruction relates to multiple theories and one of those theories is not supported by the evidence, the error is automatically reversible. *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000). Other issues also could have been raised, but the *Burnett* issue is sufficient to establish that Gaither would likely have gotten a new trial had he been represented by competent counsel.

amended after counsel was appointed on appeal, but eventually resulted in a resentencing trial, where he received a life sentence. See *Gaither v. Commonwealth*, 2013 WL 3013579 (Ky. App. June 14, 2013)(*Gaither III*)(Remand for resentencing); *Gaither v. Commonwealth*, 521 S.W.3d 199 (Ky. 2017) (*Gaither IV*)(Affirming resentencing verdict). In ordering a new sentencing hearing, the Court noted that “if this issue had been raised on direct appeal, the matter would certainly have been remanded for a new sentencing hearing at that time.”¹⁶

At the time of Gaither’s post-conviction proceedings, Kentucky had no vehicle for litigating claims related to the lack of effective assistance of counsel on direct appeal. *Pollini v. Robey*, 981 F.3d 486, 499 (6th Cir. 2020); *Boykin v. Webb*, 541 F.3d 638, 647-48 (6th Cir. 2008). Nevertheless, Gaither twice attempted to get state courts to address the issue, first through a second motion for belated appeal, and later through a state post-conviction petition, Both attempts were rejected.¹⁷

Gaither sought habeas corpus relief which the district court denied in pertinent part because it held “[t]he circumstances demonstrate that Petitioner's waiver of counsel was knowing and intelligent. Petitioner waived his right to appellate counsel by his words and his conduct.” *Gaither v. Mazza*, 2024 WL 6843553, *2 (W.D. Ky. Sept. 16, 2024), *aff'd sub nom. Gaither v. Lane*, 169 F.4th 716 (6th Cir. 2026). The District Court found that Gaither’s “written requests indicate that he was aware that he had a right to have counsel appointed, indicate that he did not wish to have

¹⁶ Order on Remand from the Court of Appeals Apx. 179-202, at Apx. 187.

¹⁷ Order Denying Leave to File Belated Appeal, R. 14-2, PageID#453. *Gaither v. Commonwealth*, 2021 WL 5751511 (Ky. App. 2021)(*Gaither V*).

counsel, and sought to invoke self-representation on his direct appeal. Based on these facts, Petitioner has failed to satisfy his burden to demonstrate that his waiver of counsel was not voluntary or intelligent or that he was denied the right to appellate counsel.” *Id.*

The District Court relied extensively on the Sixth Circuit case of *Beatty v. Caruso*, 64 Fed. Appx. 945, 950 (6th Cir. 2003), which held that “Supreme Court precedent does not establish any specific procedure, such as a hearing, for informing a criminal defendant of the consequences of a waiver of counsel. . . . At the appellate level, courts will ordinarily not have face-to-face contact with the appellant, and the waiver will be accomplished by written communications.” *Id.*,

The District Court granted a certificate of appealability on this issue. Recognizing that the limitations of § 2254 “wouldn't apply here because Kentucky's state courts never heard this claim,” the Sixth Circuit nevertheless reversed based on the same language from *Beatty*. *Gaither v. Lane*, 169 F.4th 716, 723 (6th Cir. 2026). The Sixth Circuit held that this case “isn't close” because “[i]t's difficult to imagine how Gaither could've made it any clearer that he didn't want counsel on appeal. So the Kentucky courts didn't violate his constitutional rights when they gave him exactly what he wanted. And the district court didn't err when it found that Gaither's ‘waiver of counsel was knowing and intelligent.’” *Id.* In the eyes of the court, “Gaither didn't proceed pro se by default—it's what he wanted from the start of his appeal”, evidenced by Gaither “fervently and repeatedly assert[ing] his right to represent himself in his filings, which spanned several months.” *Id.* (quotations omitted).

