THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0665

Kenneth H. Hart

v.

Warden, New Hampshire State Prison

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

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# BRIEF FOR THE WARDEN

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THE STATE OF NEW HAMPSHIRE

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## ISSUE PRESENTED

Whether this Court should adopt and retroactively impose a heightened standard of competency for criminal defendants with mental illness to exercise their right to represent themselves at trial.

## STATEMENT OF THE CASE

In 1998, a Hillsborough County Grand Jury indicted the petitioner, Kenneth Hart, on two counts of aggravated felonious sexual assault, witness tampering, and resisting arrest. Tr1.: 41-44[1]; RSA 632-A:2 (Supp. 1996) (amended 1998, 1999, 2004, 2009, 2012, 2015, 2018); RSA 641:5 (2016); RSA 642:2 (Supp. 1998) (amended 2008). The petitioner sought to represent himself and the trial court (*Groff*, J.) allowed him to do so with the assistance of standby counsel. DApp. 14-16.

On February 2, 2000, the jury convicted the petitioner on all charges. Tr8.: 19-29. On April 10, 2000, the trial court sentenced the petitioner to ten to twenty years with a consecutive one to three years suspended. SHTr.: 45-48.

On February 28, 2001, this Court deemed the petitioner's appeal waived because he had failed to file a notice of appeal or motion for the appointment of counsel. DApp.: 30. In the years after, the petitioner has filed numerous post-conviction motions in state and federal courts.

In January 2017, the petitioner filed a complaint that the court (*Schulman*, J.) construed as a petition for writ of habeas corpus. DApp.: 33-35. The court appointed the Public Defender to represent the petitioner. DApp.: 40.

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[1] PBr. refers to the petitioner's brief.
PSupp. refers to the supplement at the end of the petitioner's brief.
PApp. refers to the petitioner's separately bound appendix.
Tr#. refers to the trial transcript and # refers to the day of trial.
CHTr. refers to the July 21, 1999 competency hearing transcript.
SHTr. refers to the sentencing hearing transcript.
MHTr. refers to the August 31, 1999 motion hearing transcript.

On May 15, 2017, counsel for the petitioner filed an amended petition for writ of habeas corpus that alleged that the trial court violated his constitutional rights when it allowed the petitioner to represent himself at trial and for the purposes of filing a notice of appeal. DApp.: 42-53. Specifically, it looked to the Supreme Court decision in *Indiana v. Edwards*, 554 U.S. 164 (2007), and focused on the idea that the petitioner's waiver of his right to counsel was not knowing because his waiver required a heightened standard of competency. DApp.: 50-51. The State objected. DApp.: 54-79. Then, the petitioner filed a memorandum of law that expanded upon the arguments he had made in his petition. DApp.: 80-124.

On October 17, 2017, the court (*Abramson*, J.) denied the petition. It found that the petitioner "plainly and unequivocally waived his right to counsel" and that only one standard of competence existed. DSupp.: 1-9. Accordingly, the court concluded that the petitioner's waiver was valid and that the trial court did not violate his constitutional rights when it allowed him to represent himself at trial. DSupp.: 8.

This appeal followed.

## STATEMENT OF THE FACTS

At some point before trial, the petitioner declared his intention to proceed to trial self-represented with the assistance of standby counsel. DApp.: 1-2. The trial court held a hearing to determine whether the petitioner is "knowingly and intelligently waving his legal right to counsel." DApp.: 1. The State objected to the petitioner's desire to proceed self-represented. DApp.: 2.

After a hearing, both the trial court and the State expressed concern that the petitioner was not competent to stand trial. DApp.: 2-9. Dr. Albert Drukteinis performed an evaluation of the defendant and testified at a competency hearing on July 21, 1999. CHTr.: 3, 5-6. Dr. Drukteinis explained that although the records reflected that the petitioner's oral and written discourse could at times be rambling, "[t]here were loose connections there, and there was some thread of legitimate issues." CHTr.: 9. During the evaluation, Dr. Drukteinis observed that the petitioner was not hallucinating or suffering from delusions. CHTr.: 10. The petitioner was paranoid, "but the paranoia did not rise to real delusions. . . . He was oriented and he did not appear to be suffering from any brain diseases as such." CHTr.: 10. Dr. Drukteinis found that the petitioner could be distracted but was not "psychotically disorganized." CHTr.: 11.

Dr. Drukteinis further explained that the petitioner understood the charges against him, the penalties to some extent, that he needed to take the charges seriously, his right against self-incrimination, that as a self-represented litigant "he would be able to speak in other ways besides as a witness testifying," and the roles of the witnesses and the participants in the court process. CHTr.: 12-13. He was unhappy with his earlier

attorneys because "they did not argue more vigorously at the district court level for probable cause." CHTr.: 14. Dr. Drukteinis also observed that the petitioner "knew how to conduct himself in the courtroom and answered all the other questions correctly," but he did note that the petitioner "tended to focus on peripheral matters." CHTr.: 14. Dr. Drukteinis told the court that "in general, as criminal defendants go that I've evaluated, he answered ninety-nine percent of the questions very well." CHTr.: 15.

When asked if the petitioner had explained why he wanted to proceed self-represented, Dr. Drukteinis explained that he did not ask that question but that the petitioner "felt he could be *pro se* and he certainly is intelligent enough to talk around this issue of defending himself and to have considered it." CHTr.: 16. Dr. Drukteinis concluded that the petitioner may have been suffering from "a nonspecific kind of personality disorder, but that was – did not rise to the level of a major mental illness that should prevent him from being competent to stand trial." CHTr.: 17-18.

The State also asked Dr. Drukteinis if the petitioner was competent to represent himself at trial; Dr. Drukteinis explained that he believed there was a higher threshold for competency to proceed self-represented than to stand trial. CHTr.: 18. He then explained some of the issues he thought could arise if the petitioner represented himself at trial. CHTr.: 18. But, Dr. Drukteinis did opine that the petitioner could work well with his attorney or standby counsel if he chose to do so. CHTr.: 19, 27. During cross-examination, Dr. Drukteinis explained that he did believe that standby counsel could "focus [the petitioner] back on to whatever his issue is that he wants to approach." CHTr.: 27.

After re-direct examination, the trial court engaged Dr. Drukteinis. CHTr.: 29-32. It sought to clarify what Dr. Drukteinis meant when he said the petitioner's waiver would not be knowing and intelligent. CHTr.: 29-30. The trial court ascertained that Dr. Drukteinis believed the petitioner understood his right to be represented by counsel and that it could not be taken from him. CHTr.: 30. It further ascertained that Dr. Drukteinis's view on knowing and intelligent focused more on the petitioner's ability to represent himself adequately, and not his understanding of his right to proceed with the assistance of counsel. CHTr.: 29-32.

On July 21, 1999, the trial court concluded that the petitioner was competent to stand trial. DApp.: 12-13. On August 31, 1999, the trial court held a hearing on pending motions. MHTr.: 1-78. The hearing began by addressing the petitioner's wish to represent himself at trial. MHTr.: 2. The trial court repeatedly confirmed that the petitioner wished to represent himself, that he understood his right to counsel, explained the maximum penalty, the obligations that the petitioner would have to comply with the Rules of Evidence and other court rules, the obligation to examine witnesses and make opening and closing statements, that the trial court cannot treat him differently from a lawyer, and that he could face difficult advocating for himself because of the personal nature of the case to him. MHTr.: 2-9. During this exchange, the trial court repeatedly explain to the petitioner that it would be difficult for him to represent himself and that even it had challenges at times understanding things like the Rules of Evidence. MHTr.: 2-9. Despite this, the petitioner insisted on representing himself and the trial court granted his motion. MHTr. 8-9.

That same day, the trial court produced a written order that held that the petitioner was competent to represent himself at trial. DApp.: 14. The trial court found that the petitioner "knowingly, intelligently, and voluntarily waived his right to counsel." DApp.: 14. The petitioner understood the charges against him, the sentence, the complex facts and law involved, and the limitations he would face acting as his own counsel. DApp.: 14. Accordingly, it allowed him to represent himself at trial. DApp.: 14.

## SUMMARY OF THE ARGUMENT

As a threshold concern, the petitioner has had numerous opportunities to raise the issues regarding his representation before this Court and has failed to do so. His *habeas corpus* petition cannot function as a substitute for matters that should have been raised in a direct appeal or an earlier motion for a new trial. Thus, this Court should decline to address the merits of his petition.

Should this Court reach the merits, however, it must affirm the trial court's decision because the petitioner met the constitutional threshold to proceed self-represented. So long as the petitioner was competent to stand trial, a finding he does not contest, he was competent to represent himself. Although the United States Supreme Court has permitted states and trial courts to impose counsel upon defendants with mental illness against the wishes of those defendants, it has not mandated that trial courts must do so and this Court should decline to do so because a heightened standard would strip criminal defendants with mental illness of their right to represent themselves and their autonomy. Moreover, it would allow trial courts to discriminate against criminal defendants with mental illness by denying them their right to represent themselves.

To the extent that the Supreme Court's decision is persuasive to this Court, under the governing standards in 1999 and 2000, the trial court's decision still met the constitutional standard. The petitioner understood his right to counsel, the severity of the charges, and the difficulties he would face if he represented himself. With this information, he knowingly, intelligently, and voluntarily waived his right to assistance of counsel. Absent a mandate that trial courts must apply a heightened competency

standard, the trial court acted within its authority when it allowed the petitioner to represent himself. Accordingly, this Court must affirm.

## ARGUMENT

### I. THE WRIT OF HABEAS CORPUS IS NOT AVAILABLE TO THE PETITIONER BECAUSE HIS FAILURE TO RAISE HIS CLAIM IN HIS DIRECT APPEAL OR HIS NUMEROUS POST-CONVICTION MOTIONS HAS FORECLOSED FURTHER REVIEW.