The Sixth Circuit also rejected Mr. Gaither’s request for an evidentiary hearing. Mr. Gaither had argued that he had not “failed to develop” the record in state court because there was no procedure for doing so, and therefore the limitations on evidentiary hearings in §2254(e)(2) did not apply. The Sixth Circuit disagreed, finding that this Court had:

. . . rejected a nearly identical argument in *Shinn v. Ramirez*, 596 U.S. 366, 386–87, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022). It held that §2254(e)(2) prohibits evidentiary hearings even when an attorney's negligence prevented the proper development of the factual record. *Id.* at 371, 142 S.Ct. 1718. This declined to extend *Martinez v. Ryan* as an exception to the requirements of §2254(e)(2). So if Gaither failed to develop the record because he lacked an attorney, that doesn't change §2254(e)(2)’s applicability.

Gaither v. Lane, 169 F.4th at 726–27.

This petition follows.

REASONS FOR GRANTING THE WRIT

The trial judge in Gaither's case permitted him to proceed pro se on appeal based solely on a written request, signed by Gaither, without any evidence about whether he understood what he was doing. At the time the trial court made this decision, there had been no hearing on the matter, no affidavit demonstrating Gaither's awareness of the dangers and disadvantages of self-representation, and no other evidence from which the trial court could conclude that Gaither understood the dangers and disadvantages of self-representation. All it had was Gaither's signed statement that indicated he did not want counsel appointed.

This should have been the start of the process, not the end of it. While magic words are not required, in this case there was no evidence presented to the trial court to support the waiver, and the court made no finding about the sufficiency of the waiver. Courts are significantly split on whether this is sufficient for a waiver to be constitutionally valid.

Ruling that Gaither was not entitled to an evidentiary hearing in spite of the absence of a state remedy, the Sixth Circuit on the flimsy, undeveloped state court record to hold that Gaither's rights were not violated because his written request alone was sufficient to waive the right to counsel on appeal. That decision widens an existing split of authority on the requirements for a waiver of appellate counsel. This case warrants review to address both the process for accepting a waiver of counsel on appeal, and Gaither's entitlement to an evidentiary hearing in District Court.

I. This Court Should Grant Review to Resolve a Split of Authority Regarding the Requirements for Waiving Counsel on Direct Appeal.

A. The Split of Authority

This case presents a clear split of authority between state courts in Arizona, Georgia, Mississippi, Pennsylvania, Texas, and Washington, on the one hand, and the Fifth, Sixth and Seventh circuits on the other. The state courts have recognized its own state law right to self-representation on appeal. In so doing, most have required in-court procedure to ensure that the waiver of counsel is knowing, voluntary, and intelligent. *See Coleman v. Johnsen*, 330 P.3d 952, 956 (Ariz. 2014)(Requiring a “*Faretta*-like hearing” in the trial court); *Merriweather v. Chatman*, 684 S.E.2d 237, 239 (Ga. 2009)(Requiring the trial court to conduct a hearing where the defendant is advised of “the dangers of self representation”); *Grim v. State*, 102 So. 3d 1073, 1077 (Miss. 2012)(Directing compliance with Miss. R. App. P. 6(c)(2), requiring remand to the trial court for a hearing, whenever a litigant desires to represent themselves on direct appeal); *Commonwealth v. Grazier*, 713 A.2d 81, 82 (Pa. 1998)(Requiring remand to the trial court, where needed, so an “an on-the-record determination” to be made by the trial court that “the waiver is a knowing, intelligent, and voluntary one.”); *Webb v. State*, 533 S.W.2d 780 (Tex.Cr.App. 1976)(Extending *Faretta* to appellate cases). The one state that has recognized a right to appellate self-representation but has not specifically required an in-court colloquy left the issue for another day. *State v. Rafay*, 222 P.3d 86, 90 n. 4 (Wash. 2009)(Declining to reach the question but noting that “[n]othing in our opinion forecloses an appellate court from determining that a colloquy is necessary

before allowing a defendant to proceed *pro se* or that this colloquy should be undertaken in the trial court.”).

Many circuit courts of appeal do not authorize *pro se* representation in a criminal appeal, but some have adopted procedures that would permit a court to consider allowing a waiver of appellate counsel in a criminal case if there is an affidavit demonstrating a knowing, voluntary and intelligent waiver of the defendant’s right to counsel on appeal. *Compare* 1st Cir. Rule 46.6 (permitting counsel to withdraw if accompanied by, among other possibilities “[a]n affidavit from the defendant showing that the defendant has been advised that the defendant may retain replacement counsel or apply for appointment of replacement counsel and expressly stating that the defendant does not wish to be represented by counsel but elects to appear *pro se*”); *with* 6th Cir. Rule 12 (not authorizing withdrawal and substitution of *pro se* representation).

As to federal courts, prior to *Tovar* the federal courts consistently held that either a hearing or other evidence demonstrating that the waiver was knowing and that the defendant was aware of the dangers and disadvantages of self-representation was necessary to support a finding that the waiver was sufficient. In a pre-*Martinez* case, the Fifth Circuit held that even if a defendant had a right to proceed *pro se* on appeal, it was “doubtful” that the defendant had “‘knowingly and intelligently’ waived his right to counsel”, because his motion to proceed *pro se* “was admittedly prepared by a fellow inmate.” *Gomez v. Collins*, 993 F.2d 96, 98 (5th Cir. 1993).

On the other side of that spectrum, the Tenth Circuit upheld the waiver of

counsel on appeal from an Oklahoma inmate who tendered in open court an affidavit attesting to his awareness of his rights and the dangers and disadvantages of self-representation, finding that the record “demonstrates convincingly that Petitioner’s waiver of appellate counsel was made knowingly and intelligently.” *Moses v. Mullin*, 151 Fed. Appx. 728, 730 (10th Cir. 2005). See also *Baker v. Kaiser*, 929 F.2d 1495, 1500 (10th Cir. 1991)(finding that “[t]he trial judge must make the defendant aware of the disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open.”).

Then, in *Speights v. Frank*, 361 F.3d 962, 965 (7th Cir. 2004), the Seventh Circuit found that “*Tovar* strongly implies that the Supreme Court is not likely to extend, beyond the trial itself, any requirement that a defendant be informed about the benefits of counsel and risks of waiver.” Finding that “Once the trial is over, the major complexities, choices, and risks are past”, the *Speights* court found that “[j]ust as a simple consent to proceed without counsel suffices during custodial interrogation, so a straightforward assent is enough on appeal.” *Id.*

Subsequently, in *Jean-Paul v. Douma*, 809 F.3d 354, 359 (7th Cir. 2015), the Seventh Circuit upheld a state court decision finding that a waiver by an allegedly illiterate appellant was sufficient to waive the right to counsel on appeal, holding that “a waiver of counsel on appeal need not be accompanied by this kind of colloquy because “the major complexities, choices, and risks are past” [and so] “straightforward assent” is enough to waive the right to counsel on appeal. *Id.* (quoting *Speights*). Subsequently, the Fifth Circuit affirmed that principle in *United*

States v. Rodriguez, 821 F.3d 632, 633 n. 3 (5th Cir. 2016), citing *Speights* and *Douma*. In finding that Gaither had waived counsel, the Sixth Circuit joins the Fifth and Seventh and widens the split of authority over the record required for a waiver.