The writ of habeas corpus does not exist to re-litigate or raise claims that can or should have been brought before the trial court but instead, to provide individuals whose liberty has been restrained an opportunity to show how new information that had been unavailable to them at the time of trial led to an unjust result. The petitioner's claim that he was incompetent to represent himself, and the supporting argument that this Court should adopt a heightened competency standard for individuals who wish to proceed to trial self-represented, is an argument that should have been raised either in a direct appeal or before the trial court in one of his numerous motions for new trial under RSA 526:1 (2007) and petitions for the writ of habeas corpus. The petitioner's failure to raise these claims through those means available to him foreclosed his ability to rely upon the writ of habeas corpus. Accordingly, this Court must affirm the trial court's decision.

"New Hampshire has adopted the common law rule that habeas corpus is not a substitute for an appeal." *Avery v. Cunningham*, 131 N.H. 138, 143 (1988). "This extraordinary remedy is reserved for those questions which involve fundamental freedoms and occasions of pressing necessity where other remedies are inadequate or ineffective." *In re Kerry D.*, 144 N.H. 146, 148 (1999) (quotation omitted). "Although this [C]ourt has recognized that habeas corpus proceedings may be used to consider constitutional claims challenging jurisdiction after the time for appeal has expired, [it] ha[s] previously held that procedural defaults may preclude later collateral review."

*Avery*, 131 N.H. at 143; *see also State v. Kinne*, 161 N.H. 41, 44 (2010); *Sleeper v. Warden*, 155 N.H. 160, 162-63 (2007) ("Habeas corpus is not, however, a substitute for an appeal, and [this Court] ha[s] previously held that procedural defaults may preclude later collateral review.").

In *Avery*, the petitioner argued that he should be granted the writ of habeas corpus and a new trial because he was incompetent to stand trial and that the trial court had erred when it denied him the writ because he had failed to raise competency in his direct appeal. *Avery*, 131 N.H. at 142-43. This Court concluded that the petitioner was "procedurally barred from raising the issue of his incompetency in a habeas corpus proceeding because of his failure to raise the issue on his direct appeal . . . in 1984." *Id.* The petitioner was aware of the issue at the time of trial and immediately after the trial ended. *Id.* at 143. The trial court and this Court provided him with opportunities to raise the issue of competency in a motion to set aside the verdict but instead, the petitioner opted to raise the issue in a separate proceeding seeking a writ of habeas corpus. *Id.* This Court concluded that because "the petitioner had both knowledge of the issue and an opportunity to raise it properly before this court on direct appeal, but failed to do so, he has procedurally waived the issue for collateral review." *Id.* In support of its conclusion, this Court stated:

> Today's holding ensures an orderly and nondisruptive presentation of claims. This ruling serves to discourage parties from sitting on their claims until circumstances are more advantageous. To hold otherwise might encourage defendants serving lengthy sentences to lie back and wait, and to attack the basis of the sentencing after witnesses with relevant knowledge have died or have otherwise become unavailable, or after pertinent records have become routinely destroyed, lost or otherwise unavailable.

*Id.* at 143-44 (citation and quotation omitted).

Since *Avery*, this Court has held that individuals can seek the writ of habeas corpus by arguing that they received ineffective assistance of counsel because trial counsel failed to raise the issue of competency. *See, e.g., State v. Pepin*, 159 N.H. 310, 311-13 (2009). Yet, the limitation on *Avery* articulated by *Pepin* applies only in situations where the petitioner is claiming trial counsel was ineffective and had not previously challenged the trial court's rulings underlying the ineffective assistance claims in the direct appeal. *See State v. Kinne*, 161 N.H. 41, 45 (2010) ("In *Pepin*, [this Court] determined that [its] subsequent decisions had undercut the holding in *Avery* and concluded that *claims of ineffective assistance of counsel* based upon alleged trial errors are not procedurally barred by the failure to raise those errors on direct appeal." (Quotation omitted.)). "[N]othing in *Humphrey*[*v. Cunningham*, 133 N.H. 727 (1990)], or *Pepin* abrogates the general rule that a petition for habeas corpus is not a substitute for a direct appeal." *Kinne*, at 45.

This Court has routinely denied the writ of habeas corpus to petitioners who delay in seeking to vindicate their rights in a direct appeal or a motion for new trial and instead, wait years to raise claims in a petition seeking the writ. *See, e.g., Roy v. Perrin*, 122 N.H. 88, 100 (1982) (holding that a habeas corpus petitioner cannot use the writ to seek review of claims that he could have objected to earlier and raised in a direct appeal); *Martineau v. Perrin*, 119 N.H. 529, 531-32 (1979) (concluding that habeas corpus proceedings cannot serve as a vehicle for raising constitutional challenges to issues that could have been objected to and raised at trial). In *Martineau*, this Court noted, "Twenty years after