B. Unknowing Waivers of Counsel on Appeal Undermines the Quality of Appellate Review.

“Our experience has taught us that a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.” *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000)(quotations omitted). Indeed, “[s]ome critics argue that the right to proceed pro se at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial.” *Id.*, 528 U.S. at 161 n. 9, referencing *United States v. Farhad*, 190 F.3d 1097, 1106–1107 (C.A.9 1999) (Reinhardt, J., concurring specially). The challenges to those who proceed pro se on appeal are just as onerous as those who attempt to proceed *pro se* at trial. It has long been acknowledged that “the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

While counsel on appeal may be as important on appeal as it is at trial, the waiver process is inherently different. In a trial case the defendant is before the court, who is required to ensure that the defendant is “aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta v. California*, 422 U.S. 806, 835 (1975). This case also illustrates another concern for individuals

seeking to waive counsel on appeal – the influence of unqualified prison legal aides, who may wish to act as the person’s attorney for money or status, but who lack the qualifications to do the job well. In this case, Eric Hermansen clearly wanted to be Gaither’s “lawyer,” and succeeded in winning the job. In that regard he had significant advantages – he was present with Gaither all the time, while the only communication Gaither had with any attorney was by mail, which Gaither may or may not have read or understood, and which Hermansen was present to explain away.

In this environment, in-court proceedings are a valuable bulwark for protecting the defendant from an ill-informed waiver. In *Martinez*, 528 U.S. at 162, this Court found no difference in what was necessary to waive appellate counsel from what *Faretta* required for trial counsel. However, since it rejected the claim that a criminal appellant had a right to proceed *pro se* at all, it did nothing to address the clear procedural differences between trial and appeal, nor clearly identify a required process.

Subsequently, in *Iowa v. Tovar*, 541 U.S. 77, 90 (2004), this Court adopted the “pragmatic approach to the waiver question,” this Court first discussed in *Patterson v. Illinois*, 487 U.S. 285 (1988). This approach “asks ‘what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage,’ in order ‘to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.’” *Tovar*, 541 U.S. at 90,

quoting *Patterson*, 487 U.S. at 298. Since that time, this Court has not addressed the issue of the procedure needed for waiving counsel on appeal.

C. The Sixth Circuit’s Reasoning for Accepting Gaither’s Waiver is Not Supported by This Court’s Cases.

The Sixth Circuit’s reasoning is much different from the reasoning of the other courts. The Sixth Circuit relied primarily on two cases, *Beatty v. Caruso*, 64 Fed. Appx. 945 (6th Cir. 2003), and the unpublished case of *James v. Campbell*, 20-1430, 2020 WL 9597495 (6th Cir. Sept. 17, 2020). Both cases were instances where the individual waived counsel through their conduct – in both cases, repeatedly firing appointed counsel – rather than requesting to proceed *pro se*. In *Beatty*, the Sixth Circuit held that Beatty’s desire to waive appellate counsel was in part “demonstrated by his discharge of his two court-appointed appellate attorneys.” *Beatty*, 64 Fed. Appx. at 951 (emphasis added). Likewise, in *James*, “counsel was appointed at various intervals, and [James] fervently and repeatedly asserted his right to represent himself.” *James*, 2020 WL 9597495 at *2.

In reaching this conclusion, the Sixth Circuit merely affirmed the district court’s ruling, which held that Gaither had waived his right to counsel “by his words and his conduct.”¹⁸ In addition to *Beatty* and *Jones*, the District Court relied on several other cases that likewise involved attorneys being appointed and later discharged by the Appellant. See PageID #850 (quoting *United States v. Harris*, 2 F.3d 1452, 1455 (7th Cir. 1993)(“Harris discharged four attorneys, the last on the morning of his trial.”); *Oimen v. McCaughtry*, 130 F.3d 809, 811 (7th Cir.

¹⁸ *Id.*, PageID # 850.

1997)(Finding that Oimen “was represented by the state public defender in the court of appeals; that is, he was until he effectively fired his attorney for not raising an issue Oimen wanted to pursue.”).

The Court has never held that the right to counsel can be waived by conduct in the first place. The closest the Court has come is the *Faretta* court’s admonition that “the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Faretta*, 22 U.S. at 834, n. 47 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). In *Allen*, this Court held that “a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” *Id.* 397 U.S. at 343. Assuming that *Allen* is applicable to forfeiting the right to be represented by counsel, it certainly requires much more than a mere request.