[Martineau's] trial, he now brings our attention to an asserted jury charge error he never previously raised." *Martineau*, 119 N.H. at 533. "A criminal trial, like any other human institution, can never be perfect, and for that reason, appeals should not be based upon 'treasure hunts' by counsel grounded upon the shifting judicial winds of appellate courts years after a trial." *Id.*

Here, the petitioner cannot claim the writ in light of the fact that he actively sought to represent himself at trial and resisted a finding that he was incompetent to stand trial or to represent himself. This is particularly true where he did not raise the issue in a direct appeal to this Court, in a motion for a new trial under RSA 526:1 or in one of his numerous petitions for the writ of habeas corpus. Instead, he waited seventeen years after his conviction, and nearly ten years after the United States Supreme Court's decision in *Indiana v. Edwards*, 554 U.S. 164 (2008)—a decision that never held that it was unconstitutional for a trial court to equate the standard for competence to stand trial with the standard for competence to proceed self-represented—to challenge the trial court's decision to allow him to proceed to trial self-represented. *See Halifax-American Energy Co., LLC v. Provider Power, LLC*, 170 N.H. 569, 574-75 (2018) (detailing procedural bars to appellate review). Under these circumstances, the petitioner stands in the same position as petitioners like Avery, Roy, Martineau, and others that this Court concluded were procedurally barred from seeking the writ because he had the opportunity to raise his claims in earlier proceedings and failed to do so.

Moreover, allowing him to raise this issue for the first time in a habeas corpus petition would undermine this Court's preservation requirements and plain error rule

because it affords him *de novo* review of claims he never brought to the trial court's attention. Thus, this Court must conclude that the petitioner's claims are procedurally barred and affirm the trial court's decision.

## II. THIS COURT SHOULD NOT ADOPT THE PETITIONER'S PROPOSED STANDARD OF COMPETENCY OR ANY HEIGHTENED STANDARD OF COMPETENCY AS DOING SO WOULD STRIP THE RIGHT TO PROCEED SELF-REPRESENTED FROM AN ENTIRE CLASS OF LITIGANTS.

The Sixth Amendment of the United States Constitution does not require trial courts to impose counsel upon criminal defendants with mental illness. Instead, a criminal defendant may waive his right to counsel and proceed to trial self-represented so long as he is competent to stand trial and makes the waiver knowingly, intelligently, and voluntarily. This Court has not addressed the question of competency, but has adopted the Sixth Amendment standards in other context. Moreover, the New Hampshire Constitution explicitly guarantees criminal defendants the right to represent themselves. This Court must respect that right and protect the autonomy and dignity of criminal defendants rather than succumb to the paternalistic impulse that consumed the Supreme Court in *Indiana v. Edwards*, 554 U.S. 164 (2008), and impose unwanted counsel upon criminal defendants. Because this issue presents a question of constitutional law, this Court's review is *de novo*. *State v. Gibson*, 170 N.H. 316, 319 (2017).

### A. The United States Constitution does not require trial courts to perform a separate competency analysis to determine whether a defendant can proceed to trial self-represented.

The United States Supreme Court's decision in *Indiana v. Edwards*, does not mandate that trial courts must impose counsel upon criminal defendants with mental illness. Instead, it held that the Sixth Amendment does not forbid trial courts from doing so. The constitutional standard for a criminal defendant to proceed to trial self-represented remains that which the Court established in *Faretta v. California*, 422 U.S.

806 (1975). The constitutional standard for competency to proceed to trial self-represented remains that which the Court established in *Godinez v. Moran*, 509 U.S. 389 (1993), which is the same competency standard for a criminal defendant to stand trial.

The Sixth Amendment provides, among other rights, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The United States Supreme Court has construed this right to implicitly include the right for individuals to represent themselves in criminal proceedings. *Faretta*, 422 U.S. at 821.

*Faretta* recognized that the structure, logic, and history of the Sixth Amendment did not "provide merely that a defense shall be made for the accused." *Id.* at 819. Instead, it granted "to the accused personally the right to make his defense." *Id.* Because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction[,] . . . the defendant . . . must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. The Court found that "[t]he language and spirit of the Sixth Amendment contemplate that counsel . . . shall be 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. It concluded that when the State forces "counsel upon the [defendant], against his considered wish, . . . the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." *Id.*

This reasoning was consistent with the law that pre-dated *Faretta*. Before *Faretta*, and particularly before the United States Supreme Court's decision in *Gideon v.*

*Wainwright*, 372 U.S. 335 (1963), criminal defendants often appeared as self-represented litigants or had to hire their own attorneys to represent them in court. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case* 90 B.U. L. Rev. 1147, 1167 (2010) (explaining how "defendants were entitled to representation by counsel only if they could afford to retain someone" after the Sixth Amendment was first adopted). Although this paradigm presented significant challenges, it did provide—as the Sixth Amendment envisions—defendants with the control over the direction that the defense of their cases would take; they never had to acquiesce to the decisions and demands of appointed counsel as later decisions, post-*Gideon*, required. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 245 (2008) (concluding that counsel has the authority to consent to an Article I judge, as opposed to an Article III judge, conducting jury *voir dire* without the consent of the defendant); *Florida v. Nixon*, 543 U.S. 175, 178 (2004) (reversing the Florida Supreme Court's conclusion that concessions of guilt made against the defendant's wishes constituted ineffective assistance of counsel); *see also* Hashimoto, *supra* at 1156-62 (discussing the increased restrictions on defendant-directed representation that have arisen since *Gideon*).

*Faretta* also recognized that the Sixth Amendment does not permit trial courts to limit a criminal defendant's right to proceed self-represented simply because exercising that right may be to his detriment. *Faretta*, 422 U.S. at 835. "[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Id.* The Court acknowledged that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own

unskilled efforts" and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (*Brennan*, J., concurring)). Thus, so long as a defendant is "aware of the dangers and disadvantages of self-representation" and "the record . . . establish[es] that 'he knows what he is doing and his choice is made with eyes open,'" then that defendant may proceed self-represented. *Id.* at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

In the wake of *Faretta*, however, questions began to emerge regarding when a criminal defendant's decision to exercise the right to proceed self-represented is knowing and voluntary. *See* Jona Goldschmidt, *Autonomy and "Gray Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom* 6 Nw. J. L. & Soc. Pol'y 130, 134-42 (2011) (discussing the "autonomy-fair trial debate" that *Faretta* ignited with regard to allowing criminal defendants to proceed self-represented); *see also Godinez*, 509 U.S. at 395 (describing the split of authority on the issue among the federal and state appellate courts).

In *Godinez v. Moran*, the United States Supreme Court provided an answer to that question. The Court considered "whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial." *Godinez*, 509 U.S. at 391. The Court found that "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." *Id.* at 399. "[T]he competence that is

required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id.* The Court reiterated what it had previously explained in *Faretta*, "that the defendant's 'technical legal knowledge' is 'not relevant' to the determination whether he is competent to waive his right to counsel." *Id.* at 400 (quoting *Faretta*, 422 U.S. at 836). So long as the defendant "knowingly and voluntarily" waives the right to counsel, the competency required to make that choice is the same as the competency necessary to stand trial because "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Id.* at 400-01.

Fifteen years later, in *Indiana v. Edwards*, the Court reaffirmed the constitutional standard announced in *Godinez,* but it also created room for trial courts to limit the right for criminal defendants to proceed self-represented. *Id.* at 167. The Court distinguished *Godinez* by noting the factual distinction that "*Godinez* involved a State that sought to *permit* a gray-area defendant[[2]] to represent himself" and that "*Godinez*'s constitutional holding is that a State may do so." *Id.* at 173. In *Edwards*, however, the Court faced a different question: whether a State "may *deny* a gray-area defendant the right to represent himself." *Id.* Because of this distinction, the Court found that "the question before [it was] an open one." *Id.* at 174. It then went on to base its holding—that a trial court can prevent defendants with mental illness from exercising their constitutional right to represent themselves at trial because of their mental illness—on the idea that "self-

[2] The Court appears to use this term to define a class of defendants who suffer from mental illness, and whom a trial court has found competent to stand trial but questioned their ability to adequately represent themselves at trial. The decision does not, however, provide an explicit definition for this term.

representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial," because a trial is only fair if it "appear[s] fair to all who observe [it]." *Id.* at 176-77 (quotation omitted).

Yet, the way the Court distinguished *Godinez* is critical because it created a permissive system where a trial court may permit a "gray-area defendant" to proceed to trial self-represented, as *Godinez* held, or the trial court may set standards that would prevent or limit a "gray-area defendant" from proceeding to trial self-represented. *See id.* at 177-78 ("[T]he Constitution *permits* judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (Emphasis added.)). The decision never forbade states or trial courts from allowing "gray-area defendants" to represent themselves in a criminal trial. *Id.*

### B. The New Hampshire Constitution has never mandated that trial courts perform a separate competency analysis to determine whether a defendant may proceed to trial self-represented, and this Court should not interpret it to include such a requirement.

This Court should reject the petitioner's invitation to create a heightened standard of competency for "gray-area defendants" or defendants with mental illness to proceed self-represented. This Court has never before mandated such a requirement and instead, has erred on the side of protecting the autonomy of criminal defendants and allowing them to direct their defense. Accepting the petitioner's invitation would strip a segment of criminal defendants of their ability to exercise their constitutional rights, their autonomy, and their dignity. It also invites trial courts to discriminate against criminal defendants with mental illness by forcing counsel upon them against their wishes simply

because they suffer from mental illness. Accordingly, this Court should decline to permit trial court to wantonly restrict the rights of criminal defendants.

### 1. The New Hampshire Constitution and this Court's precedent do not recognize a heightened standard of competence for criminal defendants who wish to exercise their right to represent themselves.

Since 1966, part I, article 15 of the New Hampshire Constitution has provided that "[e]very person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court." The amendment went to voters after the 1964 Constitutional Convention, eleven years before the United States Supreme Court decided *Faretta*. The primary purpose was to enshrine the requirements of *Gideon* in the New Hampshire Constitution and the primary resistance came from concerns about the costs this could impose upon the state. N.H. Const. Conv. J. 177-82 (1964).