D. The Seventh Circuit’s Finding That “a Straightforward Assent is Enough on Appeal” Is Also Inconsistent With This Court’s Cases.

The Seventh Circuit relied upon *Tovar*, *supra*, which rejected a lower court decision that held that a specific procedure was required to ensure a knowing, voluntary and intelligent waiver of counsel. Quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) this Court noted 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—even though

the defendant may not know the *specific detailed* consequences of invoking it.” *Tovar, surpa*, 541 U.S. at 92 (emphasis in original). In that regard, “the information a defendant must have to waive counsel intelligently will ‘depend, in each case, upon the particular facts and circumstances surrounding that case.’” *Id.* quoting *Johnson v Zerbst*, 304 U.S. 458, 464 (1938).

The Seventh Circuit concluded that this Court’s “pragmatic approach” to the issue of waiver would apply to the waiver of the right to counsel on appeal,¹⁹ and that it weighed in favor of finding that “straightforward assent” to proceeding without counsel on appeal was sufficient, because “the major complexities, choices, and risks are past.” *Speights*, 361 F.3d at 965. However, the Court has found the opposite, holding that “a criminal appellant must face an adversary proceeding that-like a trial-is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.” *Evitts*, 469 U.S. at 396. As such, the waiver process for an appeal should be similar to the waiver at trial, not the waiver that accompanies a pretrial statement to police.

Further, other issues complicate the waiver process on appeal that are not commonly present at trial, including that the appellant is typically an inmate who is not in court regularly and may fall under the influence of other inmates. In *Gomez*,

¹⁹ *Tovar* involves a waiver of the Sixth Amendment right to counsel at trial, but the right to counsel on appeal is protected by the Fourteenth Amendment, and so *Tovar* does not directly apply, though it is unlikely that the Fourteenth Amendment standard differs in any important way. *Evitts*, 469 U.S. at 393.

the Fifth Circuit noted that Gomez “is apparently seeking lay representation from a fellow inmate. Such lay representation on a direct appeal is clearly impermissible.” 993 F.2d at 98.

The same is true in this case, as Mr. Gaither was not seeking to represent himself so much as he was approving of Eric Hermansen’s lay representation. What was Hermansen’s motivation to assist Gaither? Perhaps it was an earnest desire to help a friend, but it also could have been a belief that he could litigate through Gaither’s case an issue that could help Hermansen. Having a procedure that required a court appearance or even just a well written affidavit would supply the evidence needed to establish whether Gaither was aware of the challenges associated with this arrangement. Indeed, had Gaither’s arrangement with Hermansen been brought out during the process, the courts might well have not approved it at all, nipping the problem in the bud.

The influences surrounding a prisoner and the challenges inherent in litigating an appeal—the procedure which requires the greatest technical knowledge of any other stage of the criminal justice system—a robust procedure for ensuring a knowing, voluntary and intelligent waiver is the “pragmatic approach.” *Tovar*, 541 U.S. at 90. Allowing a waiver based on a “straightforward assent”, especially where, as here, that assent is a typewritten document written by a fellow inmate, does not do enough to ensure a knowing, voluntary and intelligent waiver.

II. This Court Should Also Accept Review to Decide Whether § 2254(e)(2) Forbids an Evidentiary Hearing on a Claim that The State Has No Process to Review.

The Sixth Circuit’s ruling cannot be reconciled with the Court’s longstanding

federal habeas jurisprudence, the purpose of the AEDPA, and *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000), regarding the ability to develop factual basis of the record in federal court when the habeas petition is not at fault for the failure to develop the factual basis in state court.

The Court has long held that the requirement of exhaustion of state remedies is excused when there is an absence of a state corrective process. Demonstrating its awareness of the Court's longstanding equitable federal habeas doctrines, Congress codified that within the AEDPA. 28 U.S.C §2254(b)(1)(B)(i). Resultingly, both before and after the adoption of AEDPA, state court remedies did not need to be exhausted when there was an absence of a state corrective process. Indeed, how could one exhaust in state court if there is no state court mechanism to do so and the state courts refused to recognize a right or provide a process through which one could try to vindicate a federal constitutional right? One could not. That is why the matter could be brought in federal court and addressed there for the first instance, with factual development as necessary.

In these regards, the Court's habeas corpus jurisprudence has long authorized evidentiary hearings to address factual disputes. In *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court held that where a habeas petition raised a disputed material fact, an evidentiary hearing was required "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." Later in *Keeney*, the Court limited this requirement to some extent. Four

years after *Keeney*, to try to further finality and expedite federal habeas proceedings, Congress adopted the AEDPA, including § 2254(e)(2), which limited the availability of those hearings in cases when “the applicant has failed to develop the factual basis of a claim in State court proceedings.” Nothing within the legislative history surrounding the adoption of the AEDPA indicates a majority of Congress intended to prevent an evidentiary hearing anytime a habeas petitioner failed to present the factual basis of a claim in state court regardless of the reasons the petitioner failed to do so. Indeed, the Court resoundingly rejected the argument that “failed to develop” meant that, ruling instead that it applies only when the habeas petitioner can be considered “at fault” for the failure to develop the claim, as opposed to a state actor being responsible for the factual basis of a claim not being developed in state court. *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000). *Shinn v. Ramirez*, 596 U.S. 366 (2022), neither changed that nor is inconsistent with *Williams (Michael)*.

In *Ramirez*, 596 U.S. at 382 et seq, the Court held that where ineffective assistance of initial-review collateral proceeding counsel is the basis for excusing a procedural bar, the factual record must first be developed in state court before the federal court can rely upon it because there is no constitutional right to the effective assistance of initial-review collateral proceeding counsel and thus the habeas petitioner must be considered at fault. That is consistent with *Williams (Michael)* and the Court’s longstanding habeas jurisprudence because *Williams* focused on situations where there were constitutional rights and a state actor was responsible for the constitutional violation.

Of course, a habeas petitioner cannot be at fault for the failure to develop in state court the factual basis for a claim when the state court does not recognize the federal constitutional right or otherwise fails to provide a mechanism by which the constitutional violation could be vindicated. Indeed, since *Ramirez*, and consistent with *Ramirez*, the Ninth Circuit held that where the state prevents factual development, the litigant is not “at fault” for purposes of § 2254(e)(2). *Rodney v. Garrett*, 116 F.4th 947, 957 (9th Cir. 2024)(Failure to appoint counsel or hold a requested hearing). Other circuits have reached the same conclusion, based on the “had failed to develop” language in §2254(e)(2). *Fooks v. Superintendent, Smithfield SCI*, 96 F.4th 595 (3d Cir. 2024); *Small v. Woods*, 146 F.4th 590 (7th Cir. 2025).

The Sixth Circuit, in Mr. Gaither’s case, appears to be the only circuit to have ruled otherwise by holding, in light of *Ramirez*, § 2254(e)(2) prohibits factual development where the state court does not recognize a federal constitutional right or provides no mechanism by which the federal constitutional right can be vindicated. That cannot be reconciled with *Ramirez*, which focused on situations where the reason the factual record was not developed has nothing to do with a constitutional right, *Williams (Michael)*, the Court’s habeas jurisprudence, or the purpose of the AEDPA. Rather, it would undermine the AEDPA’s purpose and be contrary to these cases.