Yet, the language also enshrined the right of a criminal defendant to waive counsel and proceed self-represented so long as the defendant understands his right to have the assistance of counsel. N.H. Const. pt. I, art. 15. The inclusion of this right makes explicit what the Sixth Amendment made implicit, that criminal defendants must be able to exercise their autonomy to refuse the assistance of counsel and proceed to trial self-represented. *Id.* It also comports with other elements of the New Hampshire Constitution that enshrine the importance of liberty and freedom. *See, e.g.*, N.H. Const. pt. I, art. 1 ("All men are born equally free and independent."); N.H. Const. pt. I, art. 2

("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty. . . .").

In the context of the relationship between a criminal defendant and counsel, this Court has erred on the side of protecting the defendant's autonomy to control the direction of his defense rather than reducing him to a ward of his counsel. *See, e.g.*, *State v. Jaroma*, 139 N.H. 611, 614 (1995) ("Where the defendant does not object, counsel may, as a matter of trial tactics, waive [certain of the defendant's constitutional rights] by stipulating to the admission of evidence, so long as the stipulation is not tantamount to a guilty plea." (Quotation omitted.)); *State v. Anaya*, 134 N.H. 346, 348 (1991); *State v. Collinge*, No. 2013-0516, 2014 N.H. LEXIS 169, at *6 (2014) (unpublished 3JX order) (explaining how the trial court determined that "the defendant had knowingly, intelligently, and voluntarily waived his constitutional rights with regard" to a lesser-included offense his attorney planned to admit to during closing argument before allowing the attorney to make such an argument). In *Anaya*, for example, the trial court had appointed counsel to represent the defendant, who had been charged as an accomplice to first degree murder. Over the course of preparation for trial, the defendant made it clear to his lawyers that he refused to plea bargain and declared that he "want[ed] to argue this case in court, [he] want[ed] to prove [his] innocence." *Anaya,* 134 N.H. at 348. The defendant did not make these wishes clear to the trial court, however. *Id.* at 350. Despite this, defense counsel argued to the jury in both opening and closing arguments that the defendant was guilty of accomplice to second degree murder. *Id.* The defendant testified and claimed that he was innocent of all the charges. *Id.* The jury

convicted him of accomplice to second degree murder and he sought a new trial alleging ineffective assistance of counsel because his lawyers' statements "constituted an involuntary plea of guilty." *Id.* at 350-51.

On appeal, this Court rejected the State's contention that defense counsel's admission of guilt to a lesserincluded offense could occur without the defendant's consent—a position the federal courts had adopted. *Id.* at 352-53 (citing *McNeal v. Wainwright*, 722 F.2d 674, 677 (11th Cir. 1984)). This Court concluded that the defendant's objections to counsel regarding their proposed strategy were sufficient to support his ineffective assistance claim; he need not make his objections clear to the trial court as well. *Id.* at 353-54. It further found that such a concession without the defendant's consent constituted ineffective assistance and that ineffective assistance was *per se* prejudicial. *Id.* Accordingly, this Court protected the defendant's ability to maintain control over his defense and granted him a new trial. *Id.* at 354.

In the context of determining when a criminal defendant, may waive the right to counsel, this Court has held that "[b]oth Part I, Article 15 of the State Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to self-representation and the right to counsel." *State v. Towle*, 162 N.H. 799, 803 (2011); *see also State v. Thomas*, 150 N.H. 327, 328 (2003). "The two rights are mutually exclusive; the exercise of one right nullifies the other." *Towle*, 162 N.H. at 803; *see also Thomas*, 150 N.H. at 328. "Because the two rights are antithetical, and the exercise of one right nullifies the other, [this Court] respect[s] a waiver of the right to counsel only if the defendant has evinced an understanding of the right and has asserted

an unequivocal desire to relinquish it." *Towle*, 162 N.H. at 803 (quotation, brackets, and ellipsis omitted); *see also Thomas*, 150 N.H. at 328. "Thus, to be effective, an assertion of the right to self-representation must be: (1) timely; (2) clear and unequivocal; and (3) knowing, intelligent and voluntary." *Towle*, 162 N.H. at 803; *see also Thomas*, 150 N.H. at 328; *Lewis v. Powell*, 135 N.H. 490, 496 (1992).

This Court has consistently looked to the standards announced and applied in *Faretta* and its progeny when determining when a waiver of the right to counsel was valid. *See, e.g.*, *Thomas*, 150 N.H. at 328 ("The United States Supreme Court has found that if a defendant is literate, competent, and understanding, and voluntarily exercising his informed free will, then a waiver may be found to be knowing and intelligent." (Quotation and ellipsis omitted.)); *Lewis*, 135 N.H. at 496 ("In order to represent himself, the accused must knowingly and intelligently relinquish the traditional benefits associated with the right to counsel." (Quotations omitted.)). It has also required '[t]he court [to] make the defendant 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." *State v. Barham*, 126 N.H. 631, 637 (1985) (quotation omitted). Under the governing standards at that time of the petitioner's trial, and still in place today, a criminal defendant's waiver must be "knowing, intelligent, and voluntary," something that the trial court can ascertain by detailing the dangers and disadvantages of self-representation so that the defendant makes his decision with eyes wide open. *See id.*; *see also Thomas*, 150 N.H. at 328; *Lewis*, 135 N.H. at 496.

Although this Court has not addressed the standard of competency necessary to choose to proceed to trial self-represented, it has held that only one competency standard exists. *See State v. Champagne*, 127 N.H. 266, 274 (1985). In *Champagne*, this Court declared that "a defendant cannot be competent for some trial proceeding purposes and incompetent for others. He is either competent or he is incompetent." *Id.* Thus, the New Hampshire Constitution neither requires or recognizes a heightened standard of competency for defendants to exercise their right to represent themselves.

**2. This Court should decline the defendant's invitation to strip a class of criminal defendants of their right to represent themselves at trial.**

Given that this Court has erred on the side of protecting a criminal defendant's autonomy, it should reject the petitioner's invitation to create a heightened standard of competency for self-representation. Since the decision in *Edwards*, legal commentators have criticized the ruling as one which retreats from *Faretta* and strips segments of society of the autonomy the Sixth Amendment was designed to protect in favor of protecting the courts' image of institutional legitimacy. *See, e.g.*, Goldschmidt, *supra* at 130; Hashimoto, *Resurrecting Autonomy*, *supra* at 1148-52 ("[I]t is readily inferable that the Framers intended to protect the autonomy of criminal defendants when they drafted the Bill of Rights."); Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez, and Edwards* 7 Ohio St. J. of Crim. L. 391, 392 (2009) ("But otherwise the defendant who understands the risks of waiving the right to counsel should be allowed to represent himself; no competency-to-represent-oneself test, a la *Edwards*, should be required."); *see also Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160

(2000) ("[T]he *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for autonomy."). The crux of these criticisms is that the framers of the Constitution concerned themselves with protecting the autonomy of citizens and allowing citizens to be masters of their own destinies rather than thralls of the government's will. *See*, *e.g.*, Goldschmidt, *supra* at 147 ("The modern essence of dignity of the person supervenes autonomy."); Hashimoto, *Resurrecting Autonomy*, *supra* at 1163 ("The history of the Constitution, and in particular the history of the Sixth Amendment, strongly suggests that the autonomy interest recognized in *Faretta* underlies many of the Constitution's criminal trial rights."); *see also Faretta*, 422 U.S. at 830 n.39 ("The Founders believed that self-representation was a basic right of free people." (Citation omitted.)).

The legal commentators view the decision as premised upon a paternalistic view that lawyers, alone, are the only individuals capable of protecting a defendant's interests despite research that shows that juries acquit self-represented defendants at a similar rate as represented defendants. *See* Hashimoto, *Resurrecting Autonomy*, *supra* at 1174-79 (discussing the paternalistic underpinnings of *Edwards*); Slogobin, *supra* at 407 ("So long as the defendant is an autonomous actor . . . then a failure to honor the waiver decision undermines the defendant's dignity far more than a trial at which the defendant is given a chance to persuade a jury . . . that his story is the right one."); Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant* 85 N.C. L. Rev. 423, 428 (2007) ("[A]t the state court level, felony defendants representing themselves at the time their cases were terminated appear to have

achieved higher felony acquittal rates than their represented counterparts."). This paternalism is particularly problematic because in the case of "gray-area defendants" it strips them of their constitutional rights simply because they have a disability, something that absent efforts to accommodate those defendants would be discrimination.

Some even contend that absent a criminal conviction, the government can never interfere with a defendant's autonomy interests. *See* Hashimoto, *Resurrecting Autonomy*, *supra* at 1170 ("Because the trial necessarily takes place before a defendant has been found guilty—and therefore before the government is authorized to deprive a defendant of his autonomy—the defendant retains an autonomy interest during the trial proceedings."). Thus, in the view of these scholars, *Edwards* or any decision that strips defendants of their ability to control the direction of their criminal defense undermines the purpose of the rights enshrined in the Sixth Amendment. *See*, *e.g.*, Goldschmidt, *supra* at 177 ("[T]o argue that avoidance of the spectacle by imposition of unwanted counsel will protect the legitimacy of the court is to improperly use such [gray-area] defendants as a means to an end. Imposing unwanted counsel should simply be a last resort and not a matter of course."); Hashimoto, *Resurrecting Autonomy*, *supra* at 1186 ("The solution . . . cannot be to curtail the rights of all defendants in order to protect mentally ill defendants."); Slobogin, *supra* at 410 ("[T]rial judges should not be able to foreclose self-representation on the extremely vague ground that a defendant is not 'mentally competent to conduct his own defense' or to carry out 'basic trial tasks.'").