Under the Sixth Circuit’s ruling, one of two results must be correct: (1) a federal constitutional claim in which factual development is necessary to prevail would not be cognizable in federal court when the state court fails to recognize the

federal constitutional right or fails to provide mechanism to vindicate the right, which should shock the Court's conscience and which would raise significant questions as to whether such a conclusion (and thus the Sixth Circuit's ruling in Mr. Gaither's case) violates the Separation of Powers Doctrine; or (2) a federal habeas court's authority in this situation would be to simply note the existence of the federal constitutional right, that some court must provide a mechanism to vindicate the constitutional right/claim, and that because the federal habeas court cannot do so, a writ of habeas corpus conditioned on the state court provide a mechanism for the claim to be reviewed much issue, which would fly in the face of Congress' intent of promoting finality and speeding up habeas litigation that underlies the AEDPA. Clearly, neither of these conclusions can be what the law stands for. Instead, it should be clear that the AEDPA means that factual development, consistent with § 2254(e)(2) and *Ramirez*, is permitted in federal court when the state court either fails to recognize the federal constitutional right or fails to provide a mechanism to vindicate the constitutional right. That is the situation here.

It is well established that the Kentucky courts had no procedure to litigate issues related to representation on appeal at the time the issue arose in Mr. Gaither's case. *See, e.g., Pollini v. Robey*, 981 F.3d 486, 499 (6th Cir. 2020); *Boykin v. Webb*, 541 F.3d 638, 647-48 (6th Cir. 2008). Therefore, under *Williams (Michael)*, *Ramirez*, and the purpose of the AEDPA, Mr. Gaither does not "bear[] responsibility for the failure to develop the record" and therefore is not "at fault" as defined by *Ramirez*. The Sixth Circuit therefore clearly got it wrong here in a way that cannot be reconciled with

this governing law and the AEDPA's purpose. Certiorari should therefore be granted to bring this rogue decision (the Sixth Circuit is the only court that has reached the conclusion that occurred here, while many courts have reached the opposite conclusion) into conformance with the law, particularly since the ruling cannot be reconciled with a number of the Court's cases.

III. This Case is an Appropriate Vehicle to Decide These Important Questions

The issue of what procedure a court must use to accept a waiver of the right to counsel on appeal is an important question on which the lower courts disagree. There is no reason to believe that the issue will be resolved without the intervention of this Court. Additionally, the Sixth Circuit's ruling that factual development is not permitted, and the reason the Court so ruled, cannot be reconciled with the Court's decisions or even with the purpose of the AEDPA, thereby underscoring the importance of granting certiorari to reign the Sixth Circuit in once again on its failure to properly apply the AEDPA and to therefore bring the Sixth Circuit's precedent into conformance with the Court's governing precedent.

This case squarely presents both issues on a factual record that will allow the Court to address the various dimensions of each issue. With respect to the waiver of counsel claim, not only can the Court look at the issue from the standpoint of the trial court's duties, but it can do so in a context that raises some of the most salient concerns about how an involuntary waiver might occur in the context of a direct appeal. The Court has never addressed the kind of lay representation that occurred here, but such representation is likely common across the nation, and an opinion

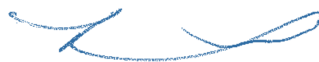
addressing the question of what steps a court must take to address the issue, if any at all, would be of significant benefit to bench and bar.

While this is a habeas corpus case, the Sixth Circuit explicitly presumed that there was no state remedy for Gaither to use to address this claim, and therefore the usual limitations of § 2254(d) and (e) do not stand in the way of a de novo review of both questions presented. As such, this is an appropriate vehicle for review.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Scot Gaither respectfully requests that this Petition be granted, and the judgment herein reversed.

Respectfully submitted,



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July 10, 2026

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2026

SCOT GAITHER, *Petitioner*

v.

TIM LANE, WARDEN,
GREEN RIVER CORRECTIONAL COMPLEX, *Respondent*

APPENDIX

<i>Gaither v. Lane</i> , 169 F.4th 716 (6th Cir. 2026)	Appendix (“Apx”) A.
<i>Gaither v. Mazza</i> , 4:18-CV-00151-JHM, 2024 WL 6843553 (W.D. Ky. Sept. 16, 2024),	Apx B.
<i>Gaither v. Commonwealth</i> , 2004-SC-0474-MR, 2006 WL 436071 (Ky. Feb. 23, 2006)	Apx C