This is particularly true in the context of "gray-area defendants" because "trial judges will be sorely tempted to take advantage of this vacuous standard [established by

*Edwards*] to prevent any defendant with a diagnosis from exercising the right to self-representation." Slobogin, *supra* at 410-11. Those "competent, autonomous defendant[s]" will then "be prevented from telling [their] own stor[ies] and forced, instead, to listen to a lawyer tell . . . . entirely different one[s]." *Id.* at 411.

Moreover, New Hampshire would not stand alone in rejecting the permissive standard set forth in *Edwards*. At least five other jurisdictions have maintained that the competency standard to proceed self-represented is the same as the standard for standing trial. *See, e.g.*, *Duckett v. State*, 769 S.E.2d 743, 748-49 (Ga. Ct. App. 2015); *Stewart-Bey v. State*, 96 A.3d 825, 839 (Md. Ct. Spec. App. 2014); *Mathis v. State*, 271 P.3d 67, 74-75 (Okla. Crim. App. 2012); *State v. Barnes*, 753 S.E.2d 545, 550 (S.C. 2014); *State v. Maestas*, 299 P.3d 892, 961 (Utah 2012). Those jurisdictions that have rejected the permissive standard of *Edwards* have often done so with an eye toward protecting the autonomy of criminal defendants to direct their defense at trial. *See, e.g.*, *Barnes*, 753 S.E.2d at 550 (rejecting the idea of imposing a heightened competency standard because the Constitution protects everyone's right to represent themselves at trial); *Maestas*, 299 P.3d at 961 ("[W]e have recognized a competent defendant's right to exert control over his or her defense. And we have held that a defendant should not be required to display a heightened level of competency to waive his right to a particular defense." (Quotations and footnotes omitted.)). Thus, to protect a criminal defendant's ability to be the master of his own destiny, this Court should reject the petitioner's proposed heightened standard of competency for self-representation.

## III. THE PETITIONER CANNOT DEMONSTRATE THAT HIS WAIVER OF COUNSEL WAS NOT COMPETENT, KNOWING, AND VOLUNTARY BECAUSE THE TRIAL COURT'S INQUIRY WAS CONSISTENT WITH STATE AND FEDERAL LAW AT THE TIME OF HIS TRIAL.

The governing standard at the time of trial was that articulated in *Godinez*: if a criminal defendant was found competent to stand trial then that defendant was competent to waive the right to counsel, so long as his waiver is knowing and intelligent. It is consistent with this Court's conclusion that only one competency standard exists. The trial court found that the petitioner understood his right to counsel, understood the severity of the charges against him, and understood the difficulties he would face by choosing to represent himself. His waiver of his right to the assistance of counsel was knowing, intelligent, and voluntary. Accordingly, this Court must affirm the trial court's decision.

As detailed above, "to be effective, an assertion of the right to self-representation must be: (1) timely; (2) clear and unequivocal; and (3) knowing, intelligent and voluntary." *Towle*, 162 N.H. at 803. "The court must make the defendant 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." *Barham*, 126 N.H. at 637 (quotation omitted). Thus, a criminal defendant's waiver is only "knowing, intelligent, and voluntary" if the trial court has detailed the dangers and disadvantages of self-representation so that the defendant makes his decision with eyes wide open or is able to conclude that the defendant is aware of the dangers and disadvantages of self-representation. *See id.*; *see also Thomas*, 150 N.H. at 328; *Lewis*, 135 N.H. at 496.

Here, the trial court held a competency hearing and engaged in a colloquy with Dr. Drukteinis to determine whether the petitioner was competent to represent himself at trial. CHTr.: 29-32. The Court ascertained that Dr. Drukteinis believed that the petitioner would have difficulty effectively advocating before a jury, but also that he understood his rights and what he was giving up by waiving those rights. CHTr.: 29-32. Dr. Drukteinis explained that the petitioner believed the State's case was insufficient to convict him and appeared to have a rational understanding of how to proceed. CHTr.: 33-35. Moreover, with standby counsel he could be redirected to follow a rational course of action. CHTr.: 33-35. Throughout the hearing, the petitioner heard Dr. Drukteinis, the trial court, and counsel discuss the difficulties he would face should he proceed to trial.

With this information in mind, the petitioner proceeded to the August 31, 1999 hearing and insisted on representing himself. MHTr.: 2. The trial court thoroughly explained the burdens the petitioner would undertake by choosing to represent himself and the dangers and disadvantages of not having counsel. MHTr.: 2-9. At the end of the colloquy, the petitioner made the decision to represent himself with his eyes wide open. MHTr.: 8-9. He understood his rights, understood the charges and consequences, and understood the disadvantages and dangers he would face by representing himself. Thus, his decision to waive the assistance of counsel was knowing, intelligent, and voluntary and this Court must affirm.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the trial court's decision.

The State requests a fifteen minute oral argument before the full court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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June 22, 2018

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## CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Christopher M. Johnson, Esquire, by first-class mail postage prepaid, at the following address:

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